



Rule of the Dead Hand

Perpetual conservation easements are contrary to common law. By Nathan Descheemaeker

“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of the elements of property, to that extent, destroys the property itself.”

—Richard B. Sanders (former Washington State Supreme Court Justice)

Perpetual conservation easements can be categorized in what historically was considered the “rule of the dead hand.” It was so well understood during the founding of the U.S. republic that many original states included language within their constitutions which disallowed perpetuities. Perpetuities were understood to be contrary to the genius of a free state. This long recognized rule prevents perpetual control of property by an individual who is dead. Obviously a man needs, and is rightfully granted, to state his will to his direct descendants and for a limited time control or direct the descent of his estate. But to grant perpetual control through the rule of the dead hand, you rob the living of the constitutionally guaranteed right to self-government and self-determination.

The Constitution of North Carolina, Article 23 of the Declaration of Rights of Dec. 18, 1776, reads: *“That perpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed.”*

The Wyoming Constitution, Article I, Sec. 30, states: *“Perpetuities and monopolies are contrary to the genius of a free state and*

shall not be allowed.”

Tax-funded conservation easements represent a form of subsidy which should never be justified in terms of the interest of the immediate beneficiary, and other general benefits should be verifiable. Benefits expressed by many state- or federally sponsored easements are largely speculative and ambiguous based on assumptions that because a development right exists, that in and of itself is a threat to habitat.

“Preservation payments” based on these assumptions lack the burden of proof, which would provide a basis for comparing “costs” and “benefits.” If short-term or long-term development potential and plans are not substantiated on a case-by-case basis, then there is no ground for economic calculation to compare costs and measure benefits. For example, if you pay a landowner not to plow up ground that he is not planning nor likely in the future to do, the benefits are negligible while the costs remain exorbitant. And because these imposed regulations permanently prohibit development of the property, it remains impossible to prove that the development prohibited ever would have taken place.

By their very design and nature, conservation easements impose in perpetuity deed restrictions on property permanently sequestering working lands, creating a complex split-estate contractual relationship between landowners, land trusts, and/or the state or federal government. Because permanent deed

restrictions are imposed on these lands, the owner of the property is essentially ceding his sovereign jurisdiction over his interest in his property, which accrues an unsustainable cost burden in perpetuity to the taxpayer.

“Ownership is power of disposal, and when this power of disposal is divorced from its traditional name and handed over to a legal institution which bears a new name, the old terminology is essentially unimportant in the matter. Not the word, but the thing must be considered. Limitation of the rights of owners as well as formal transference is a means of socialization. If the state takes the power of disposal from the owner piecemeal, by extending its influence over production; if its power to determine what direction production shall take and what kind of production there shall be is increased, then the owner is left at last with nothing except the empty name of ownership, and property has passed into the hands of the [s]tate.”—Ludwig Von Mises (1881-1973), “Socialism: An Economic and Sociological Analysis” (Indianapolis: Liberty Fund, 1981, chapter 2 p.45 The State of Economic Activity).

Perpetual easements put a landowner on a trajectory to hold a deed which represents an empty shell of property. In the late ’90s Washington state Supreme Court Justice Richard B. Sanders wrote a Fifth Amendment treatise which included the following definition of property rights: *“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and dis-*

posul. Anything which destroys any of the elements of property, to that extent, destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right."

In the Federalist Papers number 79, Alexander Hamilton stated, *"In the general course of human nature, a power over a man's subsistence amounts to a power over his will."* Or to put it another way, *"He who pays the piper calls the tune."*

Proponents of perpetual easements want to believe that it is their right to bind rights in property to generations unborn. A government established to protect and preserve property rights—as ours was—should never traffic in the trade of limiting the rights of property in the private domain. As the legislator Frederick Bastiat said in 19th century France, *"Everyone is living under the present delusion that they can enrich themselves at the expense of everyone else."*

Our Founders stressed that liberty cannot be maintained without a frequent recurrence to fundamental principles. The Virginia Declaration of Rights, May 1776, penned by George Mason states: *"That no free Government, or the Blessings of Liberty can be preserved by any People, but by a firm adherence to Justice, Moderation, Temperance, Frugality, and Virtue and by frequent Recurrence to fundamental Principles."*

I understand that some folks who enroll into a perpetual easement can have financial and other pressures making for difficult circumstances and may feel stripped of other alternatives. Nonetheless, government-funded perpetual easements break from first principles of good government and should not be encouraged by a free people. The general application of such programs would place our lands into a feudal state and make people serfs on the land. A generation having forfeited operational control and potentials to the rule of a dead hand and the oversight of an omnipresent state could be likened to Esau, who sold his birthright for a pot of stew, and though he sought repentance with tears, found none (Heb. 12:17).

"The earth belongs in usufruct to the living: that the dead have neither powers nor rights over it," stated Thomas Jefferson in a letter to James Madison on Sept. 6, 1789. ■

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