

The Back Forty

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Reserved Interest Deeds: An Alternate Approach to Drafting Conservation Easements

by James B. Snow

Drafting conservation easements has to be one of a lawyer's more creative and frustrating challenges because an easement, like any legal instrument, must fulfill many often competing goals. First, an easement must stand the test of time, economics and politics to achieve a long-range conservation objective. The easement must be understandable to both landowner and easement holder. It must be precise enough to be enforceable, yet sufficiently compromising to reach a mutually acceptable agreement. Often, the lawyer's frustration comes years later when an easement is defeated in court or is thwarted by some unforeseen event.

In my 17 years as a lawyer for the United States Forest Service, I've had many creative challenges and some frustrations with easements. Through an ever evolving process of trial, error, and a lot of money, government agencies have found what works and what has not. To understand what we are doing today, it helps to see where we have been.

The Federal Experience with Conservation Easements

As owner of one-third of the Nation's land, the federal government has the pivotal role in protecting our scenic, cultural and natural heritage. The federal gov-

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Editor's Note

This issue begins with an examination of conservation easements drafted in the form of reserved interest deeds. In the traditional negative easement, the donor transfers a limited number of rights in the land, which are typically expressed in the deed as restrictions. In contrast, in a reserved interest deed, the donor transfers all rights in the land except those few rights specifically retained in the deed.

In the first article, an attorney with the federal government discusses the experience of the U.S. Forest Service, which pioneered the use of reserved interest deeds. The two following articles explore the concept of the reserved interest deed from the perspective of private land trusts.

ernment protects, through reservation or purchase, millions of acres as National Parks and National Forests. Most of the purchases for National Forests were in the eastern part of the country where the government acquired large forested tracts for timber production and watershed protection. However, the emphasis in acquisition has shifted in recent decades to securing land primarily for recreation and similar purposes.

The National Park Service was a pioneer with easements, having first acquired them in the 1930's for the Blue Ridge Parkway and the Natchez Trace Parkway. By 1974, the Park Service had obtained easements over more than 25,000 acres at more than two dozen park areas.

Since passage in 1964 of the Land and Water Conservation Fund Act (LWCF), federal land acquisition has focused on achieving recreation and conservation aims for national trails, wild and scenic rivers, and areas of particular scenic or recreational importance. Because these areas often involve established private landownership patterns, easements have become a major means for achieving conservation objectives.

Easements have consistently succeeded as a means for preventing adverse development without forcing landowners to move off their land. Conservation goals are met while keeping private property on the tax rolls.

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Finally, there is the rebuttable presumption that easements are a cheaper alternative to fee acquisition because the government only buys the rights in the land it actually needs.

Easements were also deemed by Congress the panacea for resolving some unique land management challenges posed in large areas of significant scenic and recreation value with mixed public and private ownership. To this end, the most significant authorization for easement use was the enactment by Congress of Public Law 92-400 establishing the Sawtooth National Recreation Area (NRA) in central Idaho. A major objective of the Sawtooth NRA is to keep 25,000 acres of privately owned land in traditional ranching and pastoral uses. This has not been an easy or inexpensive project because of the significant development pressures from the nearby ski resort of Sun Valley. Ultimately, between 1975 and 1990, the Forest Service acquired approximately 78 easements over more than 18,600 acres. In addition to the Sawtooth NRA, several other national recreation and scenic areas have extensively used easements. Easement enforcement problems, however, have tempered the earlier success of the Sawtooth NRA.

Federal Law Related to Easements

Federal agencies look to both federal and state law as a basis for easement acquisition. In the normal course of real property transactions, the federal government follows the property law of the particular state in which the land is located. However, this is not always the case if the choice of state law could defeat the federal land acquisition purposes.¹

The classic confrontation took place in North Dakota over a wetland easement held by the Fish and Wildlife Service on a prairie pothole. The landowner sought to drain areas under the easement, asserting that the federal easement was an "easement in gross" in violation of North Dakota property law. In *United States v. Albrecht*, 496 F.2d 906 (1974), however, the 8th Circuit Court of Appeals held that application of state law could not defeat the federal easement.²

Partly to avoid conflicts with state property laws, federal land managing agencies have sought a solid basis in federal law for easement acquisition programs. Congress defined easements in several major enactments including the Wild and Scenic Rivers Act,³ the Act establishing the Sawtooth NRA,⁴ and for the Forest Legacy Programs under the 1990 Farm Bill.⁵

Federal Experiences with Various Types of Easements

Until recently, the traditional form of easement used by federal agencies is what I refer to as a "negative restrictive" deed. Simply described, it states the do's and don't's of land management. It is the kind of easement deed most private lawyers will readily recognize.

Typically, federal negative restrictive easements listed a series of prohibitions on activities such as subdivision, commercial and industrial operations, timbering and the like. The agency gained a limited right of entry into the area for administrative purposes.

The well known drafting problem with the negative restrictive deed is that it requires clairvoyance as to future uses. Technology and land use patterns can shift rapidly in ways that even the most careful draftsman can not anticipate. A classic example occurred on a Wild and Scenic River administered by the Forest Service. The Forest Service acquired easements in the mid-1970's to regulate land uses and maintain the scenic views from the river. Seven years later, the Forest Service was dismayed to learn that their easements were insufficient to prevent landowners from installing large satellite antennae for enhanced television reception. In just a few short years, technology had affected land uses in ways unanticipated by the easement drafters.

Unfortunately, the practical effects of negative restrictive easements have often been less than desired. The Park Service recognized as early as the 1940's the difficulties of enforcing easements when the surrounding conditions were changing. Enforcement efforts on various parkways, particularly against successors in interest, resulted in ill will and continual management problems. An example of enforcement problems was an easement provision stating that the landowner could not cut trees except those which were dead and down. The property owner sought to open a view and promptly poisoned the trees blocking the view. Once dead, they were cut down, opening the view sought by the landowner.

The Forest Service tried to address the problem of drafter's clairvoyance through a regulatory scheme using what I call "result-oriented deeds." This is the approach the Forest Service has used in the Sawtooth NRA, where the agency recognized the impossibility of anticipating all the possible land uses that might conflict with conservation objectives. Therefore, the Forest Service wrote easements with language generally outlining the easement's conservation goals. The easement then authorized the Forest Service to allow those activities which it found to be consistent with the goals, and to prohibit those judged inconsistent. Simply

stated, the Forest Service bought the right to say "no" to most potential land uses.

A typical Sawtooth easement contains some specific prohibitions such as subdivision, and allows all other activities to continue insofar as they do not "substantially impair" scenic, pastoral, fish and wildlife values of the area. The theory at the time of acquisition was that the Forest Service could review land use activities and say no to those believed to substantially impair. Unfortunately, the scheme has not worked very well.

In *Racine v. United States*,⁶ a landowner in the Sawtooth NRA wanted to build a resort consisting of a lodge and several other buildings. The easement deed provided for building "only one tenant dwelling and one residence" on the property. In denying the proposed use, the Forest Service said that the easement permitted only one tenant dwelling and one residence. Unfortunately, the United States District Court took a very literal and narrow construction of the easement, finding that the deed only restricted the number of tenant dwellings and residences, not the number of other structures. In so ruling, the court effectively ignored the overall purposes of the easement.

The cases that go to court are rare and do not adequately illustrate the management problems encountered by the federal agencies. For example, the right to say "no" in the result-oriented deeds in the Sawtooth NRA has effectively become a duty to negotiate. Proximity to the Sun Valley ski resort has attracted many wealthy landowners to the Sawtooth area. These wealthy property owners have learned to bring to easement disputes political pressures from a commonly unsympathetic congressional delegation, plus the efforts of well-paid lawyers and consultants. The result is a constant battle by the Forest Service to hold off the most detrimental proposals and ameliorate, when possible, the environmental impacts of the others.

The fundamental problem with both the negative restrictive and result-oriented deeds concerns subjective standards for imposing land use restrictions. Courts are reluctant to rule against the landowner in possession, and interpret restrictions strictly against the government. This is particularly true when the proposed use falls within a "gray area" of the deed. An activity or use falls within the gray area if it is not expressly prohibited under the terms of the deed, but might be subjectively judged inconsistent with the deed's overall goals. Generally, the federal government has had little success enforcing restrictions which fall into an easement's "gray area."

Reserved Interest Deeds

The reserved interest deed is one response to the problems associated with the negative restrictive and result-oriented deeds. Conceptually, a reserved interest deed is easy to define — it is the acquisition by the easement holder of all rights, title and interests in a property except those rights specifically reserved by the landowner.

The term "reserved interest" describes this kind of easement because the easement defines the rights of the landowner by the affirmative rights reserved to the landowner. The reserved interest concept attacks the gray area problem head on — anything not expressly reserved is considered transferred to the easement holder. Using the property rights metaphor of the bundle of sticks, the reserved interest approach buys the remaining bundle of rights, not just a few of the sticks.

As a simplistic example, consider a tract of farmland along a wild and scenic river. The conservation goal is to keep the land undeveloped in farmland. A traditional approach with a negative restrictive deed might be described as follows:

Example A. Landowner conveys to United States a perpetual easement whereby landowner agrees for himself and his heirs and assigns that he will not do any of the following: no structures shall be built, no subdivision, no draining, etc.

The reserved interest deed flips the approach, as follows:

Example B. Landowner conveys to the United States all right, title and interest in the property, reserving to himself and his heirs and assigns only the following rights in the property: the right to plant and grow row crops, orchards, etc.

These simple examples show the relative division of the rights in the property. In example A, the gray area vests in the landowner. In example B, the landowner retains everything expressly reserved, but the gray area vests in the easement holder.

The federal land-managing agencies have used reserved interest deeds on various projects for a little more than a decade. The first use of reserved interest deeds was by the National Park Service on the Appalachian National Scenic Trail. To assure that all 14 states along the Trail would accept these deeds, Congress amended the National Trails System Act in 1983 to permit easement acquisition without regard to state law limits.⁷

The first major use of reserved interest deeds by the Forest Service was in 1986 in the Oregon Dune National Recreation Area. The Forest Service now prefers these deeds for most easement projects. In the Columbia Gorge National Scenic Area in Oregon and Washington, the Forest Service has acquired over 26 reserved interest easements.

Advantages to Reserved Interest Deeds

The following considerations have led the Forest Service and other federal land managing agencies to rely more frequently on reserved interest easements:

Ease of negotiation. If properly presented by a knowledgeable negotiator, reserved interest deeds may be easier to negotiate with landowners. This is primarily because the listing of affirmative rights stresses the positive elements of landownership. In many areas such as wild and scenic river corridors, landowners are primarily concerned about retaining their existing uses of their property. Reserved interest deeds are ideally suited to listing and affirming rights to existing uses.

The Forest Service experience in the Columbia River George National Scenic Area has been very positive. Landowners now have readily accepted the reserved interest approach and negotiating problems have been minimal. Disputes over easements have centered only on the offered price, not the terms of the deeds.

Valuation considerations. Easements have always posed unique appraisal problems. An oversimplified explanation is that the land placed under easement is appraised twice, once with and once without the easement. First, the appraiser estimates the market value of the land without easement restrictions (the "before" value) and then estimates the market value of the land under easement (the "after" value). The difference between the before and after value is the value of the easement and the amount which the government pays for its conveyance.

The federal experience has been that reserved interest deeds are easier to appraise assuming one is using an appraiser experienced in valuing partial interests in land. The reason is fairly straightforward. In determining the after value of property under easement, it is easier to find market values for land uses comparable to those reserved in the deed. Appraising has many subjective elements and one of the most subjective is determining how restrictions on land use will affect its market value. Reserved interest deeds may afford a more definitive and objective statement of the actual uses that may be made of a property.

Enforceability. Reserved interest deeds shift the burden of proof in an enforcement action from the easement holder to the owner in possession. In most

easement enforcement cases, the easement holder must show that the easement was lawfully acquired and recorded, that it proscribes certain activities, and that the owner in possession has undertaken a proscribed action. The Forest Service has found that courts usually resolve questions of intention in the favor of the owner in possession.

With a reserved interest deed, the easement holder owns the unreserved bundle of rights in the property. Therefore, in theory, the easement holder must establish only that the owner in possession is engaging in activities not reserved in the deed. The owner in possession will bear more of the burden to establish an affirmative reservation of right.

This reasoning is speculative since we have yet to have an enforcement action on a reserved interest deed. Most easement enforcement problems occur with successors in title to the landowner from whom the easement was originally bought. Since reserved interest deeds have received use for only a little more than a decade in limited areas, time has not allowed problems to surface. Another reason for the dearth of conflicts may be that landowners are unwilling to challenge an inherently stronger position of the easement holder.

A corollary to enforceability is maximizing the amount of on-the-ground conservation per dollar spent. As noted above, federal experience has often been that rights under easements were appraised as having been acquired by the government and consideration paid accordingly. When it came to asserting those rights in court or a political context, however, we often lost. Payment for a right we cannot assert or enforce is money wasted. While all easement deeds are subject to this problem, reserved interest deeds may be more cost-efficient because we have clearly bought what we paid for.

Considerations For the Non-Government Easement Holder

In recent years, there has been an increasing cooperation between the federal government and private land trusts and similar conservation organizations. Frequently, those relationships have involved fee acquisitions within federally administered areas. However, with the advent of the Forest Legacy and other new programs under the 1990 Farm Bill, there will be increasing cooperation on easement acquisitions. Because use of reserved interest easements by federal agencies has engendered skepticism and questions from such organizations, several points of clarification are in order.

A drafting technique. First, the reserved interest deed is most simply a drafting technique, albeit with particular results as to the division of the bundle of

rights in a property. In the hands of the skillful drafter, a reserved interest deed may produce a more cost-effective and enforceable easement. Similarly, a poorly drafted reserved interest easement will have as many enforcement and other problems as any other instrument.

The problem of specificity. As a corollary on drafting, a reserved interest deed can be as ambiguous as more conventional forms of easements. Consider a rose garden. If a landowner reserves the right to residential use of the property, does that imply the right to have a rose garden? If a rose garden is not specifically reserved, is the landowner in violation of the easement? This question points out the problem of specificity inherent in all easements. The only difference with the reserved interest situation is that the problem of specificity is borne more by the grantor of the easement than the easement holder.

Precise drafting addresses the specificity problem with all easements. By "precision," I do not mean multiple pages addressing the minutiae of land ownership rights. Drafting precision should address those critical elements of land ownership necessary to achieve the easement's conservation goals. Thus, if the goal of an easement is to prevent subdivision and retain residential uses, then precision should directly work toward that goal. In this context, a rose garden is not critical to the conservation objective and can be permitted through generic reservations of reasonable rights associated with residential uses.

An eclectic approach can address some of the remaining specificity problems. In some reserved interest deeds, the Forest Service has added clarifying provisions listing some prohibited activities to prevent confusion later in determining what is allowed and what is prohibited. This eclectic approach combines some of the attributes of the negative restrictive and reserved interest approaches. The reserved interest elements determine the respective division of the rights in the property, while the listing of prohibited activities helps to clarify general proscriptions.

Conformity with state law. I am unable to assess the efficacy of the reserved interest approach under various state property laws. As noted, the federal agencies have relied upon the preemptive status of federal law to overcome any possible state limitations. While I am not aware of any state law incompatible with the reserved interest approach, the private lawyer will need to assess state law limitations before embarking on a reserved interest approach.

In summary, the federal land management agencies have administered thousands of easements over many decades in a myriad of settings to achieve various conservation objectives. Drawing on that experience,

we have tried to draft more efficient, enforceable and cost-effective easements. The reserved interest approach to easements is one such approach. It is not a panacea to all easement problems, nor is it a new diabolical form of land use control. It may, however, best achieve our conservation objectives.

ENDNOTES

1. In *United States v. Little Lake Misere Land Company*, 412 U.S. 580 (1973), the Supreme Court decided a choice-of-laws question when interpreting federal land transactions involving the Migratory Bird Conservation Act. The Court found that if the state property law is aberrant or hostile to a federal program, the federal courts will not apply it against the United States.

2. Citing to *Little Lake Misere*, supra, the 8th Circuit found that the federal easement could not be defeated by the application of state law. "To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights [under federal law] and to destroy a national program of acquiring property..." 496 F.2d at 911.

3. The Wild and Scenic Rivers Act defines a scenic easement as the "right to control the use of land (including the air space above such land) for the purposes of protecting the natural qualities...[of a designated river]." 16 U.S.C. 1286(c).

4. Public Law 92-400 defines a scenic easement as the "right to control the use of land." 16 U.S.C. 460aa-3.

5. Public Law 101-624, §1217 (104 Stat. 3530), defines conservation easements for purposes of the Forest Legacy Program.

6. *Racine v. United States*, Civil No. 84-4119, U.S.D.C. Idaho (Memorandum Decision, March 20, 1987), affirmed 858 F.2d 506 (9th Cir. 1988).

7. 16 U.S.C. §1246(k). A similar amendment was made to the Wild and Scenic Rivers Act in 1986. 16 U.S.C. §1286(c).

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Commentary on "Reserved Interest Deeds: An Alternate Approach to Drafting Conservation Easements"

Thomas R. Duffus, Director of Land Protection, Adirondack Land Trust/Adirondack Nature Conservancy, writes:

If nothing more, Jim Snow's article should cause consternation amongst administrators of conservation easement programs. The experiences described by Mr. Snow merely touch the surface of a potentially devastating problem that our successors will inherit: poor conservation easement draftsmanship. The reserved interest deed easement is, as Mr. Snow points out, only one response to a history of "gray areas" and lack of "clairvoyance" common to recent conservation easement drafting. Now is the time for all land trusts and advisors to re-examine their drafting techniques as well as consider a variety of applications of the easement concept.

Mr. Snow's discussion illuminates a few interesting points about draftsmanship that we should all heed. The examples given reflect a rather typical approach to easements that emphasizes restricting specific land uses rather than protecting natural resources. In my state, for instance, the government has taken to describing its conservation easement program as "buying development rights" instead of as protecting resources (meaning, "easements prohibit development, and thus eliminate an undesirable land use and this alone will protect the land"). As in Mr. Snow's examples, this thinking often translates into easements that set forth a series of detailed do's and don'ts. In the example of viewshed protection, one might argue that *all* structures should be prohibited within a defined view rather than citing the *type* of structures that are prohibited. Exceptions may then be cited on a specific basis so that any responsibility for "clairvoyance" would fall with the landowner in the normal course of the negotiation.

To protect scenic resources, for instance, our land trust has used measurable setbacks for building exceptions rather than relying on a recitation of unacceptable structures or subjective statements (such as, "no structures that impair the view of..."). Replacing the subjective with measurable standards eliminates the gray area and places the focus on resource protection by actually defining the resource.

The Forest Service's so-called "result-oriented deed" attempts to be resource-driven, but the consent clauses can place extraordinary stewardship obligations on the easement holder, who in essence becomes a regulatory body. It may behoove a land trust to limit

the use of consent clauses for this very reason. One might argue that if consent is needed, the proposed land use may be inappropriate to begin with and should be prohibited. Again, the grantor should bear the responsibility of "clairvoyance," working with the grantee to provide for specific new uses during negotiation. If a potentially detrimental use is to be permitted, measurable standards governing the exercise of the right, rather than mere consent, could be drafted into the easement. Some easements I have read actually cite construction and site preparation standards, for example. Many land trusts steer clear of consent altogether and instead require notice for some permissible uses just to keep tabs on the property. Notice provisions, if honored, ensure a continual and healthy stewardship dialogue between the two parties. Easement amendment provisions also provide a means of addressing changing conditions.

The use of exceptions has great potential for eliminating "gray areas." Generally, restrictions could be crafted so that new uses would be prohibited except those which are predetermined as benign (or even necessary, as in the case of farmland), and worded as exceptions. This age-old drafting technique of "taketh away and giveth back, with conditions" is the foundation of reserved interest deeds but may also boost the effectiveness of standard conservation easements.

The reserved interest deed is a good idea. Our land trust has used this technique on occasion. Like all tools of the land conservation trade, if one technique works, use it or invent a new one. There are some problems with reserved interest deeds, such as whether the holder may actually exercise the nebulous rights it acquires, and, that the "land grabbing" perception of reserved interest deeds has hindered some land protection programs (i.e., Forest Legacy).

However, debating the merits of reserved interest deeds is not the point — the concept has merit and should be used when it fits a particular situation. I would concur with Mr. Snow that the reserved interest deed may be one means of eliminating "gray areas" and the need to predict the future. However, this same goal can also be achieved with careful drafting of standard conservation easements.

My reading of Mr. Snow's article has left me with a few simple drafting tips: don't become hung up in the details of land uses, focus on the resource; protect the land's basic resources, then consider exceptions as part of the normal negotiating process; and, avoid subjectivity at all cost. Then again, as a non-lawyer, I am afforded the luxury of thinking with confidence, "simpler is better," before I run my draft easements through the legal review meat grinder.

James J. Espy, Jr., Attorney and President of the Maine Coast Heritage Trust, writes:

In my view, reserved interest deeds may be an important new tool for land conservation. The more tools the better in this business. However, I think there are several significant problems that will limit their usefulness in practice. I also believe that many of the problems attributed to traditional easements stem from "loose" drafting rather than a "fundamental flaw" in the tool.

Before enumerating the problems, I wish to state that my commentary is intended simply to stimulate thinking about solutions to problems, real or imagined. I do not see one technique as a substitute for the other, nor do I see one as being inherently "better" than the other. It is my hope that both reserved interest deeds and traditional easements can be used side by side to promote land conservation.

My concerns fall under four headlines: (1) Property Taxes; (2) Landowner Acceptance; (3) Cost of Acquisition; and (4) Enforcement.

Property Taxes

When a reserved interest deed is purchased by a government agency or land trust, the landowner has sold all rights except those specifically retained. Unlike a traditional easement in which the landowner clearly owns the underlying fee, the fee appears to vest in the purchaser of the deed. The owner of property restricted by a traditional easement pays property tax (in many states) on the basis of the value of the underlying fee retained. But how will a reserved interest deed be taxed?

Many state agencies have a policy of paying no property tax to municipalities, and most federal agencies pay only a fraction of the taxes they would pay if taxed on the basis of full fair market value. Is a property restricted by a reserved interest deed and held by a government agency tax exempt?

What if a nonprofit land trust held the deed? In Maine, and I suspect elsewhere, conservation groups are exempt from tax only if they use property "solely" for their charitable purposes. No reserved rights by a private party are permitted. I can envision a municipal assessor arguing that, under the terms of a reserved interest deed, the land trust owns the property, has provided private uses of the property (the reserved rights), and is therefore fully taxable.

Landowner Acceptance

Flexibility and control are two of the most important selling points of traditional easements for landown-

ers. The fact that a landowner is permitted to use property in all ways not restricted by the traditional easement provides a significant level of comfort that "Big Brother" will not be breathing down the owner's back at every turn. The owner retains control over all future uses so long as those uses conform to the terms of the easement. Although the landowner must think ahead and consider the impact of restrictions on future uses of the land, he is not required to enumerate all possible uses at the time the easement is granted.

The reserved interest deed takes much, if not all, of the flexibility and control of future uses away from the landowner. Yes, there may be ways to draft such deeds to provide flexibility (I address this below), but the landowner would likely need approval before making almost any change in use. The thought of being lost in a bureaucratic maze (real or perceived) each time a question arises about the deed is distressing to most, repugnant to many.

The U.S. Forest Service's preliminary guidelines for the new Forest Legacy Program suggest that reserved interest deeds will be preferred over traditional easements for land interests acquired by the federal government. I suspect that many landowners, particularly industrial forest owners, will choose not to participate in the Forest Legacy Program because of the preference. It would be most unfortunate if an important conservation opportunity were missed as a result.

Cost of Acquisition

The fact that the purchaser of a reserved interest deed acquires more rights than the purchaser of a traditional easement suggests that such deeds will cost more to buy. Is this a wise use of limited conservation dollars? Perhaps in some instances, where very tight control by the holder is required to protect a property, the extra cost will be justified. However, in these cases one might want to first ask whether full fee ownership is recommended.

Enforcement

Mr. Snow argues that reserved interest deeds will be easier to enforce than traditional easements and, therefore, will be less expensive to the holder over time. Since the burden of proof will fall on the landowner to establish that he or she has retained the right to engage in certain activities, the courts will be better able to identify a violation and will be more likely to rule in favor of the holder.

It seems to me that ease of enforceability is, primarily, a function of clarity of language rather than form of deed. A document, whether a reserved interest deed or a traditional easement, drafted in nebulous fashion will

surely cause problems someday. Likewise, a carefully drafted document of any form should provide enough guidance for those who interpret it in the future.

If a reserved interest deed is to provide the flexibility that many landowners demand, language providing for generic reservations will have to be incorporated in the document. Mr. Snow uses the example of a rose garden. Generic language could be inserted in a deed to allow landowners to establish such things as rose gardens in association with their reserved residential use rights. But what else could such language permit? Satellite dishes? How can the drafter be assured that such language will not be interpreted in a way harmful to the original conservation intent?

Once a reserved interest deed becomes "flexible" it also becomes subject to the vagaries of interpretation. At that point it takes on many of the characteristics of a traditional easement.

Finally, I wonder whether the reserved interest deed may produce new administrative burdens that do not currently exist with traditional easements. By restricting the landowner to only those uses that are specifically enumerated in the deed, might the holder be asked to grant permission or provide clarification on a host of landowner wishes and questions? "The deed says that I can graze cattle; does that mean I can graze sheep?" "What about kangaroos?" How will the US Forest Service address and process such landowner questions? Will the landowner receive a timely response? Will the Forest Service spend an inordinate amount of time clarifying picayune points?

I pose a lot of questions but offer few answers. Perhaps readers can help with the hard part.