Annual Assessment of Florida's Conservation Lands

2025 Edition
Chapter 1

Part 2
Special Analysis of Conservation Easements

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SPECIAL ANALYSIS OF CONSERVATION EASEMENTS

Overview...

The sheer number and associated costs of properties already identified by government agencies for protection makes it unlikely that meaningful progress can be made by outright acquisition alone. Other methods need to be explored and implemented.

Writing over 20 years ago, a team of researchers found that the preponderance of all land that is privately owned meant that "biodiversity conservation efforts must include private land."[1] Today, depending on the study, about 60 percent of the land acreage in the United States is privately owned and the remaining 40 percent is in some form of public ownership. A nontrivial percentage of both groups is held for a broad array of purposes that protect or restore ecosystems and habitats.[2] Either as an alternative or a complement to land use regulation through law and rule, there are three ways that governments can aid in the long-term preservation of environmental value. Each of the three has a different impact on local communities and landowners:

- Acquisition of Public Lands from Willing Sellers...This process is the most common method of state land acquisition. Also known as fee title acquisition or fee simple acquisition, it is based on voluntary negotiations and a rigorous appraisal phase to change ownership from private to public.
- Exercise of Eminent Domain...This process is generally adversarial. It is seldom used at the state level and is typically the most expensive option. Also referred to as the taking of private property for public use, it entails legal costs and the provision of just compensation to compel a change in ownership.
- Advancement of Conservation Easements[3]...The overall process is found in state enabling statutes, but it is also shaped by federal tax law. This is typically the least expensive and most expedient method of environmental conservation. Also known as acquisition of less-than-fee real property interests, ownership of the underlying land remains in the private sector.

Generally, a conservation easement is perceived as a creature of statute. It is most often used to prevent future land uses that otherwise would be allowed as a normal part of landownership. According to Cheever and McLaughlin:

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[1] Merenlender, A. M., Huntsinger, L., Guthey, G., and Fairfax, S.K. (2004). *Land Trusts and Conservation Easements: Who Is Conserving What for Whom?* Conservation Biology Volume 18, No. 1.

[2] By one estimate, roughly 12 percent of the country's land (as well as 26 percent of its marine territory) in 2022 had some level of environmental protection. See https://www.scientificamerican.com/article/how-conserving-30-percent-of-u-s-land-by-2030-could-work/.

[3] The National Land Trust Census of 2020 indicated that 20.2 million acres were under conservation easements out of 61.1 million acres in any form of protected status across the United States (33.1 percent of the total).

> *By encumbering a piece of land with a conservation easement, a landowner transfers certain specific rights from the landowner's "bundle of rights"—generally rights to restrict the development and use of the land—to a governmental entity or charitable organization for the purpose of preserving the conservation or historic values of the land. The landowner retains certain rights, including the right to possess and use the property in a manner that does not disrupt the conservation or historic purposes for which the easement was established.*[4]

Conservation easements have existed since the late 1880s but were used infrequently until the 1960s. Widespread use occurred even later, with a high degree of variability across government jurisdictions.[5] Generally but not uniformly, their common features are that the conservation agreement lasts in perpetuity[6], the land remains in private use, and the public has no right of access unless the land is being preserved to provide recreational or educational opportunities in an outdoor setting.[7]

In 1976, Florida joined the modern conservation easement era when it created section 704.06, Florida Statutes, where it described the new easement as a right. Among other things, the law specified that:

> *Conservation easements are perpetual undivided interests in property and may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the property, or in any order of taking. Such easements may be acquired in the same manner as other interests in property are acquired, except by condemnation or by other exercise of the power of eminent domain, and shall not be unassignable to*

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[4] Cheever, F., and McLaughlin, N.A. (2015). *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*. 1 Journal of Law, Property, and Society 107, U Denver Legal Studies Research Paper No. 15-45, University of Utah College of Law Research Paper No. 130.

[5] Almost exclusively related to tax code changes, this occurred after the passage of the Tax Reform Act of 1976 (with amendments in the Tax Reduction and Simplification Act of 1977) and was further facilitated by the passage of the Tax Treatment Extension Act of 1980. The latter revision is perhaps better known, even though it primarily eliminated the prior sunset date and made the deduction for charitable donations permanent. Near the same time, the Uniform Conservation Easement Act by the National Conference of Commissioners on Uniform State Laws was approved in 1981.

[6] See footnote 2 above. Importantly, under federal law: "A conservation easement must be perpetual to bestow upon the donor [that is, the landowner] the benefits of the charitable deductions and possible estate tax exclusion...A contribution of a perpetual easement entitles the donor to an income tax charitable deduction and possibly to a partial estate tax exclusion for the land subject to the easement." See 26 U.S. Code § 170(h)(2)(C) for the federal charitable income tax deduction; final regulations were not completed until January 1986. For the preferential estate tax treatment (equal to a maximum of $500,000, but no more than 40% of the qualifying land value), "a prohibition on more than a de minimis use for a commercial recreational activity" must also be included. See 26 U.S. Code § 2031(c)(8)(B) for the estate tax exclusion; this provision was included in the Taxpayer Relief Act of 1997. Of interest to this discussion, Pidot (see footnote 9 below) writes: "While a typical charitable donation involves the transfer of money or tangible property in the present, a conservation easement is intangible and has value only if the easement's promises, though appraised in the present, are realized in the future."

[7] Squires, R. H., and Gustanski, J. A. (Ed.) (2000). *Protecting the Land: Conservation Easements Past, Present and Future*. Island Press. The provisions related to outdoor recreation and education of the general public are required by Treasury Regulations [26 C.F.R. §1.170A-14(d)-(f)].

> *other governmental bodies or agencies, charitable organizations, or trusts authorized to acquire such easements for lack of benefit to a dominant estate.*[8]

Easements can be donated by the landowner (thereby allowing the original owner to benefit from the federal tax breaks) or purchased. Regardless of obtainment method, land trusts and government entities are the most common easement holders.[9] Governments that are directly involved in easement purchases have used a variety of approaches that range from the designation of public agencies to conduct the negotiations in-house to operating through external organizations and contractors that are limited to a brokering role (effectively, middlemen). The purchase price generally reflects the landowner's loss of market value due to the easement's terms.[10] Because each easement results from a direct negotiation between the landowner and easement holder, the terms and conditions can differ from easement to easement.

Once recorded, the easement runs with the land and binds not only the current landowner, but all future landowners as well. Monitoring and enforcement are needed by the accepting organization (generally, the easement holder) to ensure the restrictions are upheld—both by the original property owner and the successive landowners. This includes taking any necessary legal actions to defend the easement and its terms. Many stakeholders are reliant on the success of this part of the process, most of whom are not named parties to the agreement:

> *The use of diverse sets of easement restrictions negotiated, monitored, and enforced by hundreds of easement-holding organizations with varying goals and capacities on tens of thousands of individual parcels of land creates enormous challenges for land management.*[11]

Over time, the costs for monitoring and enforcement may escalate significantly—even more so for a large property that is subsequently subdivided. Just like the duration of the easement itself, the holder's stewardship is a perpetual responsibility.[12] According to one analysis:

> *...unlike outright land ownership, which is an asset to the owner, conservation easements are liabilities that impose long-term costs without having marketable, economic value.*[13]

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[8] Chapter 76-169, Laws of Florida (Senate Bill No. 1231). Quoted language designated as section 704.06(2), Florida Statutes. This language today continues as originally created in 1976.

[9] This outcome is advanced in law. Government entities and charitable organizations such as land trusts are operated primarily to benefit the public, in keeping with the public nature of conservation easements.

[10] The easement restricts the future uses of the property, thereby diminishing the property's potential value. Generally, the difference between the pre- and post-easement fair market value equals the loss. This loss also becomes the value of the donation when that method is used.

[11] Morris, A.W. (2008). *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*. Geoforum. 39. 1215-1227. 10.1016/j.geoforum.2006.10.004.

[12] Florida law also allows for a third-party right of enforcement to any entity eligible to be a holder but who is not the holder of the easement. This would include the Attorney General on behalf of the State.

[13] Pidot, J. (2005) "Reinventing Conservation Easements: A Critical Examination and Ideas for Reform." Lincoln Institute of Land Policy.

Economic and Market Features of Easements...

From an economic perspective, the marketplace for conservation easements is arguably incomplete, with the limited number of buyers and sellers hampered by imperfect information. While the sellers are in the private space, the typical buyers are either government entities or indirectly those entities through publicly subsidized land trusts and the creation of secondary markets.[14] Moreover, each market participant is engaged in the achievement of a narrow purpose that often runs counter to the highest land value by seeking to protect or retain an *existing* level of environmental benefit into perpetuity. Even though meaningful restoration or improvement is seldom the objective, successful transactions are primarily based on societal well-being and regularly rely on the generosity of willing landowners.[15] Despite the limited marketplace size, the use of perpetual easements as a supplementary tool to conserve land puts more participants and options into play, thereby broadening the pool of potentially positive outcomes relative to what this set otherwise would have contained.

Because they limit rights to future uses of the property, conservation easements ultimately reduce the parcel's value.[16] This value loss can come from two directions: through the immediate loss of development rights and through an erosion over the longer term in the number of future buyers willing to purchase the property solely for its allowable uses. Many easements are donated; however, when a government agency or non-for-profit organization pays the owner for the easement, they are seeking to compensate him for at least a portion of his loss in market value.[17] From the State's perspective, an easement purchase is still attractive—primarily because of its lower upfront cost relative to fee simple acquisition, but also because ongoing maintenance costs shift to the seller. Similarly, some states provide tax incentives for easements to induce property owners to either make donations or enter into purchase agreements. The empirical evidence is mixed on whether these tax incentives spur the creation of easements that otherwise would not have occurred. Consistent statistically significant results are only linked to the handful of states (Virginia and Colorado among them) that have the most generous financial terms for landowners.

Since no public agency directly oversees the specific attributes, public benefits or location of easements, some academicians view their use as a privatization of government land use

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[14] Cheever, F. (1996). *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*. 73 Denv. U. L. Rev. 1077. As used here, the secondary marketplace is the resale market—typically from a land trust to a government entity.

[15] This type of narrow purpose is sometimes referred to as a merit good, with the end goal being a socially efficient allocation of resources rather than an economically efficient allocation associated with the highest and best economic use. For government, the easement likely provides the least costly—and perhaps most expedient—conservation option.

[16] Sundberg, J. O. (2011). *State Income Tax Credits for Conservation Easements: Do Additional Credits Create Additional Value?* Lincoln Institute of Land Policy.

[17] Market value loss can also be compensated indirectly. For example, certain qualifying donations of easements are eligible to be claimed as charitable contributions on federal tax returns. Most states with personal income taxes offer similar treatments—whether through deduction or credits.

regulations or as the privatized governance of environmental protection.[18] Others argue strongly that conservation easements are pure public goods—equally upon acquisition and into the future. Both arguments have flaws. The relationship between governments, land trusts and landowners is often inextricably intertwined, with the economic distinction between public and private ownership blurred. This blend is further exacerbated in the several states that have created and/or operate their own land trusts.[19] According to Merenlender et al., "The division of actual costs among the public, the landowner, and the nonprofit sector is difficult to sort out..."[20] This sentiment has been echoed by Morris who believes that "as a result of extensive public funding and management, conservation easements are not nearly as private...as they sometimes seem."[21] Given this, whether easements should be treated as public goods or private assets is unclear even when the nominal easement holder is clearly one entity or the other. Be that as it may, there appears to be greater agreement that public interests are involved:

> *Easements are an important example for transparency and accountability because they blend public and private governance, have perpetual land use restrictions, represent a large public investment, and are relied upon for public good provision and regulatory mitigation.*[22]

State Land Acquisition History and Current Easement Law...

Over time, Florida has seen intermittent spurts of land acquisition activity that have largely been driven by bond issuances. The major state funding initiatives include: the Outdoor Recreation and Conservation program in 1963; the Environmentally Endangered Lands program (EEL) in 1972; the Conservation and Recreation Lands program (CARL) in 1979; Save Our Coast and Save Our Rivers in 1981; Preservation 2000 (P2000) in 1990; and the Florida Forever program in 2000.

Nearly 60 years after Florida's first major acquisition initiative, the Florida Legislature passed the Florida Wildlife Corridor Act of 2021. Among the duties assigned to the Department of Environmental Protection is the promotion of "investment in conservation easements voluntarily entered into by private landowners to conserve opportunity areas."[23] According to the Wildlife Corridor Foundation's website, "As of March 2025, 84 properties totaling roughly 317,000 acres have been approved for protection in or adjacent to the Florida Wildlife Corridor since the signing of the Act."[24] The total corridor is nearly 18

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[18] Morris, A.W. (2008). Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism. Geoforum. 39. 1215-1227. 10.1016/j.geoforum.2006.10.004.
[19] Merenlender, A. M., Huntsinger, L., Guthey, G., and Fairfax, S.K. (2004). *Land Trusts and Conservation Easements: Who Is Conserving What for Whom?* Conservation Biology, Volume 18, No. 1.
[20] Ibid.
[21] Morris, A.W. (2008). *Easing Conservation? Conservation Easements, Public Accountability and Neoliberalism*. Geoforum. 39. 1215-1227. 10.1016/j.geoforum.2006.10.004.
[22] Rissman, A.R., Morris, A.W., Kalinin, A., Kohl, P.A., Parker, D.P., and Selles, O. (2019). *Private Organizations, Public Data: Land Trust Choices About Mapping Conservation Easements.* Land Use Policy, Volume 89, Article 104221.
[23] See section 259.1055(5)(b), Florida Statutes.
[24] See https://floridawildlifecorridor.org/about/about-the-corridor/.

million acres, of which nearly 10 million acres have been previously protected. Initial funding came from available federal stimulus dollars, as well as increased priority given within the Florida Forever program. In 2024, the Legislature provided a dedicated source of funds from revenue sharing associated with the 2021 gaming compact between the Seminole Tribe of Florida and the State of Florida. Each year, the lesser of 26.042 percent or $100 million must be distributed "to support the Florida wildlife corridor as defined in s. 259.1055, including the acquisition of lands or conservation easements within the Florida wildlife corridor."

Several reports have been published regarding the performance of the earlier programs; many of them are critical of the land acquisition process. In 1982, the Senate Committee on Natural Resources found:

> *The chronic problem with voluntary land acquisition is delay...Some delay is caused by the exacting acquisition procedures imposed by section 253.025, Florida Statutes. These procedures were enacted in 1979 to eliminate opportunities for criminal acts and to ensure an open acquisition process in the future.*[25]

Other criticisms have been levelled against the proliferating number of programs. Borrowing heavily from a January 1992 report that is still relevant today, several characteristics seem to define Florida's history of environmental land acquisitions:[26]

1. A tangle of older and newer programs with different originations, purposes, and degrees of overlap.
2. A start-stop approach to the state's efforts, with spates of intense activity interspersed with dormant periods.

After the enabling statute for conservation easements was enacted in 1976, Florida endeavored to make easements a viable alternative to fee simple acquisition. More recent efforts include the provision of additional inducements that are intended to stack onto federal incentives. Most importantly, since 2008, the Florida Constitution has mandated that:

> *There shall be granted an ad valorem tax exemption for real property dedicated in perpetuity for conservation purposes, including real property encumbered by perpetual conservation easements or by other perpetual conservation protections, as defined by general law.*[27]

The referenced general law establishes two tax preferences: (1) a full exemption equal to 100 percent of the land value that is dedicated in perpetuity and used exclusively for conservation purposes, and (2) a partial exemption equal to 50 percent of the land value

[25] See *A Review of Section 253.025, Florida Statutes, State Land Acquisition Procedures* (Senate Committee on Natural Resources, January 1982).
[26] See *Florida's Environmental Land Acquisition Programs: A review and Analysis of Policies and Procedures* (Economic and Demographic Research; January 1992).
[27] See article VII, section 3, subsection (f) of the Florida Constitution.

that is dedicated in perpetuity and used for allowed commercial purposes.[28] The statewide ad valorem tax roll for 2024 contains 3,282 parcels with full and partial exemptions for conservation easements that total just over $466 million in value.[29] Further, the presence of land subject to a conservation easement (as described in section 704.06, Florida Statutes) engenders special treatment for property tax assessment that leads to a classified use valuation which produces the assessed value. This treatment requires the property appraiser, when valuing such land for tax purposes, to consider no factors other than those relative to its value for the present use, as restricted by the easement.[30]

There are also a significant number of conservation easements directly held by the State of Florida and local governments that are not included in this total. According to the expected update to the Department of Environmental Protection's website:

> *Since the late-1990's, the Department of Environmental Protection via the Division of State Lands has implemented a very successful less-than-fee acquisition program. Utilizing funds from the CARL, Preservation 2000 and Florida Forever programs, the Division has acquired more than 181 conservation easements and land protection agreements (CE/LPAs) protecting over 345,662 acres statewide.*[31]

In addition, the Florida Department of Agriculture and Consumer Services indicated that it has acquired permanent rural lands protection easements through the Rural and Family Lands Protection Act for over 125,000 acres of working agricultural land.

Finally, the Acquisition and Restoration Council, created in section 259.035, Florida Statutes, must maintain a list of nonprofit entities that are qualified to enforce the provisions of a conservation easement.

Unique Conservation Easement Features in Other States...

- Prior to recording, Massachusetts requires "approval of an easement's public benefits at both state and local government levels."[32] Likewise, if subsequent termination is sought in whole or in part, the state and local government must approve that action before it takes place.

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[28] The constitutionally referenced general law was adopted during the 2009 Regular Session and can be found in section 196.26, Florida Statutes. Also see section 193.501, Florida Statutes, which was amended at the same time.

[29] Internal analysis by the Office of Economic and Demographic Research and the Department of Revenue. Polk County has nearly 15% of the statewide total of parcels with exemptions. It is followed by Highlands County with 7.0%. Ten counties had none.

[30] See section 193.501, Florida Statutes.

[31] See https://floridadep.gov/lands/environmental-services/content/conservation-easements. Note that the Land Management Uniform Accounting Council's 2023 Annual Report (Fiscal Year 2022-23) instead reported that 140 conservation easements and protection agreements addressed 292,619 acres. See page 12 of 64 at: https://floridadep.gov/sites/default/files/2023%20LMUAC%20Annual%20Report_0.pdf.

[32] Pidot, J. (2005) "Reinventing Conservation Easements: A Critical Examination and Ideas for Reform." Lincoln Institute of Land Policy.

- Colorado and Vermont specifically allow easements to include obligations to perform certain acts (like the removal of nonnative vegetation). New Hampshire and Rhode Island have similar language. Florida's language is broad and generally defines a conservation easement as "...a right or interest in real property which is **appropriate to** retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition..." [Emphasis added.] The use of "appropriate to" can arguably include any affirmative obligations for which agreement is reached.

- South Carolina has a Heritage Trust Program which has the responsibility of inventorying and managing "unique and outstanding natural or cultural areas and features." Further, "property owners may establish a heritage preserve by donating the fee title, a conservation easement, or an open-space easement to the State Department of Natural Resources."

- In 1967, Maryland created the Maryland Environmental Trust (MET) as a unit of the Department of Natural Resources. Today, MET co-holds (as a co-grantee) many the state's conservation easements with local non-profit land trusts. MET also has an active stewardship program for both the easements that it owns directly and those that it co-holds, with each co-grantee having the independent authority to enforce the terms of the conservation easement.

- In 2006 and 2007, California passed legislation requiring central tracking of conservation easement data, with a publicly accessible online conservation easement registry. After the 2007 change, the registry was limited to conservation, open-space and agricultural easements held by the state or purchased with state grant funds after January 1, 2000; however, practical applications continued to evolve with the introduction of the separate California Conservation Easement Database in 2014. In 2007, Maine also passed legislation establishing a mandatory statewide registry for all conservation easements within the state. Maine's registry has a specific data field for the easement holder to enter the date of the most recent monitoring report. That report is statutorily required at least once every three years.

- Heading off expected development pressures, Maine (2007) and Colorado (2019) each amended their enabling statutes for conservation easements to specify that only a judicial proceeding can extinguish or release a conservation easement.[33]

- In 2024, the state of New York made $1.35 million available to protect New York's forestlands. The Forest Conservation Easements for Land Trusts Grant Program allows eligible, accredited land trusts to apply for up to $350,000 to purchase conservation easements on forested land in New York State.

[33] Note: based on the common law doctrine of *cy pres* which seeks a finding that the purpose of the restriction is now impossible or impractical. For a more in-depth discussion, see: McLaughlin, N.A. (2024). *Keeping the Perpetual in Florida's Conservation Easements*. 18 FIU L. Rev. 347.

Florida Options for the Future...

1. Strategic Targeting...Although it would take more resources, identifying and actively seeking out projects with the highest environmental value to the state could improve the effectiveness of the state's land acquisitions through fee title acquisition. Any remaining properties on state lists could then be deemed as easement-only, with a separate unit and staff resources dedicated to that process. Some practitioners have opined that the use of easements should be limited to desired lands of lower priority or lower rank that can still be adequately protected, despite the more flexible and negotiated conditions of an easement.[34] The benefit to the State of Florida is the lower acquisition costs for conservation easements relative to buying parcels outright. There would still be costs for monitoring and enforcement, but these would likely be less than the active management costs for maintenance and improvements.

2. Provision of Additional Financial Support...Establish and fund a first-come / first serve grant program that defrays a portion of any easement holder's cost for enforcing a conservation easement. These actions are likely to increase over time.

3. Creation of a formal statewide registry of conservation easements at a state agency that is both easily accessible to the public and computerized. Possibilities include the Office of the Attorney General or the Department of Revenue (Property Tax Oversight). The most likely funding source would be a filing fee. Aside from general transparency, the benefit to the State of Florida is a greater likelihood that the easements will be monitored and enforced.[35]
    - The Legislature could require—or the designated state agency could explore the feasibility and cost of—digital mapping of geospatial data as an added feature of the new registry. Otherwise, require standardized maps.
    - This option could be further modified to incorporate a certification by the easement holder that a specifically stated conservation value is both present on the parcel and can be protected through its monitoring and enforcement efforts for the duration of the easement.[36]
    - As an alternative, several analyses have extended the conservation registry concept to incorporate a formal "state-wide system of recording easements" rather than the more ad hoc county-by-county approach currently in place for most states.[37]

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[34] Squires, R. H., and Gustanski, J. A. (Ed.) (2000). *Protecting the Land: Conservation Easements Past, Present and Future*. Island Press. In particular, see chapter 29 entitled "Reflections on Patterns and Prospects of Conservation Easement Use" by John B. Wright. Also see: Pidot, J. (2005) "Reinventing Conservation Easements: A Critical Examination and Ideas for Reform." Lincoln Institute of Land Policy.

[35] See https://www.calands.org/wp-content/uploads/2018/12/EasementReviewPolicy2018.pdf for a general discussion of pros and cons of publishing easement data.

[36] Sundberg, J. O. (2011). *State Income Tax Credits for Conservation Easements: Do Additional Credits Create Additional Value?* Lincoln Institute of Land Policy.

[37] Ibid. Sundberg (2011) summarizes these studies by saying, "Many scholars have argued that every state should be expected to have an accessible record of all easements, but very few actually do." See https://www.lincolninst.edu/app/uploads/2024/04/1961_1282_sundberg_finalwp11js1.pdf. Also, Morris and Rissman (2010-Final, Wisconsin Law Review) find that: "…it is impossible to get comprehensive

information on how and where conservation easements are being created, what they are supposed to accomplish, whether they are being monitored and enforced, and how much public money is being spent." See https://rissman.russell.wisc.edu/wp-content/uploads/sites/281/2011/12/Morris-and-Rissman-2009-public-access-to-private-land-conservation-info-WLR.pdf.