

Research on easement for environmental protection

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Abstract. The servitude conservation system, originating in the United States, is a juridical instrument devised to safeguard the ecological and anthropological value of the environment. In implementation, this system has flourished in the United States due to its emphasis on autonomy of intention. This has infused new vigor into the US environmental conservation system and provided a novel perspective for traditional government-led environmental conservation endeavors. From a comparative jurisprudence standpoint, this article scrutinizes various servitude conservation system from countries including America, Russia, Chile, and France. The objective is to ascertain whether a similar system could be successfully transplanted into China's current national conditions.

Keywords: Easement; Environmental Protection; Environmental Service.

1. Overview of environmental conservation easements

In the report of the 20th National Congress of the Communist Party of China, General Secretary Xi Jinping emphasized that nature is the fundamental condition for human survival and development. Respecting, conforming to, and protecting nature are essential requirements for building a modern socialist country. We must firmly establish and practice the concept that lucid waters and lush mountains are invaluable assets and plan development from the perspective of harmonious coexistence between humanity and nature. [1] The adoption of the Civil Code in 2020 officially established the green principle as one of its fundamental principles, highlighting the importance of environmental protection in civil activities.

Compared to developed countries in Europe and America, China's environmental protection system has a shorter history and is less mature. There are two main issues with traditional environmental protection measures in China:

First and foremost, there exists a potent "governmental influence," signifying that public authority frequently plays a paramount role. During the nascent stages of instituting an environmental conservation system, measures spearheaded by public authority maintained elevated efficiency and were capable of expeditiously ameliorating local environmental governance levels. Nevertheless, elevated-efficiency administrative measures also signified that issues such as one-size-fits-all "indolent governance" were concealed beneath the guise of "elevated efficiency," thereby posing a peril to private entitlements.

Secondly, there exists a predilection for "quantity" over "quality." Since China promulgated its inaugural environmental conservation law in 1979, more than 40 years have elapsed. After 43 years of evolution, China's ecological and environmental legislation has burgeoned to encompass 33 laws, in excess of 100 administrative regulations, and more than a thousand local regulations. The legislative system is colossal. [2] Nevertheless, these laws span an extensive period of time, implicate numerous departments, and are frequently revised. They exhibit an overt reactive approach to environmental issues, addressing predicaments as they materialize rather than adopting a more philosophical approach to environmental jurisprudence. As a consequence, the overall caliber of environmental legislation is subpar. As socialism with Chinese characteristics enters a novel era, the construction of China's socialist environmental conservation system should not concentrate solely on "quantity" as a measure of its caliber. Instead, the focus should shift from resolving the predicament of "whether or not" to resolving the predicament of "how well." To address these issues in China's environmental conservation system, the environmental conservation servitude system originating in the United States can provide some reference value due to its emphasis on autonomy of intention.

An environmental protection easement, as defined by the United Environmental Easement Law, refers to a non-possessory interest in real property that imposes restrictions or affirmative obligations

on the right holder. Its purpose includes preserving or protecting the natural, scenic, or open-space values of real property; ensuring that the property can be used for agriculture, forestry, recreation, or open space; protecting natural resources; maintaining or enhancing air and water quality; or preserving the historical, architectural, archaeological, or cultural values of real property. [3] In terms of its legal nature, an environmental protection easement can be incorporated into the conceptual framework of easements (servitudes) in civil law systems. According to Roman law, an easement is a right recognized in Roman civil law that involves splitting the rights bundle of one object for the benefit of another object. An environmental protection easement splits the rights bundle of land for the benefit of the land itself and theoretically fits within the logical framework of easements. However, current environmental protection easements do not fit within the secondary classification of easements recognized by academics. This secondary classification includes positive and negative easements. A positive easement refers to a right that benefits another piece of real property, while a negative easement restricts the use of the burdened property. Secondly, the object in an easement relationship should be certain, while the object of an environmental protection easement is uncertain land. Nevertheless, environmental protection easements challenge traditional easement theory on these two levels. They exist only for the benefit of no specific servient estate or, more accurately, without a specific servient estate. Due to the interconnectedness of global ecological systems, damage to any piece of land can have global consequences. This means that it is almost impossible to determine a specific servient estate for an environmental protection easement. The only land that can be determined is the land itself. This contradicts traditional concepts of easements and thus cannot be included within traditional easement systems.

Consequently, if we aspire to incorporate the concept of environmental conservation servitudes without introducing a novel system, we necessitate comprehending the core of environmental conservation servitudes and devising a novel juridical theory within the civil jurisprudence system. This paper will scrutinize environmental conservation servitudes and analogous systems in other countries to inform the future evolution of China's environmental conservation system.

2. Investigation and Reference of Typical National Environmental Protection Easement Legislation

2.1 The United States

2.1.1 Overview of the US environmental protection easement system

Since the 1960s, the United States has established a robust legal infrastructure for environmental conservation easements through both practical application and meticulous examination at the federal and state levels. As a federal republic, its statutes and mandates concerning environmental conservation easements are bifurcated into two tiers: the federal government and the state government.

At the federal level, key documents include the Federal Highway Beautification Act of 1965, which explores the law of environmental protection easements for landscape types; Section 170(h) of the Internal Revenue Code of 1980, which provides tax breaks for environmental protection easements; and the Uniform Environmental Protection Easement Act of 1981, issued by the Uniform Law Commission (ULC), which provides a standard for state-level environmental protection easement legislation.

At the state level, each individual state possesses its own environmental conservation easement legislation that operates in tandem with federal laws and regulations to establish a comprehensive network of legal safeguards from the federal to the state level. This guarantees the thorough execution of the environmental conservation easement system. [4]

Section 2 of the Uniform Environmental Conservation Easement Act stipulates: "Unless otherwise specified, an environmental conservation easement may be established, recorded, conveyed, relinquished, amended, terminated or otherwise altered or affected in the same manner as other easements." This provision integrates environmental conservation easements into the formal

easement framework and permits them to be governed by conventional easement legislation while also being differentiated according to the specific statutes of each state.

2.1.2 The cornerstone of the practice of environmental protection easements in the United States

The developed land trust system and real estate market in the United States are important cornerstones of the country's environmental protection easement framework. These systems ensure that public interest is considered during the implementation of easements.

Land trusts are a specific type of non-profit organization that work to achieve land protection goals by purchasing or managing private land or regulating environmental protection easements on private land. Their staff is mainly composed of professional conservationists and environmental protection easement lawyers who supervise and manage the execution of natural environmental protection easements. If a violation of an environmental protection easement is discovered, the land trust will seek legal intervention as the plaintiff.

Land trusts play an irreplaceable role in the exercise of environmental protection easements. They are able to negotiate with government agencies to promote the development of protection plans and obtain financial support for the implementation of environmental protection easements. Additionally, if land trust interests are infringed upon by imperfect laws, they will work to improve related legislation. Land trusts also have a keen ability to identify potential projects and promote cooperation between government and landowners to assist in negotiations and realize the function of environmental protection easements. In cases where only government agencies are allowed to hold an environmental easement, land trusts can make an initial acquisition and then transfer it to the government.

In the 1950s, there were only over 50 environmental protection easements in the United States. However, from 1998 to 2003, the area covered by these easements increased dramatically. The number of land trusts also increased from 1213 to 1526, and the environmental protection easements under their management expanded from 1.4 million acres to over five million acres. The strong land trust fund in the United States (with some states having hundreds of land trust funds) provides sufficient support for the subsequent protection of easements, and their public welfare ensures that public interest is considered first during implementation.

2.1.3 Management characteristics of "drip irrigation" of environmental protection easement

In the United States' environmental protection easement system, the right to supervise the execution of environmental protection easements is divided into two categories based on the role in the easement contract: the easement holder and third-party enforcement rights. In terms of their social nature, these rights are held by both government and private non-profit land trust organizations.

The detection of environmental protection easement implementation is not clearly stipulated in US law. However, in practice, special personnel are generally assigned to monitor environmental indicators around the land and provide factual evidence for implementation and relief. The frequency and method of monitoring depend on factors such as the area, type of land, surrounding activity level, and monitoring funds. Violations discovered during management supervision are recorded and addressed through the corresponding judicial process as outlined in the protection agreement. The Restatement Third, Property (Servitudes) of 2000 notes that relief procedures can be initiated in such situations to prevent landowners from violating easements or to adjust third-party enforcement.

Unlike civil law systems where regulatory enforcement power for public easements is concentrated in the government, the United States partially delegates regulatory power for environmental protection easements to qualified private institutions recognized by law. This approach lays the foundation for the "drip irrigation" practice of environmental protection easements in the United States.

At a comparative law level, most countries and regions dominate supervision of similar easement systems through public power. For example, in France, Germany, Japan, and Taiwan (China), supervision and administration of public easements are firmly in the hands of the government due to

public interest. However, governments have limited public resources. Precisely dividing the bundle of rights held by an easement holder through an environmental protection easement can significantly reduce compensation funds in the early stages. However, precise division means that rights and obligations vary depending on the divided bundle of rights. As the number of segmented power bundles increases, so do the subsequent supervisory obligations of the easement holder or third-party enforcement rights holder. This leads to an increase in subsequent regulatory costs.

Therefore, for governments with limited administrative resources, although traditional land expropriation methods may lead to more administrative funds being used in early stages, follow-up supervision convenience at least ensures administrative act effectiveness and is more applicable to administrative work needs. However, by delegating regulatory supervision of environmental protection easements to private sector organizations in the United States, consumption of public resources for management and supervision is partially allocated to people. This change greatly reduces government contributions to administrative resources for environmental protection easements.

In current practice, American civil land trusts play a significant role among environmental easement rights holders with 1,671,721 environmental easements covering an area of about 112,282 square kilometers. Non-governmental organizations hold 42.74% while state, federal, local and other agencies hold 22.53%, 21.51%, 5.80%, and 7.42% respectively. As can be seen from this data, NGOs hold a comparable number of environmental protection easement contracts as government agencies.

The initiative to delegate environmental protection easements to civil organizations provides a foundation for its huge environmental protection easement system but requires a special realistic environment as soil: a developed land trust system and real estate market. The United States has strong land trust funds with some states having hundreds. These social organizations provide support for subsequent easement protection work while their public welfare ensures that public interest is considered first during implementation.

However, there are still questions about whether civil society organizations are competent enough to take responsibility for managing environmental protection easements involving public interests. Public welfare organizations are not a panacea; landscape-scale protection work often involves a wide range and many contract details so long-term effective implementation often goes beyond some public welfare organizations' scope. Protection goals can only be achieved with government macro guidance and management.

2.2 Chile

In 2016, Chile passed a law allowing landowners to voluntarily establish "environmental rights" through contracts. These environmental real rights can limit or prohibit specific real estate for one or more specific purposes and impose negative or positive environmental obligations on relative persons. This has the effect of an environmental protection easement and shares the same creation method and duration.

Thus, Chile's legislation essentially continues the American way of creating environmental protection easements through voluntary contracts and sustainable rights in principle. However, Chile defines this right as a real right rather than an easement and does not modify its civil law easement system. Instead, it avoids the incompatibility between environmental protection easements and civil law in a disguised manner.

This practice has several characteristics. Firstly, it relies on special provisions. This "environmental real right" is not an easement in civil law, so it does not apply the easement principle like the environmental easement in the United States. Its basic system is separately stipulated by Chile's Law 20.930. Secondly, it avoids theoretical obstacles. Environmental protection easements are not traditional civil law easements. Chile takes a new approach without changing the original system, giving a new definition of environmental protection easements under the civil law system and avoiding contradictions with traditional easements.

2.3 France

Compared to other continental legal countries where environmental protection easements are often incompatible, France has more theoretical space to accommodate this system. The French Civil Code includes a type of legal easement that does not require servitude and is established based on specific legal circumstances. In practice, legal easements have been used for environmental protection. For example, the French Code of Urban and Rural Planning allows the government to establish easements to protect cultural heritage.

However, there are several drawbacks to transferring environmental protection easements to legal easements in France. Firstly, it confuses the connotations of the two and makes it difficult to completely fit them together. Legal easements have many contents and purposes with specific provisions scattered across different laws. Adopting the same method to accommodate environmental protection easements only solves the special system without considering the whole and may lead to a loss of the original characteristics of both environmental protection easements and the general branch of legal easements. Secondly, it goes against the original intention of the theory and leads to disorderly expansion of public power. The advantage of environmental protection easements is their use of the private law attribute of easements to reduce public power intervention. Completely abandoning private law nature raises suspicions of abandoning essence.

Therefore, France has not further added similar environmental protection easements to its legal easement provisions. Instead, the French Environmental Code draws on the American system and stipulates that real estate owners can sign a contract for the purpose of maintaining, protecting, managing or restoring elements of ecological diversity or ecological functions to establish real right obligations for themselves and subsequent real estate owners. These rights continue to exist even after real estate ownership changes. Although not named an easement, this right is fully consistent with the characteristics of an environmental protection easement in the United States.

2.4 Russia

According to the Russian Land Code, a public easement on land grants the right to request that the government collect the land and compensate for damage to property rights. In addition to traditional relief methods such as nuisance prevention, danger elimination, and damage compensation, the Russian public easement system also grants the incumbent the right to claim reverse expropriation. In addition to generally granting real estate right holders the right to judicial relief, Article 23, paragraph 7 of the Russian Land Code clearly grants land right holders the right to claim reverse expropriation and compensation.

Reverse expropriation is mainly for special circumstances where real estate rights are burdened. When the establishment of a public easement makes it impossible for land ownership to continue using land benefits or causes unbearable impairment to the overall value of the land, the landowner has the right to request that the government collect and compensate for losses. [5] The right to claim compensation refers to the right to claim compensation from the government when the overall economic value or effective use value of land is reduced due to the establishment of a public easement.

In summary, because Russian public easements can only be established according to laws and regulations by parties (individuals or groups) or under special circumstances by public authorities in accordance with their functions and powers, they grant two special rights: compensation claims and reverse expropriation. This makes it more diversified for serving rights holders to request compensation when their rights are infringed and protects their legitimate rights and interests under coercive legislation.

In this way, when a right holder's rights are infringed, they can protect their legitimate rights and interests through traditional relief methods or by requiring direct collection by the government. However, this presents challenges for China's administrative system and relevant departments. For example, defining the degree of "the right limit of real estate has already exceeded necessary limits and is close to expropriation effect" and determining compensation standards after expropriation.

It is not difficult to see that reverse levy claims belong to a right of compensation. After establishing a public easement, if it is considered beyond limits, compensation can be applied for. This can restrain relevant department behavior and prevent abuse of public easements. However, subsequent compensation can cause problems such as disputes between parties due to undetermined compensation amounts in advance. At the same time, because China's land situation is different from Russia's with complex relationships between people and land and a large number of land laws, it is worth considering how to ensure that obligees receive sufficient compensation without causing excessive financial expenditure.

3. Construction of easement system for environmental protection in China

3.1 Introduction of "environmental property rights" in Chile

The first problem in introducing an environmental protection easement system in China is the conflict between the concept of environmental protection easements and the current concept of easements. Article 372 of China's Civil Code stipulates that easements require both a serving and a served estate. Following the United States' example by introducing a new type of easement into civil law would mean modifying the Civil Code and overthrowing the original concept of easements. However, China's Civil Code was only recently completed and has yet to establish a solid order. Such a significant change should not be made blindly.

In essence, environmental protection easements are a translation. Their lack of servitude is due to their ability to exist for a certain group or public interest. For example, if a contract restricts natural resource development and protects endangered species on land, the retained ecological value can also be transformed into welfare for surrounding residents and even all of humanity. In essence, environmental protection easements are a type of property right subordinate to land. They are relatively stable rights that take into account the relationship between people and land, refine protection needs, and emphasize public welfare.

The lack of servitude means that establishing an environmental protection easement does not need to be based on the real right relationship of servitude but can be directly realized from the right holder to the servitude for real public interest not necessarily for the right holder. The easement mode is for rights or obligations interests. When the interests of a real right are based on limiting others but do not rely on others' ownership, this belongs to the characteristics of an easement but does not meet the form of an easement. Therefore, strictly speaking, an environmental protection easement is not an easement but a type of real right with easement characteristics. Some scholars describe it as a "quasi-personal easement," summarized as "three no one": no easement owner occupies the subject matter, has no maturity, and the owner of the served estate has an active obligation. This is different from but similar to existing personal easements.

Because of this difference, environmental protection easements do not necessarily need to exist in China under the name of an easement and there is no need to follow the United States by bringing it into the easement system through legislation.

If it were to be incorporated into environmental law, establishing an environmental protection easement with the goal of reducing administrative force intervention and advocating private law value orientation would not easily reconcile with China's environmental law which has a public law color. In fact, Article 31 of China's Environmental Protection Law states: "The state establishes and improves the ecological protection compensation system. The state increases financial transfer payments to ecological protected areas. The local people's governments concerned shall implement ecological protection compensation funds to ensure their use for ecological protection compensation. The state shall guide beneficiary area people's governments and ecological protection area people's governments to make ecological protection compensation through consultation or in accordance with market rules." This provision for an ecological compensation system is similar to environmental protection easements in balancing protection and development measures. The system relies on state public power regulation and compensation systems are not perfect. Environmental protection

easements are not contradictory but may supplement existing disadvantages. However, both are distinct public-private systems that should not exist within the same system.

In summary, environmental protection easements should not be inherited by China's environmental law system.

Therefore, Chile's practice provides much enlightenment: retaining environmental protection easements in contract form as private law while introducing them through single law regulation including definition, subject, establishment, rights survival, supervision, and compensation avoids theoretical conflict while ensuring system completeness. Environmental protection easements as quasi-easements have potential for quasi-use under Civil Code usufructuary rights provisions. Some usufructuary rights are not unprecedentedly independent from special Civil Code legislation due to their special nature such as sea area use rights and exploration rights. If environmental protection easements are confirmed by following former general usufruct provisions then improving their specific systems through special legislation would avoid revising the Civil Code's original easement framework while also excluding its application in conflict with environmental easements through special legislation regarding it operating independently under property right system protection.

3.2 Build the reverse invitation system of environmental protection easement contract based on the reverse expropriation system

China's law does not explicitly stipulate reverse expropriation. This means that when government restrictions on land usufructuary rights reach a certain degree (beyond reasonable limits), the usufructuary right holder cannot request that the government expropriate it but must passively wait for the government to actively compensate for restrictions on usufructuary rights. In an environmental protection system that prioritizes administrative methods over protecting private property rights and interests, China could consider establishing a similar reverse invitation system.

When land usufructuaries believe their real estate rights are burdened, they can request that the government consult with them on an environmental protection easement contract. If the two sides conclude an environmental protection easement contract through this appointment and the government negatively consults contract details or deliberately delays causing the contract to not be signed, civil law contracting fault liability can be applied to require government contracting fault liability.

Considering that land usufructuary right holders are often in a weak position in China's environmental protection system, such a system could make their rights protection methods more diversified and better protect their legitimate rights and interests.

3.3 Setting termination conditions for the effective duration of environmental protection easements

According to the implementation of environmental conservation servitudes in the United States, one conspicuous deficiency is the perpetuity of servitude establishment, which disregards the evolving environment of land development. [6] Real property customarily possesses an array of prerogatives such as environmental conservation entitlements, economic advancement entitlements, and agricultural production entitlements. The proportion of these prerogatives on land is incessantly adjusted with alterations in the adjacent land and environment.

For instance, if the proportion of various land prerogatives fluctuates with the environment and real property commences to urbanize or extensive development projects are initiated proximate, property prerogative protection interests may appear excessively inferior compared to other prerogative interests. The necessity of safeguarding real property servitudes will be significantly diminished and in instances of prerogative alteration, termination of protection servitude contracts should be permitted to maximize real property interests. In other words, although environmental conservation servitudes are real entitlements and perpetual, punctual modifications should also be allowed. [7]

Secondly, if the original objective of establishing a real property servitude has not been actualized or has long been actualized, removal of the right bondage state on the real property should also be permitted. For example, some regions establish environmental conservation servitudes to safeguard precious animal and plant resources. If these resources become extinct or abundant due to natural evolution and no longer necessitate protection, the objective of the protection servitude will vanish. In this instance, the government should initiate removal of the protection servitude contract to diminish conservation servitude investment and manpower. [8]

These are rationales for premature termination of environmental conservation servitudes. In the United States, environmental conservation servitudes are perpetual and cannot be terminated without legal procedures. This can result in system inflexibility that contradicts original environmental conservation objectives. China should assimilate from this system inflexibility and establish premature termination safeguards for servitudes. [9]

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