


HOW BEST TO ADDRESS CLIMATE CHANGE IN CONSERVATION EASEMENTS: A PUBLIC AGENCY PERSPECTIVE

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- ▶ WCB perspective as funder of a conservation easement:
 - ▶ As a funder of a conservation easement, WCB will review the terms of the easement to ensure perpetual conservation of the property consistent with the applicable funding source.
 - ▶ Parties are given discretion to draft terms that accomplish this goal.
 - ▶ In reviewing a conservation easement, WCB evaluates the terms to determine if future events would give rise to a scenario where the easement might be challenged or terminated. Accordingly WCB's goal is to determine that the conservation easement adequately protects against this situation.
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▶ Recitals

- ▶ Recitals provide the parties the opportunity to “tell the story” of why the parties are entering into the conservation easement and what they intend to accomplish.
- ▶ Recitals can include language stating the parties acknowledge that climate change is occurring, and that it is the intent of the parties that conservation of the property will continue despite impacts to the property resulting from climate change.
- ▶ Recitals can also describe that the property will provide benefits by mitigating impacts of climate change such as allowing for species movement due to climate change or sequestering carbon.

- ▶ Conservation Purposes and Conservation Values
 - ▶ Description of Conservation Purposes should include as a purpose that the conservation of the property is to provide habitat for species movement and adaptation to climate change. Similarly, the purpose may also include carbon sequestration ability of the property to offset the impacts of climate change.
 - ▶ Conservation values can similarly include language that the property will help in species movement due to climate change and the ability of the property to sequester and store carbon to offset the impacts of climate change.




- ▶ Clauses in Conservation Easement addressing changes to property caused by climate change.
 - ▶ The conservation easement can include language addressing the potential that habitat and species composition may change over time due to climate change and the landowner and conservation easement holder agree that the change to the property is not a situation which would give rise to frustration of the conservation purposes.
 - ▶ Eliminate ability of landowner to challenge the conservation easement under the doctrine of changed circumstances.
 - ▶ *Wooster v. Department of Fish and Game* 211 Cal.App.4th 1020 – Although not addressed in the court's decision, the plaintiff argued that the conservation easement could be terminated under the doctrine of changed circumstances.

- ▶ Sample Clauses – WCB funded conservation easement being presented at the May WCB meeting
 - ▶ Grantor and Grantee acknowledge that, in view of the perpetual duration of this Easement, they are unable to foresee all potential future land uses, technologies, and natural changes to the land and its Conservation Values over time.
 - ▶ Grantor hereby waives any defense of laches, estoppel, prescription, unclean hands or the doctrine of changed circumstances in any action or proceeding, including but not limited to any mediation brought by Grantee to enforce or to interpret the provisions of this Easement.
 - ▶ This language can be modified to directly address climate change impacts

- ▶ Sample language that can be adapted to address climate change in conservation easements.
 - ▶ In making this grant, the Landowner has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than the Landowner's Reserved Rights and that neighboring properties may in the future be put entirely to such prohibited uses. It is the intent of both the Landowner and the Grantee that any such changes will not be deemed to be circumstances justifying the termination, extinguishment, or modification of this Conservation Easement. In addition, the inability of the Landowner, or the Landowner's successors or assigns, to conduct or implement any or all of Landowner's Reserved Rights, or the unprofitability of doing so, will not impair the validity of the Conservation Easement or be considered grounds for its termination, extinguishment, or modification.

- ▶ The previous language can be modified to address a scenario where changes in climate may ultimately change the habitat values of the property, or nature of the property in the future (i.e. from one habitat composition, or allowable use, to one not originally covered), but any such change will not be grounds for termination of the conservation easement in the future.
- ▶ The language can also be adapted to acknowledge that climate change may result in an allowable revenue generating use no longer being viable, and that such a scenario will not be grounds for termination of the conservation easement.

- ▶ Adaptive Management as a way to address climate change.
 - ▶ The Conservation Easement could include management plans or adaptive management provisions that allow for changes in management due to climate change impacts.
 - ▶ If the recitals, conservation purposes, and/or conservation values address climate change impacts, they can acknowledge that adaptive management of the property will occur in response to those changes.
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- ▶ WCB Implementation of Civil code section 815.11
 - WCB grant Language Section 5.15
 - ▶ For conservation easements on property that consists completely of forest lands, or includes some forest lands, Grantee shall ensure that the terms of the Conservation Easement require an associated easement management plan (or similar document) whereby the landowner agrees to: (1) maintain and improve forest health through promotion of a more natural tree density, species composition, structure, and habitat function, (2) make improvements that increase the land's ability to provide resilient, long-term carbon sequestration and net carbon stores as well as watershed functions, and (3) provide for retention of larger trees and a natural range of age classes, and ensure the growth and retention of these larger trees over time.
 - ▶ For purposes of this Section 5.15, "forest lands" are lands primarily suited to growing timber and forest products such as sawlogs, pilings, poles, split products, pulpwood, bolts, bark, and other products.

▶ Questions or comments?



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