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Wyoming's Trepidation toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature

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COMMENT

Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature

"We can't solve problems by using the same kind of thinking we used when we created them."[1]

INTRODUCTION

Easements of all types have a long history, and "[p]rivate arrangements that bind particular burdens or benefits to the occupier of land have

1. Miriam Knight, *Editorial*, New Connexion, *available at* http://www.newconnexion.net/article/03-02/editorial.html (last visited Oct. 20, 2003) (noting that the quote is thought to be a version of a famous quote coined by Albert Einstein).

been known to the common law since medieval times."[2] Private parties increasingly began to use easements during the Industrial Revolution, especially for use in the "protection of urban residential areas."[3] Eventually, conservation easements were developed and utilized to provide private landowners with practical land-use and land-management choices, such as to "provide some landowners with funds for their retirement years, . . . allow them to fund or endow conservation management projects on the land at no additional net cost," and to afford landowners an opportunity to lower the appraised value of their land.[4]

With the availability of conservation easements as a land-use management tool on private land, landowners have the ability to permanently bind themselves and successors to land-use restrictions placed upon their land.[5] A landowner who grants a conservation easement may enjoy several benefits, such as realizing various federal estate and income tax benefits, reduced property value for state property taxes, and the furtherance of various personal, philanthropic ideals.[6] Further, conservation easements are important to the conservation movement because sixty percent (60%) of land in the United States is privately owned, but "most of the effort toward protecting ecosystems and preserving biodiversity has been aimed at the approximately [thirty] percent [30%] of the land owned by the federal government."[7] Thus, any conservation movement aimed at protecting biodiversity and ecosystems must also focus on private lands to be successful.[8] Commentators have maintained that the use of conservation easements is the "best, and perhaps only, tool for preserving open space and ecologically sensitive lands that are in private hands."[9]

Conservation easements are typically defined as "privately initiated land-use restrictions designed to protect and preserve private lands from

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2. Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1262 (1982).

3. *Id.*

4. Steven J. Eagle, *Conservation Easements and Private Land Stewardship, available at* http://www.cei.org/pdf/1339.pdf (last visited May 19, 2003). Easements were used not only to provide direct benefits to the landowner, such as reducing the fair market value of the encumbered property, but also for secondary benefits such as providing a means to ensure that "family members will be able to keep the land instead of very possibly having to sell large parts of it to pay large scale estate and inheritance taxes." *Id.*

5. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 16 (Julie Ann Gustanski & Robert H. Squires, eds., 2002).

6. Myra Lenburg & Norman Rogers, Jr., *Farmland Preservation*, 18 PROPERTY AND PROBATE 16, 17-18 (2003).

7. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 373 (2001).

8. *Id.*

9. *Id.* at 375.

development."[10] Because conservation easements are private contractual agreements, conservation easements vary tremendously depending on the contracting parties' intentions and desires.[11] However, a

> [c]onservation easement [generally] means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agriculture, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving historical, architectural, archeological or cultural aspects of real property.[12]

Generally, conservation easements "are entirely voluntar[y] and are donated or sold by landowners at their discretion. [The r]esulting restrictions on the land are arrived at jointly, a concerted effort between the landowner and the organization or agency accepting the easement."[13] The holder of the conservation easement, typically a land trust or governmental organization, can enforce the terms and restrictions of the easement against the current owner of the land and any future owners of the land.[14]

A conservation easement is a non-possessory interest in the land and the "owner retains all rights to the property that the owner possessed prior to the easement subject to the restrictions imposed by the easement."[15] Thus, "the easement restrictions are tailored to the particular property and to the interests of the individual owner," and the conservation easement "may run for a term of years or in perpetuity; however, only easements in perpetuity qualify for tax benefits."[16] A common illustration of the effects of a conservation easement on a landowner's land is as follows:

> [A] conservation easement on a cattle ranch will generally prohibit the owner (current or future) from subdividing the property; the owner, however, is permitted to continue using

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10. *Id.* at 379.
11. Gustanski, *supra* note 5, at 15.
12. UNIF. CONSERVATION EASEMENT ACT § 1(1) (1981) [hereinafter UCEA].
13. Gustanski, *supra* note 5, at 15.
14. *Id.* at 12. Additionally, some conservation easement restrictions provide for a third party right of enforcement, should the original holder of the conservation easement fail to adequately perform its duties under the terms of the easement. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 26, 48 (Julie Ann Gustanski & Robert H. Squires, eds., 2002).
15. Morrisette, *supra* note 7, at 379.
16. Kari Gathen, *The Use of Conservation Easements to Preserve New York State's Natural Resources*, 7 ALB. L. ENVTL. OUTLOOK 188, 189-90 (2002).

> the property as a cattle ranch and is allowed to make improvements to the property that are related to the operation of the property as a cattle ranch. Indeed, insuring that the property will remain a working ranch may be one of the primary reasons behind the conservation easement.[17]

The literature on conservation easements is extensive and comprehensive, and the purpose of this paper is not to reexamine the nature, benefits, or detriments of conservation easements or conservation easement enabling legislation.[18] This comment will first briefly distinguish between common law conservation easements and statutory conservation easements. Next, the article will focus on two issues relating to conservation easement enabling legislation that troubled the Wyoming Legislature in 2003. In 2003, the Wyoming Legislature struggled to answer how conservation easements should fit into its real property tax system and whether such legislation violates the rule against perpetuities.[19] As such, Part I will examine the common law and statutory law of conservation easements; Part II will examine conservation easements in relation to real property tax systems; and Part III will look at the rule against perpetuities and its applicability (or inapplicability) to conservation easements. Although the focus is on the State of Wyoming and Wyoming law, the discussion is applicable to similar issues and discussions raised in all states, regardless of whether the state has or does not have conservation easement enabling legislation.[20]

PART I: CONSERVATION EASEMENTS & THE LAW

I. Common Law

The legal authority for conservation easements first arose out of state property law, or state common law.[21] Generally, "[a] common law conservation easement is an easement that is created in a state that does not have an enabling statute, [which statutorily authorizes the use of conserva-

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17. Morrisette, *supra* note 7, at 379-80.

18. *See generally* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 1 (Julie Ann Gustanski & Robert H. Squires, eds., 2002) (providing an excellent, comprehensive analysis of conservation easements and their use throughout the United States).

19. H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003).

20. For example, a state system of taxing real property is always capable of being updated and modified. *See generally* Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENVTL. L. REV. 471, 506 (2003) (noting that "each state can . . . determine how a conservation easement impacts its property tax values and assessments"). Additionally, if conservation easements are deemed to violate the rule against perpetuities, all states that allow perpetual conservation easements will either have to modify their conservation easement system or be vulnerable to legal challenge concerning the validity of conservation easements within the state.

21. Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 98-99 (2000).

tion easements,] or [alternatively is] an easement that fails to conform to an enabling statute's requirements."[22] A common law conservation easement is formed under state property law, but "the common law did not recognize a restriction on land use that was not held by an adjoining landowner and that ran with the land in perpetuity."[23] Thus, landowners and land-use planners had to develop ways to create and enforce conservation easements under a common law system that was not modeled to provide for such a land-use planning tool.[24]

Most commentators and scholars agree that "a common law conservation easement is a servitude property interest."[25] Of the common law servitude property interests, conservation easements are closely related to real covenants, equitable servitudes, and negative easements.[26] First, a conservation easement parallels common law real covenants, which are promises regarding the use of land.[27] In order for a real covenant to be enforceable against a landowner and his or her heirs, the benefits and burdens of the easement must run with the land.[28] Generally, "[t]he requirements for a real covenant to run with the land are . . . as follows: the covenant must 'touch and concern' the land; the original parties to the covenant must have intended that their successors be bound by the covenant; and there must be privity of estate between the owners of the benefited and burdened properties."[29] Some courts have held that a benefit cannot run with the land with an easement in gross, and these courts require that a real covenant be appurtenant to be valid.[30] At common law, a real covenant is "typically enforced by an award of damages if the promise is breached," which is usually "not

22. Jeffrey Tapick, Note, *Threats to Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL L. 257, 265 (2002).

23. Morrisette, *supra* note 7, at 380.

24. *Id.*

25. Tapick, *supra* note 22, at 266.

26. *Id.*

27. *Id.* at 268.

28. Morrisette, *supra* note 7, at 381-82. The term "benefits and burdens" typically refers to a situation where a condition is imposed on a parcel of land that benefits one parcel of land but burdens another. *Id.*

29. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Protection*, 3 ENVTL. LAW. 319, 330 (1997). A benefit will "touch and concern the land if it increases the value of the affected land, while the burden touches and concerns the land if it reduces the value of the affected land." *Id.* at 330 n.59. Privity of estate "generally involves the relationship between the owners of the benefited and burdened properties," which commonly requires "the owners have simultaneously existing interests in the land, such as landlord and tenant or a dominant estate owner and servient estate owner of an easement." *Id.* at 330 n.61.

30. Morrisette, *supra* note 7, at 382. *See also* BLACK'S LAW DICTIONARY 98 (7th ed. 1999) (defining appurtenant as "[a]nnexed to a more important thing," i.e., an adjacent parcel of land); *id.* at 527 (defining easement in gross as "[a]n easement benefiting a particular person and not a particular piece of land"). This definition holds true for both real covenants and equitable servitudes that are in gross. Morrisette, *supra* note 7, at 382.

compatible with the rationale and intent that underlie conservation easements."[31]

A conservation easement also resembles an equitable servitude, which was developed at common law "because courts of law were reluctant to enforce real covenants."[32] An equitable servitude is generally a "promise[] regarding the use of the land; however, enforcement of [an] equitable servitude does not require privity of estate," is "typically enforced by an injunction," and usually requires an appurtenant estate.[33] Equitable servitudes, because of their increased flexibility relative to real covenants, are generally "more suitable than real covenants for use as land protection devices."[34] Most courts, however, continue to follow the traditional common law rules relating to equitable servitudes.[35]

The Wyoming Supreme Court has stated that restrictive covenants are contractual in nature, and interpreted pursuant to contract law.[36] The Wyoming courts have shown a willingness to uphold both real covenants, enforceable at law, and equitable servitudes, enforceable in equity.[37] For example, the Wyoming courts have stated that restrictive covenants are "enforceable in equity against all those who take the estate with notice of them, although they may not be, strictly speaking, real covenants so as to run with the land."[38] The Wyoming Supreme Court stated that as long as subsequent owners of land have notice of the restrictive covenant, then it can be enforced against them in a court of equity.[39] The court noted that this requirement "makes sense in contemplation of modern land use."[40] Consequently, the court will look primarily at the intent of the parties and will allow the one benefited by the covenant to enforce it as long as the general requirements of either a real covenant or equitable servitude are met.[41]

In addition, conservation easements resemble negative easements: "A negative easement is a restriction on land use that prevents the owner of the property that the easement encumbers . . . from doing specific activities

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31. Morrisette, *supra* note 7, at 382.
32. Hollingshead, *supra* note 29, at 331.
33. Morrisette, *supra* note 7, at 382.
34. Hollingshead, *supra* note 29, at 332.
35. Morrisette, *supra* note 7, at 383.
36. Anderson v. Bommer, 926 P.2d 959, 961 (Wyo. 1996) (using the term restrictive covenants to encompass both real covenants and equitable servitudes).
37. *Id.* (upholding the use of real covenants which are enforceable at law); Streets v. J M Land & Dev. Co., 898 P.2d 377 (Wyo. 1995) (upholding the use of equitable servitudes which are enforceable in equity).
38. *Streets*, 898 P.2d at 379.
39. *Id.* at 379-80.
40. *Id.* at 380 (quotations omitted).
41. *Bommer*, 926 P.2d at 960, 962.

on this property."[42] Some of the recognized negative easements include blocking a homeowner's view, interfering with air flow, removing the support from buildings, or from blocking sunlight.[43] Negative easements can be in gross or appurtenant: A negative easement in gross "involves a servient estate but no dominant estate—in other words, there is no property that is directly benefited by the easement [*i.e.*, the holder of the easement does not have a parcel of land adjacent to the land burdened with the negative easement.]."[44] In contrast, an appurtenant negative easement benefits another piece of property (*i.e.*, the adjacent parcel of land), thus having both a dominant and servient estate.[45] At common law, a negative easement had to be appurtenant because "[e]asements in gross . . . are usually restricted to affirmative commercial activities such as an easement for a railroad right-of-way or a utility line."[46]

The Wyoming Supreme Court laid out the general nature and requirements for easements in *Mueller v. Hoblyn*.[47] The court noted that "[a]n easement is an interest in land which entitles the easement holder to a limited use or enjoyment over another person's property," and the court held that an easement has five essential qualities:

> [F]irst, an easement is incorporeal or without material nature; second, an easement is imposed upon corporeal property, not the owner of the property; third, an easement confers no right to participate in the profits arising from the property; fourth, an easement is imposed for the benefit of corporeal property and; fifth, there must be two distinct estates, the dominate estate, the one to which the right belongs, and the servient estate, the one upon which the obligation is imposed.[48]

In *Cheyenne Airport Board v. Rogers*, the court discussed negative easements, stating that "[a] negative easement theoretically involves only a servient tenement and not a dominant one," and the court recognized that the owner of the land burdened by the easement would lose some use of the land while the holder of the easement would be able to stop a use on the land.[49]

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42. Morrisette, *supra* note 7, at 380. The property encumbered by a conservation easement is commonly referred to as the servient estate. *Id.*

43. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 854-56 (4th ed. 1998). In contrast, affirmative or positive easements "entitle the dominant estate to make use of the servient property in some manner," such as when the landowner of the servient estate uses the dominant estate to access his or her property. Morrisette, *supra* note 7, at 381.

44. Morrisette, *supra* note 7, at 381.

45. *Id.*

46. *Id.*

47. 87 P.2d 500 (Wyo. 1994).

48. *Id.* at 504.

49. 707 P.2d 717, 730 (Wyo. 1985).

The court also noted that "the holder of a negative easement has . . . no right to active use."[50] However, the court did not expressly validate the use of negative easements in Wyoming; its discussion in *Rogers* was merely theoretical and academic.[51] In light of *Mueller's* five essential qualities of an easement, a negative easement may not qualify as an easement in Wyoming and may not be a valid interest in the land.[52]

Nonetheless, it appears that in Wyoming, "conservation easements generally are created pursuant to the common law of appurtenant easements."[53] Conservation easements are likely classified as appurtenant easements because "unlike a real covenant, the [conservation] easement is consistently viewed as an individual property right, as opposed to a promise respecting the use of land."[54] An appurtenant easement is an easement "created to benefit and does benefit the possessor of the land in his use of the land."[55] Thus, the courts have stated that

> the benefit of a servitude is . . . appurtenant to an interest in property if it serves a purpose that would be more useful to a successor to a property interest held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor.[56]

The court has identified six traits, or badges, that generally are present with the creation of an appurtenant easement:

> (1) [T]hat the easement was created to benefit a specific tract of land; (2) that the grant was for a perpetual right-of-way for ingress or egress; (3) that the grantee has the right to inspect and maintain the easement; (4) that the right is not limited to the possessor personally; (5) that the grant expressly extends the right to the grantees, their heirs, executors, administrators, successors, assigns and legal representatives; and (6) that the easement document does not contain

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50. *Id.*
51. *Id.*
52. For example, a negative easement, as described in *Rogers* (i.e., in gross) may not meet the fifth requirement of the *Mueller's* list, which states that two distinct estates must be present to have a valid easement.
53. Timothy Lindstrom, *State Tax Incentives for Conservation Easements Can Benefit Everyone*, JOURNAL OF MULTI-STATE TAXATION AND INCENTIVES, Aug. 2002, at 23.
54. John Walliser, *Conservation Servitudes*, 13 J. NAT. RESOURCES & ENVTL. L. 47, 64 (1997). *See, e.g.*, Citizens for Covenant Compliance v. Anderson, 906 P.2d 1314 (Cal. 1995); First United Pentecostal Church v. Seibert, 323 A.2d 668 (Md. 1974).
55. Hasvold v. Park County School Dist. No. 6, 45 P.3d 635, 638 (Wyo. 2002).
56. *Id.* (quoting RESTATEMENT (THIRD) OF PROPERTY § 4.5(1) (2000)).

> any limitations on the transferability of the easement to future transfers of both the dominant and servient estates.[57]

In other words, the easement holder must own the dominate estate, which is an adjacent or contiguous parcel of property to the land burdened by the easement, at the time the easement was granted.[58] Accordingly, an appurtenant easement, which transfers to later successors of the dominant and servient estates and requires both a dominant and servient estate, is distinguished from an easement in gross, which does not.[59] Generally speaking, a typical conservation easement in Wyoming will likely qualify as an appurtenant easement under Wyoming law.[60]

It is doubtful that the Wyoming courts would disavow the use of conservation easements under Wyoming common law partially because conservation easements are prevalent and have proved to be a valuable tool for Wyoming landowners and practitioners.[61] In Wyoming, a landowner will typically donate a conservation easement to an entity, such as a land trust or governmental organization, and the landowner will simultaneously donate a small parcel of the land in fee to the easement holder.[62] The landowner's donation of an appurtenant parcel in fee, in conjunction with recording the conservation restriction, allows the benefit of the easement to run with the land.[63] The landowner's donation of a conservation easement permits the

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57. *Id.* at 640.

58. *Id.*

59. R.C.R., Inc. v. Rainbow Canyon, Inc., 978 P.2d 581, 586 (Wyo. 1999).

60. In support of classifying conservation easements as appurtenant easements, there has been no judicial challenge claiming that conservation easements are invalid under Wyoming common law. *See generally* Heidi A. Anderson et al., *Conservation Easements in the Tenth Federal Circuit, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 423, 438 n.61 (Julie Ann Gustanski & Robert H. Squires, eds., 2002) (stating that in Wyoming, a conservation easement is appurtenant and not an easement in gross and therefore becomes enforceable under common law); Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Lane Preservation,* 32 LAND & WATER L. REV. 89, 114 n.206, 119 (1997) (stating that "Wyoming, for instance, has not had any problems enforceing [sic] conservation easements").

61. *See, e.g.*, Bd. of County Comm'rs of Teton County v. Crow, 65 P.3d 720, 746 (Wyo. 2003) (referring, indirectly, to the positive use of conservation easements in Wyoming). As of 2000, land trusts operating in Wyoming have conserved over 40,000 acres of land. LAND TRUST ALLIANCE, SUMMARY DATA FROM THE NATIONAL LAND TRUST CENSUS, *available at* http://www.lta.org/newsroom/census_summary_data.htm (last visited Oct. 20, 2003).

62. *See generally* Morrisette, *supra* note 7, at 403. The commentator noted that the "[Jackson Hole Land Trust in Jackson Hole, Wyoming,] has protected over 12,000 acres of private land under conservation easements out of a total of 74,000 acres of private land in Teton County. The [Jackson Hole Land Trust] primarily seeks donated easements and targets properties that meet certain criteria." *Id.*

63. *Id.* at 404 (stating that an appurtenant parcel in fee must be granted in conjunction with the donation of a conservation easement); Tapick, *supra* note 22, at 265 (stating that "[c]ommon law conservation easements are formed under state property law, in much the same manner as any other limited property interest: the easement is negotiated, its terms are inserted into the deed to the land, and the deed is filed and recorded with the county clerk").

conservation easement holder to immediately enforce the terms of the conservation easement and to bind successors with the terms and conditions of the conservation easement.[64]

Despite the likelihood that a conservation easement would be valid under Wyoming common law, it is generally accepted that a conservation easement "must be characterized as one of [the] three types of servitudes in order for it to be valid under common law."[65] However, "upon closer examination, it becomes obvious that conservation easements may fail to comply with the legal requirements of any of these three types of common law servitude designations."[66] Due to this apparent uncertainty of a conservation easement's validity under the common law, many interested parties have successfully fought in most states to enact conservation easement enabling legislation.[67] Wyoming is only one of two states in the Nation that has yet to enact conservation easement enabling legislation.[68]

II. Statutory Law

Statutory enabling legislation typically "reflect[s] the consensus reached by the citizens of those states about the importance of protecting particular lands and the desirability of using conservation easements to do so."[69] Many practitioners view statutory enabling legislation as a superior way to authorize and utilize conservation easements due to the perceived inadequacies of the common law.[70] Practitioners argue that the common law is inadequate as applied to conservation easements because, for example, "the law of easements, real covenants, and equitable servitudes is the most complex and archaic body of American property law in the twentieth cen-

64. ALLISON PERRIGO & JON IVERSEN, WILLIAM D. RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, CONSERVATION EASEMENTS: AN INTRODUCTORY REVIEW FOR WYOMING 1, 2 (2002), *available at* http://www.uwyo.edu/openspaces/docs/conservation-easements.pdf (last visited Aug. 15, 2003).

65. Tapick, *supra* note 22, at 266.

66. *Id.*

67. *Id.* at 272.

68. *See generally* Morrisette, *supra* note 7, at 385 (stating that as of 2001, Pennsylvania, Wyoming, North Dakota, and Oklahoma have yet to enact conservation easement legislation). *But see* PA. STAT. ANN. tit. 32, §§ 5051-5059 (West 2002) (enacting the Conservation and Preservation Easement Act which authorizes the use of conservation easements in Pennsylvania); OKLA. STAT. tit. 60, §§ 49.1-49.8 (2002) (authorizing conservation easements in Oklahoma).

69. Roderick H. Squires, *Introduction to Legal Analysis, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 69, 72-73 (Julie Ann Gustanski & Robert H. Squires, eds., 2002).

70. For example, one commentator stated that "[c]learly, a state conservation easement enabling statute would simplify the process of establishing a conservation easement and add validity to the concept of conservation easements that presently may not exist under Wyoming law." Morrisette, *supra* note 7, at 404.

tury."[71] In addition, the common law typically lacks authority for "negative easements or servitudes held in gross that run with the land in perpetuity."[72]

Accordingly, many states have enacted conservation easement enabling legislation to cure the inadequacies of the common law property doctrines and to bypass the uncertainty and vulnerability of "relying on easement common law to ensure [the] validity of their actions."[73] The state statutes vary, but typically remove "the common law impediments to conservation easements—such as the restriction against negative easements held in gross, as well as privity, and touch and concern requirements. In addition, most of these statutes allow both public agencies and qualifying non-profit conservation organizations to hold conservation easements."[74] The Uniform Conservation Easement Act represents the typical approach:

> A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern the real property; or (7) there is no privity of estate or of contract.[75]

Courts generally favor the Uniform Conservation Easement Act easements over common law easements, thus facilitating state adoption of conservation easement enabling legislation, for three reasons:

> First, lawyers and courts are more comfortable with easements and easement doctrine, less so with restrictive cove-

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71. French, *supra* note 2, at 1261.
72. Morrisette, *supra* note 7, at 384.
73. Baldwin, *supra* note 60, at 109.
74. Morrisette, *supra* note 7, at 384. *See generally* Mayo, *supra* note 14, at 36-37 (listing eligible holders of conservation easements by state according to the state's statutes). For example, a Kentucky statute defines a holder of a conservation easement to include:

> A governmental body empowered to hold an interest in real property under the laws of this state or the United States; or [a] charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

KY. REV. STAT. ANN. § 382.800(2) (Michie 2003).
75. UCEA § 4 (1981).

> nants and equitable servitudes . . . . Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenants real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as 'easements.'[76]

In the Wyoming Legislature's 2003 General Session, members of the Wyoming Legislature introduced House Bill 0187.[77] House Bill 0187 proposed the adoption of conservation easement enabling legislation in Wyoming and essentially tracked the UCEA.[78] On March 4, 2003, proponents in the Wyoming Senate failed to obtain the votes necessary to pass H.B. 0187.[79] During the legislative process, Wyoming senators and representatives primarily focused on two issues relating to the conservation easement legislation. The legislature was concerned with the effect of conservation easement enabling legislation on Wyoming's real property tax revenues and with the unanswered question of whether conservation easement enabling legislation would violate the rule against perpetuities.[80] In accord, this comment will individually address and analyze the validity of each of these two concerns.

PART II: CONSERVATION EASEMENTS & REAL PROPERTY TAXES

I. Background

A. The Problem in Wyoming

In the 2003 General Session, the Wyoming Legislature attempted to pass conservation easement enabling legislation; and during the course of the session, the legislature struggled over how to tax conservation easements on non-agricultural lands.[81] The legislature attempted to amend House Bill 0187 to provide that "[i]f the land subject to a conservation easement is no longer to be assessed as agricultural land," then "[t]he holder [of] the [conservation] easement shall be liable for the taxable difference between the value of the land prior to the placement of the conservation easement and the

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76. UCEA prefatory note (1981).
77. H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003).
78. *Id. See* generally UCEA (1981).
79. H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003). The Bill failed by a tie vote. *Id.* This is not the first time that the Wyoming Legislature has failed to pass conservation easement enabling legislation: "Legislation to support conservation easements has been introduced four times in the Wyoming legislature over the course of the past ten to twelve years. In each instance, the proposed legislation has failed." Baldwin, *supra* note 73, at 110 n.167.
80. *Id.*
81. *Id.*

current value of the land."[82] Thus, the Wyoming Legislature seemed at least partially concerned with the loss of property tax revenue resulting from the use of conservation easements in Wyoming.

B. Review of Wyoming's Revenue System

Generally, "sales taxes, personal income taxes, property taxes, and . . . corporate taxes [] provide the bulk of revenues in most states."[83] Wyoming does not tax its citizens' income, personal property held for personal use, or intangible personal property. Additionally, Wyoming only minimally taxes real property located within the state.[84] A report on Wyoming's tax system found that despite exempting income and other important taxes, "Wyoming does have a balanced system" of using taxes to obtain revenue.[85] The report found that Wyoming "uses a sales tax, severance taxes and interest from the mineral trust fund" to achieve the balanced taxation system.[86] For example, the mineral trust fund alone contributes approximately $100 million to Wyoming's general yearly budget of $750 million.[87]

Wyoming also receives a large part of its revenue from severance taxes.[88] The state levies severance taxes on minerals, such as natural gas, and the state taxes mineral producers based on a proportion of their profits rather than under a traditional system which "multipl[ies] the price of a natural resource by the amount sold."[89] Although Wyoming receives a large part

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82. *Id.*

83. Katherine Barrett et al., *The Way We Tax: A 50-State Report*, The Government Performance Project, *available at* http://governing.com/gpp/2003/gp3intro.htm (last visited Sept. 30, 2003). The report was based on a "culmination of a year's effort by a team of *Governing* staffers researching the tax structures and tax management of the 50 states. Scores of reports, hundreds of interviews and thousands of hours of analysis went into this effort to evaluate the way each state raises its revenues." *Id.* The report was published in the February 2003 edition of the *Governings* magazine. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Wyoming uses a unique and innovative tool to secure adequate revenue for the state:

> In accordance with an amendment to the Wyoming Constitution approved by the voters in 1974, one and a half percent of the severance tax on each mineral is deposited in the Permanent Wyoming Mineral Trust Fund (PWMTF). The principal of the PWMTF (now well over a billion dollars) is inviolate, but may be loaned to political subdivisions. The interest on the PWMTF goes to the state's General Fund for the Legislature to allocate to current programs.

Equality State Policy Center, *Background on Wyoming's System of Mineral Taxation, available at* http://www.equalitystate.org/ESPC%20Website%20Generic%20Pages/reports/taxblueprint2.html (last visited on Aug. 13, 2003).

87. Barrett, *supra* note 83.

88. *Id.*

89. *Id.*

of its revenue from severance taxes, the revenues collected can vary considerably because the taxes are based on the profits of a producer. For example, "[i]n early 1999, Wyoming entered the fiscal year with an estimated general fund shortfall of $127 million. Eighteen months later—after the price of natural gas had soared from 90 cents per 1,000 cubic feet to $10—the forecast for the next year changed to a $700 million surplus."[90]

Under the Wyoming property tax system, a specified tax rate is applied to one hundred percent (100%) of the value of minerals and nine and one half percent (9.5%) of the value of small businesses and residential homes.[91] Thus, Wyoming relies heavily on mineral property taxes as well as mineral severance taxes for state revenues and little on residential or small business property taxes. As such, Wyoming's real property tax burden is among the lowest in the country, Wyoming does not have any income tax, even on dividends, and Wyoming's mineral production taxes constitute more than sixty percent (60%) of the taxable property value.[92] However, in most cases the bulk of *local* revenue comes from property taxes collected primarily at the local level.[93] Thus, even in counties with above average mineral wealth, property taxes supply a stable source of revenue for the county.[94] The Wyoming Legislature seemed to focus on the potential revenue loss in the state's counties when considering conservation easement enabling legislation.[95]

C. Review of Wyoming's Real Property Tax System

Because "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively" and because the Constitution does not grant Congress the power to lay or collect property taxes, the State of Wyoming has the power to use property taxes as a means of obtaining revenue.[96] In the furtherance of Wyoming's power to lay and collect property taxes, "[n]o tax shall be imposed without the consent of the people or their authorized representatives."[97] In accord, the people of Wyoming have constitutionally provided that "[a]ll lands and improvements thereon shall be listed for assessment,

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. John Casey Mills, *Conservation Easements in Oregon, Abuses and Solutions*, 14 ENVTL. L. 555, 569 (1984).
95. However, the Wyoming legislature may be masking its concerns about the "inherent tension of property versus contract rights, . . . the monitoring and enforcement of the easement, . . . and terminating the easement" in the form of the proposed property tax amendment to the conservation easement enabling legislation. Baldwin, *supra* note 73, at 111.
96. U.S. CONST. amend. X.
97. WYO. CONST. art. 1, § 28.

valued for taxation[,] and assessed separately."[98] Further, the constitution provides for uniform valuation:

> All property, except as in this constitution otherwise provided, shall be uniformly valued at its full value as defined by the legislature, in three . . . classes as follows: (i) Gross production of minerals and mine products in lieu of taxes on the land where produced; (ii) Property used for industrial purposes as defined by the legislature; and (iii) All other property, real and personal.[99]

The Wyoming Constitution provides general guidelines that shall dictate the actions of the legislature in laying or collecting real property taxes. First, the constitution provides that "[t]he legislature shall prescribe the percentage of value which shall be assessed within each designated class," and that non-agricultural land shall be valued at its full value and agricultural lands shall be valued at "the capability of the land to produce agricultural products under normal conditions."[100] Secondly, "[t]he legislature shall not create new classes or subclasses or authorize any property to be assessed at a rate other than the rates set for authorized classes," and "[a]ll taxation shall be equal and uniform within each class of property."[101] Lastly, "[t]he legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."[102]

The legislature, in an exercise of its authority under Wyoming Constitution article 15, section 11(d), has reaffirmed that all property in Wyoming is subject to taxation unless specifically exempted from taxation.[103] In the real property context, the Wyoming Legislature has provided that property taxes shall be assessed on an ad valorem basis, meaning "according to value."[104] Thus, Wyoming residents pay an ad valorem tax on their real

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98. WYO. CONST. art. 15, § 1.
99. WYO. CONST. art. 15, § 11.
100. *Id.*
101. WYO. CONST. art. 15, § 11(c), (d). Generally, equality and uniformity requirements are the foundation of a state's power to tax, mandating even and equitable distribution of the tax burden among taxpayers of the same class. *See* 84 C.J.S. *Taxation* § 27 (2003) (noting that "all taxes must be uniform on the same class of subjects within the territorial limits of the authority levying the tax, that the legislature must provide for an equal and uniform rate of assessment and taxation, [and] that the burden of taxation on all property must be equitable."); Basin Electric Power Coop., Inc. v. Dep't. of Revenue, 970 P.2d 841, 852 (Wyo. 1998) (discussing the meaning and requirements of the Wyoming Constitution's equal and uniform assessment provision).
102. WYO. CONST. art. 15, § 11(d).
103. WYO. STAT. ANN. § 39-11-103 (LexisNexis 2003).
104. WYO. STAT. ANN. § 39-13-101(a)(i) (LexisNexis 2003). *See also* WYO. STAT. ANN. § 39-11-101(a)(xv) (LexisNexis 2003) ("Real property means land and appurtenances, including structures, affixed thereto.").

property, or "a property tax based on the assessed value of the property."[105] The legislature has provided a mechanism for imposing ad valorem taxes on real property, beginning with the notion that "[a]ll taxable property shall be annually listed, valued and assessed for taxation in the county in which located and in the name of the owner of the property. . ."[106]

To accomplish the task of imposing real property taxes on property in Wyoming, the legislature has delegated the responsibilities of developing a system of equally and uniformly listing, valuing, and assessing ad valorem taxes to the Wyoming Department of Revenue (Department). The Department is required to and has developed rules and regulations necessary to perform its statutory duties.[107] In addition, the Wyoming Constitution and the Wyoming statutes provide for a state Board of Equalization, which among other things, "shall . . . equalize the valuation on all property in the several counties. . ."[108] Under the auspices of the Department, county assessors, deputy assessors, and clerical assistants in each county implement the Department's rules and regulations to list and value property within their counties.[109]

Considering the statutorily prescribed mechanisms for imposing ad valorem taxes on real property, Wyoming is a fractional assessment state: The property tax is only applied to a portion of the value of specifically listed property.[110] Real property must also be listed on the tax rolls, and each board of county commissioners, also known as the county board of equalization, is responsible for listing all taxable property within its county.[111] Each county board of equalization in Wyoming must "divide the county into assessment districts" and subsequently produce and annually update their assessment rolls, which are lists of all taxable property in a county.[112]

Once the taxable property in a county is listed, the county assessors must uniformly value the property at its full value.[113] The legislature has defined the full value of non-agricultural lands as the fair market value of the land.[114] The legislature refers to fair market value as

105. WYO. STAT. ANN. § 39-13-101(a)(ii) (LexisNexis 2003).
106. WYO. STAT. ANN. § 39-13-103(b)(i)(A) (LexisNexis 2003).
107. *See* WYO. STAT. ANN. § 39-11-102(b) (LexisNexis 2003).
108. WYO. CONST. art. 15, § 10. *See, e.g.*, WYO. STAT. ANN. § 39-11-102.1 (LexisNexis 2003); WYO. STAT. ANN. § 39-13-102 (LexisNexis 2003).
109. *See* WYO. STAT. ANN. § 39-11-102(b)(xv) (LexisNexis 2003).
110. Wyoming State Board of Equalization, *Frequently Asked Questions*, *available at* http://taxappeals.state.wy.us/faq.htm (last visited Oct. 20, 2003).
111. WYO. STAT. ANN. § 39-13-102(c) (LexisNexis 2003).
112. WYO. STAT. ANN. § 39-13-102(a), (b), (c) (LexisNexis 2003).
113. *See, e.g.*, WYO. CONST. art. 15, § 11.
114. WYO. STAT. ANN. § 39-13-103(b)(ii) (LexisNexis 2003).

> the amount in cash, or terms reasonably equivalent to cash, a well informed buyer is justified in paying for a property and a well informed seller is justified in accepting, assuming neither party to the transaction is acting under undue compulsion, and assuming the property has been offered in the open market for a reasonable time . . . .[115]

The legislature has defined the full value of agricultural lands as being "based on the current use of the land, and the capacity of the land to produce agricultural products, including grazing and forage, based on average yields of lands of the same classification under normal conditions."[116] Because the county assessors must establish the fair market value of non-agricultural lands and the production capabilities of agricultural lands, the Department has "prescribe[d] by rule and regulation the appraisal methods and systems for determining fair market value using generally accepted appraisal standards."[117]

After the full value of the real property is established by the county assessors, the Department will identify the taxable value, or the percent of the full value, that will be taxed.[118] The taxable value for "[g]ross product of mineral and mine products [is] one hundred percent (100%); for "[p]roperty used for industrial purposes [is] eleven and one-half percent (11.5%);" and for "[a]ll other property, real and personal [is] nine and one-half percent (9.5%)."[119] To illustrate, if a parcel of property categorized as "[a]ll other property, real and personal" is valued at $100,000, then the assessed or taxable value will be $9,500.[120]

Once the taxable value is established, the Department can calculate the amount of taxes owed on a particular piece of real property pursuant to the guidelines established by the legislature.[121] Generally, the taxes owed equal the taxable value of the property multiplied by the mill levy and then divided by 1000.[122] For example, if a parcel of real property valued at $100,000 has a taxable value of $9,500, and the mill levy in the tax district is

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115. WYO. STAT. ANN. § 39-11-101(a)(vi) (LexisNexis 2003).
116. WYO. STAT. ANN. § 39-13-103(b)(x)(A) (LexisNexis 2003).
117. WYO. STAT. ANN. § 39-13-103(b)(ii) (LexisNexis 2003). *See generally* Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, *available at* http://revenue. state. wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 15, 2003).
118. *See* WYO. STAT. ANN. § 39-13-103 (LexisNexis 2003).
119. WYO. STAT. ANN. § 39-13-103(b)(iii)(A)-(C) (LexisNexis 2003).
120. *See* WYO. CONST. art. 15, § 11.
121. *See* WYO. STAT. ANN. § 39-13-104 (LexisNexis 2003).
122. A mill levy is generally defined as the "number of dollars in taxes that a property owner must pay for every $1,000 of assessed value. This amount is based on budget requests from various taxing entities." Sweetwater County Assessors Office, *The Language of Assessment*, *available at* http://www.co.sweet.wy.us/assessor/The%20Language%20of%20-Assessment.html (last visited Aug. 13, 2003).

fifty and one half (50.5), then the tax owed would be $9,500 x 50.5 / 1000, or $479.75. The mill levy used in the calculation is determined by the number of mills levied in a tax district by taxing entities, such as schools, towns, and counties.[123] The taxing entities can levy a certain number of mills in a district and incorporate their proportion of the property tax revenues into their entities operating budget.[124] However, the legislature has placed limits on the amount of mills an entity can levy.[125] For example, school districts cannot levy more than twelve mills and cities, towns, and counties cannot levy more than eight mills.[126]

D. Conservation Easements and Wyoming's Real Property Tax System

The general *modus operandi* of taxing real property in many jurisdictions revolves around property tax assessors determining the fair market value of the land in order to calculate the amount of ad valorem taxes owed on that land.[127] Typically, property tax assessors will look at the current use of the land and the land's most "profitable, likely, and legal use, also known as the highest and best use."[128] By definition, conservation easements forbid a landowner from utilizing permissive uses of the land.[129] Typically, a conservation easement will reduce the value of the property by "alter[ing] the highest and best use" of the land if the highest and best use is development potential.[130]

The Wyoming Legislature has not statutorily provided guidance on how to deal with land burdened by conservation easements for real property tax purposes. As mentioned earlier, ad valorem taxes in Wyoming are assessed against real property, which is "land and appurtenances, including structures, affixed thereto."[131] Accordingly, county assessors are statutorily mandated to assess the whole parcel of land owned by the holder of title to the land and determine the full value of the land.[132] To aid the county asses-

123. *Id.*
124. *Id.*
125. WYO. STAT. ANN. § 39-13-104 (LexisNexis 2002), *amended by* H.R. 71, 57th Leg., Reg. Sess. (Wyo. 2003).
126. *See* WYO. STAT. ANN. §39-13-104 (LexisNexis 2003).
127. Daniel C. Stockford, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 827 (1990).
128. *Id.* at 827 (quotations omitted). Consequently, property tax assessors often look at the highest and best use of the land to determine the value of the land. *Id.* at 826.
129. *Id.* at 826. A landowner may engage in numerous permissible uses on his or her land, such as the right to develop all or part of the land. By placing a standard conservation easement on a parcel of real property, a landowner essentially removes the right to develop that parcel of land. *Id.*
130. *Id.* at 830.
131. WYO. STAT. ANN. § 39-11-101(a)(xv) (LexisNexis 2003).
132. *See* WYO. STAT. ANN. § 39-13-103 (LexisNexis 2003).

sors and fulfill its statutory obligations, the Department has established rules and regulations which must be followed in valuing real property.[133]

For non-agricultural lands, the Department has provided six appraisal techniques, utilized separately or in conjunction with one another, for use in determining the fair market value of real property.[134] The county assessors choose which technique to use by evaluating whether the parcel of land "fit[s] the assumptions inherent in the appraisal method in order to calculate or estimate the fair value of the property."[135] Generally speaking, the county assessor, via the use of a real property appraiser, will look at the property as a whole and consider the features or aspects that increase or decrease the value of the real property.[136] Regardless of the appraisal technique, "[e]ach approach used shall also consider the nature of the property or industry, and the regulatory and economic environment within which the property operates."[137]

For non-agricultural lands assessed at their fair market value, the placement of a conservation easement on real property should typically reduce its fair market value and translate into fewer taxes owed on a particular parcel of real property.[138] County assessors usually should reduce the value of burdened land because "[i]nherent in the determination of fair market value is the reduction in value attributable to the elimination of development potential that results from the creation of a conservation easement."[139] In support, federal tax law requires a landowner to obtain an appraisal of conservation easement burdened property in order to qualify for federal tax benefits.[140] Generally, the appraisals confirm a decrease in the market value of the burdened property, and county assessors should be able to rely on the appraisals to support their own reduction in value for state property tax purposes.[141] Further, since non-agricultural real property is valued according to

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133. *See generally* Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 15, 2003).

134. The appraisal techniques listed by the Department include the sales comparison approach, the cost approach, the income or capitalized earnings approach, and the computer assisted mass appraisal approach. Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, Ad Valorem Valuation Methodology and Assessment (Local Assessments), ch. 9, § 6 (2003), *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 16, 2003).

135. *Id.*

136. *See generally id.*

137. *Id.*

138. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 752 (2002).

139. Lindstrom, *supra* note 53, at 24.

140. *See* 26 U.S.C. § 170 (authorizing donors of conservation easements to deduct the fair market value of a donated conservation easement from their taxable income); Stockford, *supra* note 127, at 832-33.

141. Stockford, *supra* note 127, at 832-33. As the author notes:

its fair market value, the value of the land will remain unchanged regardless of whether the conservation easement was donated or sold.[142]

Since Wyoming does not have enabling legislation authorizing the use of conservation easements and does not provide direction or guidance to county assessors when assessing land burdened by conservation easements, local assessors use their discretionary authority to value land subject to conservation easements.[143] This results in an ad hoc approach to valuing non-agricultural land burdened by conservation easements. As such, Laramie, Teton, and Sublette county assessors indicated that they will consider the effect that a conservation easement has on a parcel of property, but further indicated that there are little guidelines and comparable sales data to effectively value the burdened property.[144] In contrast, Carbon and Sheridan county assessors both indicated that a conservation easement will not have any effect on a burdened property's fair market value, citing lack of comparable sales and lack of any information generally to suggest that a conservation easement lowers the value of burdened land.[145] Consequently, depending on what county the conservation easement is granted in, the burdened land may or may not decrease in value for property tax purposes.

County assessors, on the other hand, assess agricultural lands according to their production capabilities, and the Department of Revenue has defined agricultural lands as

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> The Internal Revenue Service (IRS), recognizing that conservation easements diminish the value of burdened property, applies a "before-and-after" approach in appraising the value of conservation easements. To determine the fair market value of the easement donated, the before-and-after approach calculates the difference between the fair market value of the entire property before the grant of the easement, and the fair market value of the property after the grant. The IRS considers this method necessary to determine the value of conservation restrictions because there is usually no substantial record of marketplace sales of easements to use as a meaningful guide in determining easement value. There are few sales of easements in the market place because conservation easements in perpetuity are ordinarily granted by deed of gift, rather than by sale on the open market. Thus, in order to determine the value of the easement itself it is necessary to determine the difference in the value of the property before and after the easement burdens the land.

Id. at 833.

142. *Id.*

143. *Id.* at 839-40.

144. Telephone Interview with Brenda Arnold, Laramie County Assessor, Laramie County Assessor's Office (July 2, 2003); Telephone Interview with Susanne S. Olmstead, Teton County Assessor, Teton County Assessor's Office (July 2, 2003); Telephone Interview with Janet Montgomery, Sublette County Assessor, Sublette County Assessor's Office (July 2, 2003).

145. Telephone Interview with Roger Pantalone, Property Assessor, Carbon County Assessor's Office (July 2, 2003); Telephone Interview with Rita Blantz, Property Assessor, Sheridan County Assessor's Office (July 2, 2003).

> contiguous or noncontiguous parcels of land presently being used and employed for the primary purpose of providing gross revenue from agriculture or horticultural use or any combination thereof unless part of a platted subdivision. Agricultural land shall generally include land that is actively farmed, ranched or is used to raise timber for timber products to obtain a fair rate of return.[146]

Specifically, county assessors value agricultural land according to the land's capability to produce forage or crops, including domesticated livestock, and use an income approach established by the Department to arrive at a full value.[147] The income approach involves the capitalization of a landowner's net income in order to arrive at the value per acre of land.[148] If a conservation easement is placed on a parcel of agricultural land, then the value of the land for property tax purposes will not change because the land is valued at production capabilities, not its fair market value.[149] However, if the agricultural land is brought out of agricultural production, then the land will be valued according to its fair market value, or as non-agricultural land.

E. Conservation Easements and Other Real Property Tax Systems

Because conservation easements will generally affect the value of land burdened by them, "at least 24 states [have] mandated that conservation easements be considered when calculating the value of land for property tax purposes."[150] These states have statutorily provided a means of dealing with conservation easements for property tax purposes in order to address revenue problems, provide incentives to use conservation easements, and to further other important state interests.[151]

In Nebraska, the legislature provided that "[t]he conservation or preservation easement in the hands of the holder shall be subject to assess-

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146. Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, Designation of Agricultural and Non-Agricultural Lands for Ad Valorem Taxation, ch. 10, § 3(a) (2003), *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 15, 2003).

147. *See generally* Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, Ad Valorem Classification, Valuation, Methodology and Assessment for Designated Agricultural Lands, ch. 11 (2003), *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 15, 2003).

148. State of Wyoming, Department of Revenue: *2003 Agricultural Land Valuation Study*, *at* http://revenue.state.wy.us/contentroot/MapsPubs/manuals/Chpater7.pdf (last visited on Jan. 28, 2003). *See generally* Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, Ad Valorem Classification, Valuation, Methodology and Assessment for Designated Agricultural Lands, ch. 11 (2003), *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (last visited Aug. 15, 2003).

149. Lipman, *supra* note 20, at 506.

150. Hollingshead, *supra* note 29, at 359-60.

151. Baldwin, *supra* note 73, at 108-09.

ment, taxation, or exemption from taxation in accordance with general laws applicable to assessment and taxation of interests in real property."[152] Similarly, Colorado statutes provide that "[c]onservation easements in gross shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to the assessment and taxation of interests in real property."[153]

However, the Colorado Legislature seems to have simply left a door open. Under Colorado's current property tax system, partial interests in property are not subject to a separate tax.[154] The Colorado Legislature "establish[ed] a unity rule for the assessment of property; rather than requiring assessment of the various interests in the property, . . . the property is assessed to the owner only, and it 'makes no difference' that his ownership or possession is qualified or limited."[155] In addition, Nebraska does not currently tax partial interests in property.[156]

Other states have been more forthright in their advancement of certain state interests, such as the protection against the loss of state property tax revenues. For example, Idaho statutory law provides that

> [t]he granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist.[157]

Many states that have statutorily addressed how to value land burdened by a conservation easement mandate that conservation easements shall be considered when assessing the value of burdened property.[158] These

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152. NEB. REV. STAT. § 76-2, 116 (2002).

153. COLO. REV. STAT. § 38-30.5-109 (2003).

154. *See* COLO. REV. STAT. §§ 39-1-106. Arguably a conservation easement would qualify as a partial interest in land.

155. Bd. of Assessment Appeals of State of Colorado v. City and County of Denver, 829 P.2d 1319, 1323 (Colo. Ct. App. 1991), *cert. granted in part, aff'd* 848 P.2d 355.

156. Telephone Interview with Dan Pittman, Assessor, Sarpy County Assessor's Office (July 16, 2003). See *generally* NEB. REV. STAT. §§ 77-121, 77-103 (2002).

157. IDAHO CODE § 55-2109 (Michie 2002). Commentators have suggested that this approach may have constitutional problems in Idaho. Lindstrom, *supra* note 53, at 25 n.9. Similarly, if the Wyoming legislature decides to implement this approach, it too would have to answer certain constitutional questions. For example, the Wyoming Constitution mandates property be assessed at its full value, and by disregarding a restriction upon a parcel of property, one which would otherwise reduce the value of the property, such a provision may violate the Wyoming Constitution. *See generally* WYO. CONST. art. 15, § 11.

158. The author found at least 18 states that have provided that county assessors shall consider the effects that a conservation easement has on the value of the property it burdens. Some of these states provide that county assessors shall only consider the effects of conserva-

states have legislatively and sometimes judicially recognized the fact that a conservation easement will lower the fair market value of the burdened land.[159] For example, California law provides that "[i]n the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected. These restrictions include . . . [a] recorded conservation, trail, or scenic easement . . . ."[160] California's statutory law resembles the typical state enactment which mandates county assessors to consider conservation easements when valuing burdened properties, and these legislative enactments often provide an incentive to utilize conservation easements.[161]

Some states, such as Virginia, go further in providing an incentive to use conservation easements. Virginia law initially provides that "[a]ssessment of the fee interest in land that is subject to a perpetual conservation easement . . . shall reflect the reduction in fair market value that results from the inability of the owner . . . to use such property for uses terminated by the easement."[162] However, Virginia law also provides that

> [w]here an easement held pursuant to this chapter or the Open-Space Land Act (§ 10.1-1700 et seq.) by its terms is perpetual, neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such easement shall be subject to state or local taxation nor shall

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tion easements upon meeting certain statutory conditions. However, the considerations are generally so broad that in the majority of cases all land burdened by a typical conservation easement will qualify for the property tax assessment provision. Generally, the states that statutorily provide that county assessors shall consider the effects of conservation easements include California, CAL. REV. & TAX CODE § 402.1(a)(8) (West 2002); Colorado, COLO. REV. STAT. § 38-30.5-109 (2003); Florida, FLA. STAT. ANN. § 193.501 (West 2002); Indiana, IND. CODE § 32-23-5-8 (2003); Maine, ME. REV. STAT. ANN. tit. 36, § 1106-A (West 2002); Minnesota, MINN. STAT. § 273.117 (2003); Montana, MONT. CODE ANN. § 76-6-208 (2003); Nebraska, NEB. REV. STAT. § 76-2, 116 (2002); New Hampshire, N.H. REV. STAT. ANN. §§ 79-B:3 and 79-C:7 (2003); New Jersey, N.J. REV. STAT. § 13:8B-7 (2002); North Carolina, N.C. GEN. STAT. § 121-40 (2003); Ohio, OHIO REV. CODE ANN. § 5713.04 (West 2003); Oregon, ORE. REV. STAT. §§ 271.785 and 271.729 (2003); Pennsylvania, 72 PA. CONS. STAT. § 5491.3 (2003); Rhode Island, R.I. GEN. LAWS § 44-27-2 (2003); South Carolina, S.C. CODE ANN. § 27-8-70 (Law. Co-op. 2003); Tennessee, TENN. CODE ANN. § 66-9-308 (2003); and Virginia, VA. CODE ANN. § 10.1-1011 (Michie 2002).

159. *See* Village of Ridgewood v. Bolger Found., 517 A.2d 135, 138 (N.J. 1986) (stating that a landowner who gives up the right to do something with his land in perpetuity hinders the value of the land as a marketable commodity, thus reducing the value of the land for state property tax purposes); *see, e.g.*, Parkinson v. Bd. of Assessors, 481 N.E.2d 491 (Mass. 1985).

160. CAL. REV. & TAX CODE § 402.1(a)(8).

161. *See* note 158 and accompanying text.

162. VA. CODE ANN. § 10.1-1011(B).

> the owner of the fee be taxed for the interest of the holder of the easement.[163]

To further important state interests, such as the recognition that conservation easements are valuable to the state by providing open space, preserving agriculture, and limiting unsightly development, some states have enacted legislation allowing for a reduction in property taxes contingent upon meeting certain statutory conditions.[164] For example, "some governments have tax policies that reduce or eliminate property taxes on land of ecological significance if the owner agrees to manage the land for conservation purposes."[165] The Massachusetts Legislature has provided that land subject to a conservation easement "shall be assessed as a separate parcel."[166] Consequently, as one court noted:

> Where part of a taxpayer's property is encumbered by a conservation restriction, and part is not, [Massachusetts's property tax statute] requires that the restricted and unrestricted portions be assessed separately. This [statute] . . . allows a taxpayer to realize the tax benefits of placing a conservation restriction on only part of his land.[167]

Illinois law provides that "[i]n the assessment of property encumbered by public easement, any depreciation occasioned by such easement shall be deducted in the valuation of such property."[168] Thus, an Illinois landowner can receive a preferential property tax assessment if the conservation easement is subject to public use. Similarly, Maryland law provides that landowners who donate conservation easements to the Maryland Environmental Trust shall receive a property tax credit "granted against 100 percent of all property tax that otherwise would be due."[169] In Utah, the legisla-

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163. VA. CODE ANN. § 10.1-1101A.

164. *See generally* Gathen, *supra* note 16, at 192-93. The commentator stated:

> It is apparent that the preservation of open space and other areas of scenic or natural beauty improvement and development of agricultural and forest lands, is fundamental to the maintenance, enhancement, and improvement of recreational opportunities, tourism, community attractiveness, balanced economic growth and the quality of life in all areas of the state.

Id.

165. Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL'Y F. 209, 223 (1998).

166. MASS. GEN. LAWS ANN. ch. 59, § 11 (West 2003).

167. Parkinson v. Bd. of Assessors of Medfield, 495 N.E.2d 294, 296-97 (Mass. 1986) (citations omitted).

168. 35 ILL. COMP. STAT. 200/9-145(e) (2003).

169. MD. CODE ANN., TAX-PROP. § 9-107 (2003). *See, e.g.*, Lindstrom, *supra* note 53, at 25 n.29. Further, Michigan statutory law provides for a

> credit allowed against Michigan income tax for local property taxes that exceed 3.5% of household income for farm property subject to a restric-

ture has encouraged the use of conservation easements by providing that "land is not subject to [a] rollback tax," which is a tax imposed on land which is removed from preferential assessment under Utah property tax law, "if the land becomes subject to a conservation easement."[170] Consequently, many of these states set up property tax schemes with the purpose of "encourag[ing] farmers to leave some of their land in a natural, undeveloped state."[171]

II. Analysis

A. Conservation Easements and Their Effect on State Property Tax Revenues

The economic ramifications of burdening land with conservation easements on real property tax revenues are unclear. In most situations, "it is more difficult to predict the effect that a conservation easement will have on a landowner's property taxes" because, for instance, "property tax assessors have treated conservation easements with considerable variation" in assessing the value of land burdened by a conservation easement.[172] For example, studies done in Massachusetts and Maine have revealed that property tax assessors reduced the value of land burdened by conservation easements anywhere from five to ninety-five percent.[173] Accordingly, property tax assessors are often in disagreement over the effect that a conservation easement has on land burdened by a conservation easement.[174] In reality, the "degree to which [conservation] easements diminish [the] assessed value" of land burdened by conservation easements depends upon "differences in the terms of the easements and the characteristics of individual properties."[175]

Additionally, "local assessors who may be hostile to downwardly reassessing easement-burdened property because of a feared negative effect on local revenues" may exacerbate the difficulties in determining both the effect of conservation easements on land value and the actual value of the burdened land.[176] For example, "county assessors, who must generate suffi-

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> tive agreement, including various types of conservation easements; also ad valorem tax exemption for open-space land subject to an 'open space development rights easement' with respect to which an analysis of projected loss of revenues has been prepared and a joint resolution approval has been passed by the Michigan House and Senate.

Id. (citing MICH. COMP. LAWS ANN. § 324.36109).

170. S. 148, 55th Leg., Gen. Sess. (Utah 2003), amending UTAH CODE ANN. § 59-2-506.5. *See also* UTAH CODE ANN. § 59-2-506 (2003).

171. Dekoning v. Dep't of Treasury, 536 N.W.2d 231, 233 (Mich. Ct. App. 1995).

172. Stockford, *supra* note 127, at 825-26.

173. *Id.* at 839 n.112.

174. *Id.*

175. *Id.* at 836.

176. *Id.* at 846.

cient tax revenue to satisfy the requirements of their budgets may look unfavorably upon assessing property values in a way that would complicate their collection efforts."[177] Typically, "reductions in property taxes are unpopular with local government officials and, in some jurisdictions . . . , such officials may refuse to take conservation easements into account when making assessments."[178]

Commentators have noted several possible theories to explain why property tax assessors vary in valuing conservation easement burdened lands. One commentator suggested that in states "required by state law to consider conservation easements, assessing officers [sometimes] object to [property tax] reductions in valuation or assessment on the grounds that easements do not reduce the fair market value of land."[179] Other commentators argue that "[a]ssessors are paid to make assessments that will generate enough revenue to meet local budgetary needs," and "[e]ven when state legislation mandates that conservation easements be reflected in the assessment of burdened property, [an actual downward assessment] depends [heavily] on the attitudes of local assessors toward such easements."[180] To further complicate matters, some landowners may not want to have their property reassessed out of a fear that the land will be valued higher than it previously was valued, even with the conservation easement burdening the land.[181]

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177. R. Christopher Anderson, Note, *Some Green for Some Green in West Virginia: An Overview of the West Virginia Conservation and Preservation Easements Act*, 99 W. VA. L. REV. 617, 633 (1997).

178. Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 456 n.17 (2002) (noting that some county assessors will refuse to lower property taxes burdened by conservation easements "even [] where state law mandates that conservation easements be taken into account when making assessments").

179. Lindstrom, *supra* note 53, at 24. *See also* Telephone Interview with Rita Blantz, Property Assessor, Sheridan County Assessor's Office (July 2, 2003) (indicating that a conservation easement would not reduce the fair market value of non-agricultural land because the choice to grant a conservation easement is an optional choice by the landowner).

180. Stockford, *supra* note 127, at 841.

181. *Id.* at 840. The commentator also argued:

> Because of constantly rising real estate costs in many areas, property is likely to be assessed at full value for only a very brief time. Localities may be reluctant to assess at full value, even if required to do so by law, because of the political backlash that may result from a sudden increase in assessments. Thus, a landowner who demands a reassessment because of a newly granted conservation easement may fear a higher overall valuation not corresponding to surrounding properties because a general reassessment in the area has not recently occurred. Property owners may be hesitant or unwilling to approach their local taxing authority with a request for downward reassessment, out of fear that their request will trigger a complete reassessment of property that might result in a higher overall assessment.

Id.

In sum, Wyoming can expect property tax assessors to widely diverge on whether conservation easements affect the value of the burdened land and the appropriate reduction in land value in the absence of legislative guidance.[182] Accordingly, the actual effect of conservation easements in reducing local property tax revenues will be unclear absent a statutory enactment addressing how conservation easements should be treated within Wyoming's real property tax system.[183]

Despite the difficulty in predicting the effect of lowering property taxes on land burdened by conservation easements, the use of conservation easements will not likely have a significant effect on property tax revenues. First, the importance of residential real property taxes in Wyoming varies greatly depending on the county assessing the real property taxes.[184] In a mineral rich county, such as Sublette County, the property tax revenues from residential real property are not substantial.[185] According to the Sublette County Assessor, the decrease in value of property burdened by a conservation easement is not problematic because the revenues received from taxing oil and gas amount to over ninety percent (90%) of the property taxes collected in Sublette County.[186] However, for less mineral rich counties, such as Teton County, residential property taxes are a more stable source of revenue. In Teton County, real property tax revenues generally amount to around ninety percent (90%) of the property tax revenues for the county.[187] Thus, any legislative enactment in Wyoming should realize that some counties revenues might be affected more so by the use of conservation easements than others, which may or may not have an impact on legislative voting.

Second, it appears that a substantial number of the landowners in Wyoming place conservation easements on agricultural lands.[188] These landowners use conservation easements to protect the lands from encroaching development and rising land prices, to engage in responsible estate plan-

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182. *See generally id.* at 825-26.

183. *See generally* Lipman, *supra* note 20, at 506 (noting that "each state can . . . determine how a conservation easement impacts its property tax values and assessments").

184. *See generally* Wyoming Department of Revenue, *Ad Valorem Tax Division,* Annual Report 2002, *available at* http://revenue.state.wy.us/contentroot/MapsPubs/annrpts/8FY02AdValoremTaxDivision.pdf (last visited Oct. 3, 2003).

185. Telephone Interview with Janet Montgomery, Sublette County Assessor, Sublette County Assessor's Office (July 2, 2003).

186. *Id.*

187. Telephone Interview with Susanne S. Olmstead, Teton County Assessor, Teton County Assessor's Office (July 2, 2003); Telephone Interview with Rita Blantz, Property Assessor, Sheridan County Assessor's Office (July 2, 2003).

188. *See generally* Katharine Collins, *Ranchers Protect Land in Wyoming,* High Country News, *available at* http://www.hcn.org/servlets/hcn.URLRemapper/1994/dec26/dir/wr4.html (last visited Oct. 3, 2003) (stating that "[c]onservation easements prevent housing subdivisions, ensure continued agricultural uses and conserve natural habitat connected to plant and animal life" in Wyoming).

ning, or to simply further a stewardship or conservation ethic on their lands.[189] In the proposed amendment, the legislature correctly recognized that the state will lose property tax revenue only when non-agricultural lands are burdened by conservation easements or when burdened agricultural lands are converted to non-agricultural lands.[190] As mentioned earlier, agricultural lands are valued according to production capabilities and the placement of a conservation easement on the land will not affect the property taxes collected for that land.[191]

The author reviewed 182 conservation easement deeds in Wyoming from 17 counties and found that only 32 conservation easement deeds forbid agricultural practices on the land, or approximately 18 percent (18%).[192] The majority of the conservation easement deeds disallowing agricultural uses on the burdened property were located in Teton and Sublette Counties. In Teton County, 21 of 72 surveyed deeds disallowed agricultural uses on the burdened land, or twenty-nine percent (29%); while in Sublette County, 10 of 23 surveyed conservation easement deeds disallowed agricultural uses on the burdened land, or forty-three percent (43%). These statistics indicate that many Wyoming landowners prefer retaining the ability to engage in agricultural practices on conservation easement burdened property.

The lack of a significant number of conservation easement deeds disallowing agricultural practices is also useful in attempting to define how many conservation easement burdened properties are valued as agricultural

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189. *See generally* Eagle, *supra* note 4.

190. In 2003, the Wyoming legislature attempted to introduce the following language into the UCEA:

> If the land subject to a conservation easement is no longer to be assessed as agricultural land, the conservation easement is evidence of a transfer of property subject to taxation under W.S. 39-11-103. The holder the easement shall be liable for the taxable difference between the value of the land prior to the placement of the conservation easement and the current value of the land. A conservation easement owned by a charitable corporation, charitable association or charitable trust is subject to taxation, regardless of any exemption under W.S. 39-11-105.

H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003).

191. *See* Wyoming Stock Growers Agricultural Land Trust, *Frequently Asked Questions About Conservation Easements, available at* http://www.wsgalt.org/Frequently_Asked_Questions.htm (last visited Nov. 29, 2003). According to the Wyoming Stock Growers Agricultural Land Trust, "[a]gricultural lands in Wyoming are taxed on their productive capacity, not on their development potential. Lands on which WSGALT acquires conservation easements are in agriculture and will continue to remain in agriculture, resulting in no loss in property tax revenues." *Id.*

192. In 2002, the author reviewed 182 recorded conservation easement deeds. The author traveled to the following counties, searched for conservation easement deeds, and documented various provisions in the deeds including permitted practices upon the easement burdened lands: Sheridan, Natrona, Freemont, Johnson, Campbell, Converse, Sublette, Carbon, Platte, Albany, Laramie, Goshen, Big Horn, Hot Springs, Lincoln, Uinta, and Teton County.

lands. In Sublette County, for example, this author found that forty-three percent (43%) of the surveyed conservation easement deeds disallowed agricultural practices on the land, and the Sublette County Assessor estimated that fifty percent (50%) of the lands burdened by conservation easements in Sublette County were valued as agricultural lands.[193] Thus, it initially appears that conservation easement deeds that forbid agricultural practices are primarily valued as non-agricultural lands. If this holds true, then the majority of conservation easement burdened properties in Wyoming are valued as agricultural lands and will not reduce local or state property tax revenues.[194]

Third, many commentators argue that utilizing conservation easements will not jeopardize local property tax revenues because of the relationship between state expenditures and conservation easement burdened and unburdened lands.[195] Commentators have argued extensively that "[u]ndeveloped burdened land is likely to require fewer municipal services than developed land. In contrast, developed land requires the support of numerous costly municipal services," such as roads, sewers, schools, and other support and maintenance services.[196] Nationally, residential land uses typically cost counties "an average of $1.15 in community services for every $1.00 in revenue created by that use. Farm and forest uses, on the other hand, cost only $0.036 for every $1.00 in revenue."[197] In Wyoming, non-agricultural lands also cost the community more in services than agricultural lands, with agricultural lands costing a community on average $0.54 per dollar of revenue and non-agricultural lands costing a community an average of $2.01 per dollar of revenue.[198]

Accordingly, "land that does not and, by necessary implication of the terms of the easement, will never require expensive municipal services should bear a lower tax burden than land that is subject to development that will create the need for those services."[199] Scholars have further argued that most local property taxes are based on the highest and best use of the property, and valuing property as such can "encourage habitat conversion and the consequent loss of biodiversity. By stimulating development, such policies

193. Telephone Interview with Janet Montgomery, *supra* note 185.

194. The inference that the majority of conservation easements are placed on agriculturally valued lands is rationally supported, but this author cautions against relying on this and other assumptions which may or may not ultimately hold true. The Wyoming legislature would be well-advised to accurately determine the amount of agriculturally valued lands burdened by conservation easements before rushing to conclusions as to the impact of conservation easements on real property tax revenues.

195. Stockford, *supra* note 127, at 846.

196. *Id.* (noting that community services normally entail the providing of roads, sewers, and schools to accommodate the needs of area residents).

197. Roger Coupal et al., William D. Ruckelshaus Institute of Environment and Natural Resources, *The Cost of Community Services for Rural Residential Development in Wyoming*, *in* WYOMING OPEN SPACES (2002).

198. *Id.*

199. Stockford, *supra* note 127, at 846.

also fuel demands for increased government services such as access to water, sewer, roads, and schools."[200] Consequently, any loss of property tax revenue resulting from the use of conservation easements in Wyoming should be offset by the increased costs associated with providing community services to newly developed lands.[201]

Fourth, conservation easements will not jeopardize state or local property tax revenues due to the "betterment" theory. The betterment theory states that "permanently burdened land is likely to increase the market value of neighboring property" because "[a]reas with restricted development and extensive open space are generally the most desirable and expensive in which to live."[202] Because the surrounding lands are more desirable and expensive, the value of surrounding lands should accordingly rise for property tax purposes.[203] The logical conclusion is that property tax revenues should not decrease as a result of an increased use of conservation easements.[204] In support, a study conducted by the Vermont Land Trust found that property values of land surrounding conservation easement burdened land increased "from [$0.04 to $0.77] on the average residence, with a projected $0.16 to $2.70 increase on the average house in the future."[205]

By extending the rationale of the betterment theory to the conservation easement burdened land, some scholars argue that the value of the burdened land will increase over time.[206] The value of conservation easement burdened property may rise over time because the land is permanently protected from development.[207] To illustrate, if "neighboring homeowners in a low-density area . . . agree to convey scenic easements to each other in order to raise property values," then a "rise in value would occur because each *parcel* benefits from the easements that restrict development around it."[208] Further, "since open space can yield a private as well as a public benefit, assessors can raise the values of adjacent land on a betterment theory."[209] Thus, both the land adjacent to land burdened by conservation easements

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200. Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States*, 11 J. ENVTL. L. & LITIG. 9, 26-27 (1996).
201. *See generally* Stockford, *supra* note 127, at 846.
202. *Id.* at 847.
203. *Id.*
204. *Id.*
205. Sean F. Nolon Cozata Solloway, Comment, *Preserving our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 612 n.164 (citing DEB BRIGHTON & JUDY COOPER, VERMONT LAND TRUST, THE EFFECT OF LAND CONSERVATION ON PROPERTY TAX BILLS IN SIX VERMONT TOWNS (1994)).
206. Mills, *supra* note 94, at 570.
207. *Id.*
208. *Id.* at 570 n.95 (emphasis added). Thus, a land with minimal development (i.e., a house and garage) and burdened by a conservation easement may increase in value over time because, for example, the conservation easement ensures that the land will not be later divided up and developed. *Id.*
209. *Id.* at 570.

and the burdened land may increase in value over time, and landowners may pay more property taxes over time which would help stabilize local revenues.

Finally, land burdened by conservation easements can provide significant benefits to a community, such as open space, hunting and fishing access, hiking trails, scenic views, cultural heritage, and other benefits.[210] Ordinarily, communities strive to provide many of these amenities to their citizens.[211] A community that can capitalize on landowners who utilize conservation easements can benefit economically:

> If a local community were to purchase property in order to protect it from development, there would be a substantial initial outlay of money and the property would be removed from the tax rolls completely. Easements are a mechanism by which communities can obtain the benefits of open space without expending substantial purchase money and without losing tax revenues from the property altogether.[212]

Consequently, the Wyoming Legislature should realize that the placement of conservation easements does not necessarily correlate to a loss in property tax revenues. Even if the legislature is not convinced that real property tax revenues will not be threatened, the legislature should consider its constituents' desires. Wyoming residents currently enjoy a low property tax rate: In 2000, Wyoming's property tax rate, averaging 0.753 percent of market value, was significantly lower than surrounding states.[213] Wyoming residents also receive more services funded from tax dollars generally than they pay in taxes: "For every $1,500 of taxes paid by Wyoming residents, they receive $7,800 worth of services."[214] Further, "property taxes are incredibly unpopular—largely because they tend to be paid in big, noticeable lumps."[215] Thus, Wyoming legislators could gain political capital by allowing landowners who place conservation easements on their property to enjoy a property tax break.

B. The Wyoming Legislature's Proposed 2003 Approach

In debating House Bill 0187, the Wyoming Legislature proposed a system of taxing the holders of the conservation easements, largely non-

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210. Stockford, *supra* note 127, at 847.
211. *Id.*
212. *Id.*
213. Bankrate.com, *Wyoming State Tax Report*, *available at* http://www.bankrate.com/brm/itax/edit/state/profiles/state_tax_Wyo.asp (quoting a 2000 survey by Wyoming Taxpayers Association which found that surrounding states' average tax rate was 1.4 percent and the national average tax rate averaged 1.2 to 1.5 percent) (last visited Aug. 20, 2003).
214. Barrett, *supra* note 83.
215. *Id.*

profit entities, for the value of the conservation easements.[216] The legislature's proposed approach would have the effect of changing the current real property tax system, as county assessors do not currently tax partial interest owners of land for the value of their interests in the land.[217] If the Wyoming Legislature continues to pursue the option of taxing land trusts for the value of conservation easements, it may be confronted with potentially serious constitutional, statutory, and policy problems.

The Wyoming Constitution mandates that county assessors uniformly value all real property at its full value within three classes.[218] Generally, equality and uniformity requirements are at the foundation of a state's power to tax, and the requirements mandate even and equitable distribution of the tax burden among taxpayers of the same class.[219] Under Wyoming's current system of taxing all real and personal property, ad valorem taxes are assessed against the whole parcel of land, to the owner of the whole parcel of land, and at the land's full value.[220] In contrast, taxing the holder of a conservation easement, or an owner of a partial interest in land, would require splitting interests in land and taxing the holders of the individual interests.[221]

Courts have interpreted the uniformity requirement as requiring a department of revenue to apply the same assessment ratio to all property within a class.[222] The assessment ratio is a fraction used to determine the taxable amount of real property; and for real property, the assessment ratio is

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216. H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003).

217. Telephone Interview with Janet Montgomery, *supra* note 185. The holder of a conservation easement arguably has a partial interest in the conservation easement burdened property because the landowner has conveyed rights to the conservation easement holder, such as the right to monitor and enforce the terms of the easement. *See generally* PERRIGO, *supra* note 64.

218. WYO. CONST. art. 15, § 11. One of the three classes is "[a]ll other property, real and personal," and the interest of a conservation easement holder would fall within this class of taxable property. *Id.*

219. 84 C.J.S. *Taxation* § 27 (2002) (noting that "all taxes must be uniform on the same class of subjects within the territorial limits of the authority levying the tax, that the legislature must provide for an equal and uniform rate of assessment and taxation, [and] that the burden of taxation on all property must be equitable").

220. *See generally* WYO. CONST. art. 15, § 11; WYO. STAT. ANN. § 39-11-101(a)(xv) (LexisNexis 2003) ("'Real property' means land and appurtenances, including structures, affixed thereto."); WYO. STAT. ANN. § 39-13-103(b)(i)(A) (LexisNexis 2003) ("All taxable property shall be annually listed, valued and assessed for taxation . . . in the name of the owner of the property."); Wyo. Dept. of Revenue Ad Valorem/Property Tax Rules and Regulations, Ad Valorem Valuation Methodology and Assessment (Local Assessments), ch. 9, §6 (2003), *available at* http://revenue.state.wy.us/doclistout.asp?div=15&dtype=37 (providing for a parcel of property to be valued as a single unit and not providing for the taxation of partial interests in land) (last visited Aug. 16, 2003); Telephone Interview with Janet Montgomery, *supra* note 185.

221. *See supra* notes 152-56 and accompanying text.

222. Amoco Prod. Co. v. Wyoming State Bd. Of Equalization, 899 P.2d 855, 860 (Wyo. 1995).

nine and one-half percent (9.5%).[223] In addition to the constitutional uniformity requirement, similar types of property within a class must be equally assessed.[224] In *Basin Electric Power Coop., Inc. v. Dept. of Revenue*, the Wyoming Supreme Court held: "Appraisal methods must be equally applied to all property within the class" and that "[d]iscrimination may arise in various ways."[225] In *Basin Electric*, the court identified one way to violate the equal assessment requirement, ruling that the Department of Revenue's practice of treating non-profit utility companies differently from investor-owned utility companies for ad valorem tax purposes is unconstitutional.[226]

If the Wyoming Legislature passed legislation under the current constitutional scheme, which requires conservation easement holders to pay taxes on their partial interests in real property, then the Wyoming Constitution's equal and uniform taxation provision would likely require taxing all holders of partial interests in real property for the value of their partial interests.[227] The United States Constitution's equal protection provision of the Fourteenth Amendment may also require all partial interest holders in real property to be taxed for the value of their partial interests.[228] In sum, the legislature's proposed approach to taxing conservation easement holders could potentially be unconstitutional if there is found to be an insufficient basis to distinguish conservation easements from other partial interests in land, such as servitudes, covenants, and many types of easements.[229]

The Wyoming Legislature could, however, initiate the process of amending the Wyoming Constitution to provide for a separate class of taxable property, which would have the effect of avoiding the possible constitutional problems of equal assessment of similarly situated properties.[230] In order to tax conservation easement holders for the value of their easements, article 15, section 11 of the Wyoming Constitution would have to be amended to provide for a new taxable class of property. The legislature can initiate an amendment to the Wyoming Constitution by both proposing the amendment and passing the amendment "by two-thirds of all the members of each of the two houses, voting separately."[231] Upon passing the amendment,

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223. WYO. STAT. ANN. § 39-13-103(b)(iii)(A)-(C) (LexisNexis 2003).
224. WYO. CONST. art. 15, § 11(d) ("All taxation shall be equal and uniform within each class of property.").
225. 970 P.2d 841, 857 (Wyo. 1998).
226. *Id.*
227. *See id.*; Rocky Mountain Oil and Gas Ass'n v. State Bd. Of Equalization, 749 P.2d 221, 235 (Wyo. 1987) (ruling that the Wyoming Constitution requires "equal treatment of similarly definable taxpayers").
228. *See* Hillsborough Tp., Somerset County, N.J. v. Cromwell, 326 U.S. 620, 623 (1946) (holding that when a state subjects a taxpayer to taxes not imposed on others of the same class, the equal protection clause of the Fourteenth Amendment applies to bar such discrimination).
229. *See generally* Stockford, *supra* note 127, at 848-49.
230. *See generally* WYO. CONST. art. 20, § 1.
231. *Id.*

the legislature would have to "submit such amendment or amendments to the electors of the state at the next general election" and provide notice of the amendment to the citizens prior to the election.[232] Finally, "a majority of the electors [must] ratify the [amendment]" in order for the amendment to "become part of [the Wyoming C]onstitution."[233] If two-thirds of the Wyoming Legislators and a majority of voting citizens choose to amend the Wyoming Constitution, then the legislature would be able to pass the statutory legislation necessary to tax the holders of conservation easements for the value of the easement.

Even if the legislature succeeds, which in itself is no small feat, it will be confronted with further significant hurdles to taxing the holders of conservation easements. One glaring problem is identifying a means of valuing conservation easements so the holders of the easements can be taxed. Generally, a conservation easement "expressly extinguishes all of the development rights restricted by it."[234] Thus, a conservation easement, once conveyed, may not have value because the conservation easement holder does not have any affirmative rights to use the conservation easement burdened property, must expend capital to monitor and enforce the terms of the easement, and usually cannot sell the conservation easement because a market currently does not exist for the sale of conservation easements.[235]

One commentator notes that conservation easements may have value if the easements "preserve the right of the conservation easement holder to use, on other property, the development potential removed from the land by the easement, provided that local land regulations allow such a transfer."[236] The commentator further recognizes that the value would be hard to assess due to the lack of comparable sales data and other indications of how much value a conservation easement represents.[237]

In addition to the problem of ascertaining the value of conservation easements, the legislature would be treading on sensitive ground if it chooses to tax traditionally exempt organizations. Generally speaking, conservation

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232. *Id.*
233. *Id.*
234. Lindstrom, *supra* note 53, at 25.
235. *See generally* PERRIGO, *supra* note 64. However, the conservation easement could be valued using a before and after approach. The before and after approach looks at the value of the land before the conservation easement was placed on the land and the value after the conservation easement was placed on the land, and the difference equals the value of the conservation easement. Baldwin, *supra* note 73, at 116. However, if the land is valued higher after the conservation easement is placed on the land, then this approach would be unsuccessful. Needless to say, significant problems and controversies would arise if conservation easements had to be valued for property tax purposes.
236. Lindstrom, *supra* note 53, at 25.
237. *Id.*

easements are held by non-profit, private land trusts.[238] For example, the Jackson Hole Land Trust, a private, non-profit corporation in Wyoming, frequently uses conservation easements as a land-use planning tool and has been largely successful in utilizing this tool in Wyoming.[239] Additionally, land trusts generally acquire conservation easements through a charitable donation by landowners done for public purposes, such as providing open space, public access, or the protection of scenic vistas; thus, the transaction is intrinsically a charitable transaction.[240]

The Wyoming Legislature has publicly and officially recognized intrinsically charitable transactions as beneficial to the public interest by exempting charitable trusts from property taxation.[241] The federal government has likewise recognized the charitable effect of donating a conservation easement by statutorily conferring several estate and income tax benefits upon those who donate conservation easements.[242] The legislature should be mindful of the charitable, although not always popular, acts of those who grant and hold conservation easements.[243]

III. Recommendation

Wyoming is in a unique position of being free and able to creatively and effectively deal with conservation easements in relation to its state property tax system. Wyoming legislators should heed the lessons learned and results obtained from other states that have dealt with conservation easements within their real property tax systems.[244] With this insight, the legislature should form an innovative and ideal scheme that best addresses the needs of the state and its citizens. A selective approach to granting property

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238. Tammara Van Ryn, *Sustainable Communities and Open Space: Balancing Community Assets*, 4 ALB. L. ENVTL. OUTLOOK J. 26, 29 (1999).

239. Baldwin, *supra* note 73, at 109.

240. *See* William T. Hutton, *Real Estate Tax Planning: An Oxymoron Whose Time Has Come?*, 264 PRACTISING LAW INSTITUTE/TAX LAW AND PRACTICE 401, 419 (stating that "[a]ppreciated real properties have historically been the subjects of major charitable transactions [where] . . . remainder interests, bargain sales, and conservation easements come readily to mind"); Mahoney, *supra* note 138, at 760-61 (stating that "[c]onservation easements embody the shared cultural attitudes of the contracting landowner and the easement holder and identify particular landscape features such as 'riverfront land, wildlife habitat, farmland, woods and creeks, productive forests, scenic vistas, historic sites, (and) urban gardens' for permanent protection").

241. WYO. STAT. ANN. § 39-11-105(xix) (LexisNexis 2003) (exempting charitable trusts from taxation).

242. *See* 26 U.S.C. § 170(h) (2002) (allowing donor of a conservation easement to claim a deduction for a charitable contribution on her income tax); 26 U.S.C. § 2031(c) (allowing an exclusion of forty percent (40%) of the value of land burdened by a conservation easement from the taxable estate of a decedent).

243. *See generally* Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 336 (Wyo. 1980) (noting that the legislature should consider the state as a whole when performing its duties, rather than on distinct interests within a state).

244. *See supra* notes 150-71 and accompanying text.

tax breaks to landowners based on the fulfillment of certain conditions appears to be an ideal solution. A selective approach will minimize property tax revenue losses in Wyoming, provide an incentive to utilize conservation easements as a land-use planning tool, and interject certainty into the process of granting and assessing conservation easements.

A noticeable problem with Wyoming's current situation, where landowners grant conservation easements under the common law, is that the ad hoc placement of conservation easements may be or become harmful to certain counties that rely on residential real property taxes for the majority of their revenue.[245] For instance, one county may become saturated with conservation easements, thus potentially harming that community's tax base, while another county may have little to no conservation easements, thus having a minimal effect on its property tax base.[246] Consequently, property tax assessors in communities with abundant conservation easements may feel pressure, rightly or wrongly, to not reduce land values in order to preserve the community's tax base.[247]

However, neither the common law system currently operating in Wyoming, nor the enactment of the UCEA, would prevent ad hoc placement of conservation easements.[248] Taxing conservation easement holders or prohibiting a reduction in property taxes for citizens who grant conservation easements may not be the best solution if Wyoming is truly concerned about the loss of property tax revenues in certain counties. A better approach may be to enact a state-wide conservation easement program that is selective about the restrictions it accepts when affording a positive property tax reduction.[249]

A selective approach may give the legislature more control over the use of conservation easements.[250] For example, Wyoming could provide a property tax break to landowners who grant conservation easements in specified locales; who allow public access for fishing, hunting, or other recreational opportunities; or who provide other tangible benefits to the public. Under a selective approach, Wyoming can influence, to some extent, where conservation easements are placed and what kind of public benefit conferred is worthy of a property tax reduction. Further, a selective approach to granting property tax reductions will not significantly affect the overall use of conservation easements because landowners who grant conservation ease-

245. Stockford, *supra* note 127, at 847.
246. *See supra* text accompanying notes 184-87.
247. Stockford, *supra* note 127, at 846.
248. The common law and the UCEA only permit the use of conservation easements within a state; they do not control the location or terms of the conservation easements. *See generally* UCEA (1981).
249. Stockford, *supra* note 127, at 847. *See also supra* text accompanying notes 164-71.
250. *Id.* at 848.

ments obtain many other benefits besides the property tax break. "[I]n light of the federal income tax deduction based on the value of a conservation easement, a property tax reduction rarely provides a significant impetus for the donation of a conservation easement."[251]

A property tax break, or credit, which is conditioned upon a landowner fulfilling certain conditions can provide a positive incentive to use conservation easements.[252] Many commentators have found that "an ever-increasing array of market-based and economic incentive alternatives [to command-and-control regulation] may ultimately prove more valuable in resolving the complex environmental, water and land use issues of the next millennium."[253] Providing an incentive to use conservation easements makes economic sense for Wyoming:

> It adds economic value to surrounding properties and to the community as a whole. Open space provides recreational opportunities and calming viewscapes. It provides natural functions of significant value as well, such as flood control and a recharge of our ground water resources. Protection of our open space is really the protection of our existing high quality of life.[254]

In addition to protecting the land and the environment, conservation easements are extremely flexible, allowing more property to remain in private hands and be used for productive purposes, such as ranching and farming.[255] Considering the vast amounts of public land in the state and the objection of many to "additional public land acquisitions," keeping property in private ownership and use should be a paramount goal of Wyoming Legislators.[256] Further, providing an incentive to use conservation easements will

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251. Anderson, *supra* note 177, at 634.

252. *See generally* Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 118-19 (2002). The commentator stated:

> [A]dvocates urge local governments to use a variety of traditional local land use controls such as: transfer of development rights; purchase of development rights and other market mechanisms that can preserve land; coordinate and link local, state, and federal planning on land conservation and development; [and] innovative financing tools to facilitate open space acquisition and preservation (e.g., *local property tax incentives*).

Id.

253. JoAnne L. Dunec, *Economic Incentives: Alternatives for the Next Millenium*, 12 NAT. RESOURCES AND ENVTL. 292, 295 (1998).

254. Peter C. Sisson, *Preserving Idaho's Open Space Makes Economic Sense and Protects Our Quality of Life*, 40 ADVOCATE (IDAHO) 18, 18 (1997).

255. Jennifer Rigby, Note, *Property Tax Appraisal of Conservation Easements in Utah*, 18 J. LAND RESOURCES AND ENVTL. L. 369, 372 (1998).

256. *Id.* at 373.

also mean continuing the current procedure whereby "[a]ny fees, costs or taxes associated with the land itself are paid by the landowner."[257] The landowner is still able to transfer the land to anyone she chooses, subject of course to the terms and conditions of the conservation easement. The landowner is also provided with a valuable means to advance personal interests, such as the interest in limiting estate taxes in order to retain his or her land.[258]

Lastly, providing a system of valuing property subject to conservation easements for property tax purposes interjects certainty into the process of both granting, and assessing, land burdened by conservation easements.[259] A landowner may be more inclined to grant a conservation easement if she is certain of the property tax benefits that she will receive. In the face of the "burgeoning land trust movement and the widespread use of conservation easements," all interested parties would greatly value increased certainty on all aspects of granting a conservation easement, including the property tax ramifications.[260]

In most situations, "[u]niform guidelines would give assessors and assessment authorities a comprehensive system to employ in the valuation of such restrictions."[261] By forming uniform guidelines, county assessors might be relieved of any pressure to value the property higher than they normally would and might be better equipped to consider the effects of the burdened property on surrounding lands. With uniform statutory guidelines, landowners and conservation easement holders would also have precedent to force, if necessary, assessors to comply with their statutory mandate. State officials would be better informed on the exact amount of property tax reductions and would have more certainty on the amount of revenues the state will receive from ad valorem taxes.

PART III: CONSERVATION EASEMENTS & THE RULE AGAINST PERPETUITIES

I. Background

A. The Problem in Wyoming

In the 2003 General Session, the Wyoming Legislature seemed concerned that perpetual conservation easements would violate the Wyoming

257. *Id.* at 374.
258. Karen M. White, Note, *"Extra" Tax Benefits for Conservation Easements: A Response to Urban Sprawl*, 18 VA. ENVTL. L.J. 103, 107, 110 (1999).
259. Tapick, *supra* note 22, at 276.
260. Stockford, *supra* note 127, at 848.
261. *Id.*

Constitution and statutory rule against perpetuities.[262] The legislature's fear that conservation easement enabling legislation will run counter to the Wyoming constitutional and statutory rule against perpetuities is evidenced by the comments of Wyoming's Majority Leader of the Senate, April Brimmer Kunz, during the 2003 General Legislative Session. According to Carol W. LaGrasse of the Property Rights Foundation of America, Inc., Senator Kunz "argued eloquently against the passage of the [conservation easement enabling legislation], pointing out that if the proponents want to reverse the prohibition against perpetuities, the correct thing would be to try to tackle the Constitution directly."[263]

Part of the fear over enacting conservation easement enabling legislation may stem from the potential permanency of conservation easements: Conservation easements tend "to be more permanent and more restrictive than zoning and land use regulations, which can shift with the political winds."[264] The resolution of the perpetuities issue is important to Wyoming because of the dramatic consequences associated with violating the rule against perpetuities:

> When an interest violates the Rule against Perpetuities, the general rule is that the invalid gift is stricken from the instrument, and the other valid gifts take effect as if the invalid gift were not in the instrument. If, upon striking out a gift in a deed, there is an incomplete disposition of the property, the property returns to the transferor upon the expiration of the valid interests. In the case of a transfer by will, if any remainder in a nonresiduary clause is found invalid, the residuary devisees take any interest not previously disposed of. If the invalid remainder is found in the residuary clause, a reversion arises in the testator's heirs.[265]

B. Review of the Rule Against Perpetuities

In the real property arena, early English judges were concerned primarily with the dead-hand control and limited alienability of land tied up for long periods of time.[266] The common law property rules concerning negative

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262. *See* H.R. 0187, 57th Leg., Reg. Sess. (Wyo. 2003); WYO. CONST. art. I, § 30; WYO. STAT. ANN. § 34-1-139 (LexisNexis 2003).

263. Carol W. LaGrasse, *Wyoming Conservation Easement Bill Defeated*, Property Rights Foundation of America, Inc., *available at* http://prfamerica.org/WYConsEaseBillDefeated.html (last visited on May 19, 2003).

264. Walliser, *supra* note 54, at 50.

265. Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1895 (1986).

266. John G. Shively, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule against Perpetuities*, 78 WASH. U. L.Q. 371, 371 (2000). The commentator stated:

easements, real covenants, and equitable servitudes all disfavor "negative restrictions on land use that runs with the land in perpetuity" because of the "general prohibition in the common law against dead-hand controls on property that restrain alienability."[267] Generally, the common law disapproval of negative restrictions arose due to

> [c]oncerns over economic productivity [that] have caused courts to design requirements to keep land free from burdens and restraints that unduly limit its productive use. Concerns over fairness have led to development of rules which protect parties from liabilities that a reasonable person would not expect to have incurred, and which meet their reasonable expectations.[268]

The legal system places a premium on both the free alienability of land and the easy transfer and exchange of property rights because "free and voluntary exchange permits resources, land included, to move to higher valued uses."[269] Early judges were concerned that "allowing such restraints on the alienation of land would not only hurt the marketability of land, but could also result in violent revolutions caused by land hunger among peasants and the presence of a subservient serf class."[270] Consequently, early English and American courts developed and used the rule against perpetuities to facilitate a working compromise between "landowners who wanted to keep land within the family" and the English judges who for centuries tried to stand firm against their efforts.[271]

> Not long after the idea of private property was first recognized, property owners began seeking ways to maintain control of their property and its use even after death. For nearly as long, governments have sought ways to keep property from being controlled from beyond the grave . . . . One of the first, and surely the most lasting, of these attempts to avoid "dead hand" control of assets was the Rule Against Perpetuities . . . . The Rule is a product of English law that has been part of American common law since the birth of the Republic. The Rule has also been the bane of many a practicing lawyer, not to mention causing first year law students many sleepless nights.

Id.

267. *Id.*

268. French, *supra* note 2, at 1282.

269. DUKEMINIER, *supra* note 43, at 547.

270. Shively, *supra* note 266, at 371.

271. Agnes C. Powell, *Hocus-Pocus: The Federal Estate Tax – Now You See it, Now You Don't*, 15 NAT'L B. ASS'N MAG. 21, 22 n.41 (2001) (noting that "[t]he Rule originated as a 17th century compromise between wealthy landowners who wanted to keep the land in the family and royal judges who sought to restrict such 'dead-hand' control to a time period when the patriarch could realistically recognize the capabilities of living members of his family") (internal quotations omitted).

The traditional rule against perpetuities provides that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[272] Essentially, the "Rule against Perpetuities is a rule that strikes down contingent interests that might vest too remotely," or transactions that may not vest "within 21 years after some life in being at the creation of the interest."[273] The rule against perpetuities has stood strong for centuries "as the primary weapon against restraints on the alienation of property and accumulation of wealth from generation to generation."[274] The rule against perpetuities was developed and continues to advance three basic purposes:

> [T]o limit 'dead hand' control over the property, which prevents the present generation from using the property as it sees fit; . . . to keep property marketable and available for productive development in accordance with market demands; and . . . to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements.[275]

In Wyoming, the rule against perpetuities is embodied both in the Wyoming Constitution and the Wyoming statutes. Wyoming Constitution article 1, section 30 provides that "[p]erpetuities . . . are contrary to the genius of a free state, and shall not be allowed." The Wyoming statutes state the rule against perpetuities in its traditional and well-known form: "No interest in real or personal property shall be good unless it must vest not later than twenty-one (21) years after some life in being at the creation of the interest . . . ."[276] The Wyoming Supreme Court has ruled that Wyoming's statutory

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272. *Id.*

273. *Id.* at 292.

274. Shively, *supra* note 266, at 372. In addition, the rule has had other effects:

> For centuries, an archaic property law doctrine, a relic from early English common law, has set fear into the hearts of lawyers everywhere: the Rule against Perpetuities. From novice law students to experienced practitioners, there are very few members of the legal profession who have not failed at some point in their careers to navigate successfully through both the labyrinthine workings of the Rule itself and the numerous legal fictions, such as the 'fertile octogenarian' and the 'precocious toddler,' that the Rule has spawned.

Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783, 1783 (1996).

275. Dukeminier, *supra note* 265, at 1868-69.

276. WYO. STAT. ANN. § 34-1-139 (LexisNexis 2003). In 2003, The Wyoming Legislature amended the statutory rule against perpetuities when it adopted the Uniform Trust Code.

rule against perpetuities implements the Wyoming Constitution's prohibition against perpetuities provision.[277] In addition, the court has ruled that the Wyoming constitutional prohibition against perpetuities only embodies the rule against perpetuities, not general restraints on alienation.[278]

C. Scope and Judicial Application of the Rule Against Perpetuities

Generally, "[t]he fundamental policy assumption of the Rule against Perpetuities is that vested interests are not objectionable, but contingent interests are."[279] A contingent interest is generally defined as "[a]n interest

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H.R. 0077, 57th Leg., Reg. Sess. (Wyo. 2003). The Uniform Trust Code "governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary." Glenn Lang, *2003 Legislative Update*, 26 APR WYO. LAW. 20, 20 (2003). In amending the statutory rule against perpetuities, the legislature provided that the rule against perpetuities:

> [S]hall not apply to a trust created after July 1, 2003 if: (i) The instrument creating the trust states that the rule against perpetuities as provided in (a) of this section shall not apply to the trust; (ii) The instrument creating the trust states that the trust shall terminate no later than one thousand (1,000) years after the trust's creation; and (iii) The trust is governed by the laws of this state . . . . The election provided [above] *shall not be available to real property owned and held in a trust* making an election [under this] section . . . .

WYO. STAT. ANN. § 34-1-139(b) (LexisNexis 2003) (emphasis added). Accordingly, the 2003 amendment to the rule against perpetuities arguably does not apply to most interests in real property, such as conservation easements:

> The election to opt out of the Rule as provided above is not available for real property owned and held in a trust, and the existing Rule applies to such real property held in trust. But the modified rule can apply to the other property in the trust that is not real property.

Lang, *supra* note 276, at 22. *See also* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1314 & n.25 (2003) (stating that "a settler may exempt a trust from the Rule[,] *other than as to real property assets*") (emphasis added). Whether or not crafty manipulation of the amended statutory rule against perpetuities could enable practitioners to fashion a conservation easement transaction that would enable the parties to opt out of the rule against perpetuities is outside the scope of this article.

277. McGinnis v. McGinnis, 391 P.2d 927, 931 (Wyo. 1964). The court elaborated that "[s]ince it is generally conceded by all of the eminent authors that the subject of restraints on alienation is separate and distinct from the rule against perpetuities, the [WYO. CONST. art. 1, § 30] is without force in this field." *Id.* Thus, the court stated that WYO. CONST. art. 1, § 30 only embodies the rule against perpetuities. *Id.*

278. *Id.* Further, a conservation easement will also not likely violate the rule against restraints on alienation. The Wyoming Supreme Court has found that the common law rule is applicable to Wyoming, which states that "any restriction on the permissible duration of indestructible trusts must come from the common law policy against unduly protracted suspension of the power of alienation." *Id.* at 931-32. A conservation easement will likely withstand the rule against restraints on alienation because both the land subject to a conservation easement and the interest held by the holder of the conservation easement are alienable. *See generally id.*

279. Dukeminier, *supra* note 265, at 1868.

that the holder may enjoy only upon the occurrence of a condition precedent."[280] A contingent interest is predicated upon the occurrence of a condition precedent: "[t]he term 'condition precedent' refers to an event that, under the terms of the limitation, must occur before the interest vests. Examples are 'to A if A reaches twenty-one' and 'to A if A survives B.'"[281]

The rule against perpetuities "simply invalidates any interest which vests too remotely, although it does not invalidate every perpetual interest."[282] Thus, "[t]he rule is concerned with the time within which title must vest, not with a mere postponement of enjoyment or possession."[283] A vested interest is typically defined as "[a]n interest the right to the enjoyment of which, either present or future, is not subject to the happening of a condition precedent [which is a condition that must be fulfilled before the interest can vest]."[284] Under the rule against perpetuities, the general rule is "an interest is vested when the taker is ascertained and any conditions precedent are met."[285]

The traditional approach courts used to interpret the rule against perpetuities was that "every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied."[286] In contrast, modern courts seem to assume that a "donor intended to create valid interests, not void ones."[287] Consequently, an "increasing number of courts are construing instruments to avoid violations of the Rule where such construction is reasonable."[288] In Wyoming, the courts seem intent on construing the rule against perpetuities under the traditional approach:

> In view of the fact that the rule against perpetuities is embodied in a statute and in the Constitution in Wyoming, this court is without authority to carve out an exception to the

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280. BLACK'S LAW DICTIONARY 816 (7th ed. 1999).

281. Dukeminier, *supra* note 265, at 1887. Further, Black's Law Dictionary defines condition precedent:

> An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor.

BLACK'S LAW DICTIONARY 289 (7th ed. 1999).

282. 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 5 (2003). *See also* Carlson v. Bold Petroleum, Inc., 996 P.2d 751, 753 (Colo. Ct. App. 2000).

283. Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837, 844 (8th Cir. 1975).

284. BLACK'S LAW DICTIONARY 816 (7th ed. 1999).

285. Dukeminier, *supra* note 265, at 1887.

286. *Id.*

287. *Id.*

288. *Id.*

> constitutional and statutory provision or to circumvent the Constitution and statute through the inference of a fictitious regrant or by the utilization of any other fictitious device.[289]

Many scholars and commentators "generally agree[] that the rule against perpetuities applies to easements."[290] Although no judicial opinions are available addressing when a conservation easement vests, numerous judicial decisions have decided generally when interests vest and, consequently, when interests are contrary to the rule against perpetuities.[291]

The Wyoming Supreme Court has found occasion to discuss the rule against perpetuities in various contexts. In *McGinnis v. McGinnis*, the Wyoming court had reason to analyze the rule against perpetuities to decide whether an assignment in a trust was invalid because it violated the Wyoming rule against perpetuities.[292] In *McGinnis*, beneficiaries of a trust acquired an interest in a landowner's oil and gas royalties, and the plaintiffs sought to void the transaction in part based on its violating the Wyoming statutory rule against perpetuities.[293] The trust provided that "it is the desire of the parties named herein that each shall share in any and all royalties derived or produced from said hereinafter described lands, regardless of the ownership thereof from which such royalties are produced . . . ."[294]

In reviewing the assignment against the rule against perpetuities, the court found that each beneficiary acquired a beneficial interest in the oil and gas royalties:

> Under a reasonable interpretation of the Assignment in Trust, each beneficiary was to share in the landowner-royalty interests regardless of the ownership of the land or mineral interests, and the beneficial interests transferred were not indeterminate or dependent upon future events . . . . [T]here was a conveyance of a fee simple interest in the landowner-royalty to the trustee with the equitable interest vesting immediately in the beneficiaries. The rule against perpetuities was therefore not violated.[295]

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289. Williams v. Watt, 668 P.2d 620, 630 (Wyo. 1983).
290. 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 47 (2003).
291. *See generally* Feldman v. Transcontinental Gas Pipe Line Corp., 175 S.E.2d 713, 715 (N.C. Ct. App. 1970); Phillips Petroleum Co. v. Lovell, 392 S.W.2d 748, 751 (Tex. Civ. App. 1965); Egner v. Livingston County Bd. of Ed., 230 S.W.2d 448, 450 (Ky. 1950); Harris v. Pease, 16 Conn. Supp. 13, 1948 WL 713, at *2 (1948).
292. 391 P.2d 927, 930 (Wyo. 1964).
293. *Id.* at 928, 930.
294. *Id.* at 928.
295. *Id.* at 930-31.

A Colorado appellate court has dealt with the rule against perpetuities in an analogous situation. In *Turnbaugh v. Chapman*, landowners subdivided their property and the subdivision was approved by the appropriate authorities and recorded by the landowners. In the transfer, a strip of land was reserved to a county as a future access easement.[296] The plaintiffs asserted that they regularly used the land and filed an action "for a judgment declaring that the easement referred to in the plat was presently available for use by the public."[297] The appellate court held that "the interest vested in the county when the plat was accepted. Accordingly, [the members of the court] conclude that [the] interest does not violate the rule against perpetuities."[298]

In a Kansas case, the plaintiffs and defendants were adjoining landowners, and the defendants sought to operate a rock quarry on their property.[299] In order to obtain a favorable zoning change, the defendants entered into a contract with the plaintiffs which stated that "if defendant monitored the blasting on plaintiffs' land, kept dust from their land, and restored the land to its proximate contour, plaintiffs would assist in the zoning change."[300] The plaintiffs sought to enforce their "equitable interest in compelling the restoration of the contour of defendant's land."[301] The court found that the rule against perpetuities applied and classified the interest created as a property interest: "When, however, a contract creates an interest in property that could, except for the rule [against perpetuities], be enforced by a decree for specific performance, such interest is subject to the rule."[302]

Next, the court discussed the rule against perpetuities and found that it is "concerned solely with the vesting of future interests in property . . . . A vested interest does not necessarily include the right to possession and if the title is vested, the interest is not subject to the rule however remote may be the time when it may come into possession."[303] The court went on to hold that the agreement at issue gave the plaintiffs a vested right to enforce the terms of the agreement and did not violate the rule against perpetuities.[304]

II. Analysis

Because the rule against perpetuities applies to easements, conserva-

296. 68 P.3d 570, 571 (Colo. Ct. App. 2003).
297. *Id.* at 572.
298. *Id.* at 573.
299. Moody v. Bayer Const. Co., Inc., 627 P.2d 1171, 1172 (Kan. Ct. App. 1981).
300. *Id.* at 1172.
301. *Id.* at 1173.
302. *Id.*
303. *Id.*
304. *Id.*

tion easements will, at least initially, be subject to the rule's requirements.[305] However, the conveyance of a conservation easement will not violate the rule against perpetuities if the taker of the conservation easement is identified and any conditions precedent to the conveyance are fulfilled.[306] In a typical transaction where a landowner grants a conservation easement, the taker is ascertained – usually a land trust or governmental organization. Further, since a conservation "easement is a nonpossessory right to use the land of another that may be a permanent right, or a right for a limited period of time," a conservation easement is normally classified as an interest in real property.[307] Because a conservation easement creates an interest in real property, the easement "must be created or transferred as real property by an express or implied grant or reservation, or by prescription."[308] Upon completion of a written instrument, and any additional legal requirements applicable to a conveyance of real property, the parties have completed the conditions precedent to the conveyance of a conservation easement. Thus, in a typical conservation easement transaction, the taker is ascertained and the conditions precedent are fulfilled upon the completion of the underlying transaction.[309]

Additionally, courts will look at when an interest in real property vests when deciding if a conveyance violates the rule against perpetuities.[310] Since the grantor of a conservation easement grants the holder of the easement various rights, including the right to prevent development, monitor the easement, and enforce the terms of the easement, a conservation easement will convey present rights to the conservation easement holder.[311] Since the burdened landowner is typically restricted from engaging in enumerated and

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305. Phillips Petroleum Co. v. Lovell, 392 S.W.2d 748, 751 (Tex. Civ. App. 1965) (noting that "'[l]eading text writers agree that the rule against perpetuities is applicable to easements").

306. *See generally* Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 445 n.51 (2002). The author stated that "[g]enerally, [conservation easements] do not [violate the rule against perpetuities] because they are 'vested' at their creation--not created in an unascertained person, not subject to a condition precedent and not contingent." *Id.* The author also noted that "'[s]ome perpetual conservation easements are 'defeasible' and subject to 'executory limitation' upon the happening of a specific event . . . . Even then, the easement, in the hand of the original holder, is not subject to the Rule Against Perpetuities because it is subject only to a condition subsequent." *Id.*

307. 6 HARRY D. MILLER & MARVIN B. STAR, CALIFORNIA REAL ESTATE § 15:4 (3d ed. 2002).

308. *Id.* § 15:5. For example, under the real property system, the granting of an easement falls under the purview of the statute of limitations which requires a "written instrument signed by the party to be bound thereby." DUKEMINIER, *supra* note 43, at 783.

309. *See generally* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS & LICENSES IN LAND § 3:2 (2003).

310. For example, one court has stated that "[i]f a future estate or interest vests within the time prescribed in the rule against perpetuities, it may continue beyond such period without violating the rule." Kenoyer v. Magnolia Petroleum Co., 245 P.2d 176, 179 (Kan. 1952).

311. Morrisette, *supra* note 7, at 379.

agreed upon activities, a conservation easement will likewise create an immediate servitude.[312] Thus, a conservation easement will typically vest immediately upon the completion of the underlying transaction that created the conservation easement.[313]

In support, commentators maintain that the rule against perpetuities is concerned with the contingent interests vesting too remotely and is not applicable to a vested interest, even if possession is not immediate:

> The rationale for this distinction [is] that while a contingent remainder [is] inalienable, a vested remainder could be conveyed to a third party. Like the rules that came before it, the purpose of the Rule [against Perpetuities is] to promote alienability of property. Since vested interests [are] already fully alienable, it [is] not necessary for the Rule [against Perpetuities] to apply to them.[314]

Judicial applications of the rule against perpetuities provide support for the proposition that conservation easements will not run afoul of the rule against perpetuities. In *McGinnis*, the court found that a property interest in mineral royalties was a vested interest not subject to the restraints of the rule against perpetuities.[315] The court found that the taker of the royalty interest had rights regardless of ownership of the burdened land or mineral interest at issue.[316] The court also found that the taker's beneficial interest was not dependent upon the happening of a future event.[317] Similarly, conservation easement holders retain the rights granted in the conservation easement deed regardless of the owner of the burdened land.[318] Likewise, conservation easements are conveyed at the completion of the transaction, which affords the conservation easement holder present, non-possessory rights in the burdened land.[319]

In *Turnbaugh*, the court held that a future access easement granted to a county did not violate the rule against perpetuities.[320] In reaching its holding, the court discussed "whether a property interest was validly transferred from the subdivider of the property to the county."[321] The court found that all the necessary steps to granting an easement were completed and the

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312. *Id.* at 379 & n.16.
313. 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation* § 47 (2003).
314. Shively, *supra* note 266, at 379.
315. McGinnis v. McGinnis, 391 P.2d 927, 930-31 (Wyo. 1964).
316. *Id.* at 930.
317. *Id.*
318. Gustanski, *supra* note 5, at 16.
319. *Id.*
320. Turnbaugh v. Chapman, 68 P.3d 570, 573 (Colo. Ct. App. 2003).
321. *Id.* at 572.

subdivider intended to grant the easement to the county.[322] Further, the court found that the easement interest was dedicated to the county, not reserved to the subdivider, and that the easement vested at the completion of the transaction.[323]

The court in *Turnbaugh* recognized that the rule against perpetuities does not invalidate every perpetual interest in land, such as perpetual interests that vest immediately upon the completion of the underlying transaction.[324] Likewise, a conservation easement transaction will not violate the rule against perpetuities if the underlying transaction is completed, legally valid, and if the grantor intended to grant the conservation easement.[325] Conservation easements often convey present rights in the burdened property; hence, *Turnbaugh* is closer to violating the rule against perpetuities because it dealt with the conveyance of future rights.[326]

Furthermore, the Kansas court in *Moody* v. *Bayer Construction Co., Inc.*, recognized that a real property interest vests when the holder of the interest can enforce the terms of the agreement, or has presently conveyed rights.[327] In discussing the plaintiff's right to compel restoration of the defendant's property, the court stated that "[t]his right was theirs and no event in the future could take it from them. Therefore, there was no contingency on whether plaintiffs would enjoy this right, just a question of when. The estate was vested and not subject to the rule [against perpetuities]."[328]

Moody represents a situation most resembling the conveyance of a conservation easement. The rights in *Moody* were non-possessory rights to compel restoration of defendant's land: The plaintiffs had the right to monitor the restoration and the right to enforce the terms of their agreement.[329] Similarly, conservation easements are non-possessory rights to the burdened land, which also include enforcement and monitoring rights.[330] The *Moody* court was unequivocal in its assertion that an agreement which conveys present rights does not violate the rule against perpetuities, recognizing further that the rule against perpetuities is not concerned with interests that vest immediately.[331] Consequently, the aforementioned cases illustrate that a court will likely uphold a typical conservation easement transaction with respect to the rule against perpetuities if the underlying transaction is valid and complete.

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322. *Id.*
323. *Id.* at 572-73.
324. *Id.*
325. *See generally* Gustanski, *supra* note 5, at 9-12.
326. *See Turnbaugh*, 68 F.3d at 572.
327. 627 P.2d 1171, 1173 (Kan. Ct. App. 1981).
328. *Id.*
329. *Id.*
330. *See id.* at 1172-73.
331. *See id.* at 1173.

In addition to the strong indication that the conveyance of a conservation easement will not violate the rule against perpetuities, many state courts and legislatures indicate that the rationale behind the rule against perpetuities is no longer valid:

> While the common law rules protect the long-term marketability of land by restricting the use of servitudes, they do so at the cost of restraining the ability of willing parties to agree freely to provisions regarding the future use of the land. Modern recording laws and title insurance virtually eliminate the possibility that a future buyer will be unaware of any servitudes attached to the property. In addition, productive use of land today is not always measured by productive economic value. The preservation of ecological diversity, agricultural lands, and open space serves an important public good. Furthermore, it is not always the case that a servitude that restricts how land may be used in the future will drive down the value of the land; servitudes that protect the land by preventing specific uses may actually increase the value of the land and the value of nearby land.[332]

III. Recommendations

Because the rule against perpetuities arguably will not invalidate a conservation easement, the Wyoming Legislature should focus its attention on providing meaningful and productive conservation easement legislation. In providing legislation, the Wyoming Legislature has options on how to address the perpetuities issue. Some states, such as Kansas and Alabama, require that a conservation easement be created for a fixed term rather than in perpetuity.[333] A system of prohibiting perpetual conservation easements would advance the notion that land is an extremely valuable resource because it is a freely transferable commodity.[334] Land is valuable because it "is a commodity that may be bought, sold, or otherwise transferred within the structure of rights and obligations that define a market."[335] Such a system recognizes that by eliminating land as a commodity that can be bought and sold freely for developmental purposes and by decreasing the attractiveness of buying land for the majority of the Nation's citizens, conservation ease-

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332. Morrisette, *supra* note 7, at 384.
333. Mayo, *supra* note 14, at 40.
334. Lawrence W. Libby, *Farmland Protection Policy: An Economic Perspective*, Center for Agriculture in the Environment, *available at* http://www.aftresearch.org/researchresources/wp/wp97-1.html (last visited Feb. 6, 2003).
335. *Id.*

ments threaten a highly cherished aspect of American society—the free alienability of land.[336]

Further, a system of providing for fixed term conservation easements might alleviate the fear over loss of equity in land and the possible loss of private ownership of the encumbered land.[337] A conservation easement may reduce the value of the burdened land because the land has been stripped of valuable rights, such as the right to develop the land.[338] Some commentators believe that land burdened with a conservation easement "ordinarily comprises only about ten to fifty percent of the equity of the property, depending on the practical feasibility of development of land in its unencumbered state and the range of the rights acquired by the easement."[339] As such, "[t]he bundle of private rights to the land has been so severely diminished that the farmer, rancher, or forester is essentially a tenant on his own land."[340]

Additionally, if a landowner owning a parcel of land burdened by a conservation easement becomes insolvent or if the land ceases to be viable for agricultural production, the land may become essentially worthless without the developmental rights.[341] Without adequate means to remove the conservation easement's restrictions, the land may become unproductive.[342] From a public policy standpoint, the existence of unproductive land is troublesome when it results from a landowner limiting his or her land's uses in perpetuity:

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336. *Id.*

337. *See generally* Carol W. LaGrasse, *Land Trusts Threaten Private Property, Alliance for Citizens Rights, available at* http://www.keepourrights.org/easmnt5.htm (last visited Aug. 4, 2003).

338. Generally, a "way to visualize a conservation easement is to think of owning land as holding a bundle of sticks." Little Traverse Conservancy, *What is a Conservation Easement?, available at* http://www.landtrust.org/ProtectingLand/EasementInfo.htm (last visited Oct. 3, 2003). The bundle of sticks analogy illustrates:

> Each one of these sticks represents the landowner's right to do something with their property. The right to build a house, to extract minerals, to lease the property, pass it on to heirs, allow hunting are all rights that the landowner has. A landowner may give up certain development rights, or sticks from the bundle, associated with their property through a document called a conservation easement.

Id.

339. LaGrasse, *supra* note 337.

340. *Id.*

341. *See generally id.*

342. Some legal challenges to the continued existence of conservation easements include the doctrine of changed conditions, the doctrine of merger, and the public policy against the dead hand control of land. However, these doctrines are essentially untested in judicial adjudications with respect to conservation easements, and some authors cite significant impediments to their successful use when attempting to remove a conservation easement. *See generally* Tapick, *supra* note 22, at 278-82.

> [T]he fear [is] that a permanent decision regarding the use of land today may cease to be a desirable decision at some point in the future. [Some] scholars generally believe that it is socially desirable that the wealth of the world be controlled by its living members and not by the dead.[343]

On a practical note, the existence of unproductive land may lead to more federal control of what was once private land. One author maintains that when once productive land becomes unproductive, and the land is encumbered by a conservation easement, then "the only buyer for the land may be [the] government. Thus, the conservation easement is in essence a step along the way from 100 percent private to 100 percent government ownership."[344] In a state already comprised of approximately 6.2% state held land and approximately 47.7% federally owned land, even the possibility of facilitating further state or federal land ownership in Wyoming may outrage citizens and caution legislators.[345]

In contrast, the Wyoming Legislature could pass conservation easement enabling legislation similar to that of the Uniform Conservation Easement Act.[346] Such legislation would offer landowners and conservation easement holders a method of utilizing conservation easements outside of the inadequate common law constraints.[347] Conservation easements are prevalent in Wyoming, with various land trusts operating successfully within the state.[348] Many of these land trusts and governmental agencies have been

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343. *Id.* at 281 (quotations omitted); *see also* Points v. Barnes, 301 So. 2d 102, 104 (Fla. Dist. Ct. App. 1974) (ruling that portion of agreement which "permanently depriv[ed] the grantor of any reasonable use of the property . . . is, indeed, against public policy and, therefore, is void and unenforceable").

344. LaGrasse, *supra* note 337.

345. DAVID T. TAYLOR, WILLIAM D. RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, THE ROLE OF AGRICULTURE IN MAINTAINING OPEN SPACES IN WYOMING (2003).

346. *See, e.g.*, UCEA (1981).

347. *See generally* Maureen Rudolph & Adrian Gosch, *A Practitioner's Guide to Drafting conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RESOURCES J. 143, 147-48 (2000) (stating that the purpose of the UCEA was to remove conservation easements from operation under the common law).

348. For example, the Jackson Hole Land Trust and The Nature Conservancy have been holding and monitoring conservation easements successfully for the past decade. *See generally* Baldwin, *supra* note 73, at 99. Recently, other land trusts have surfaced in the past few years, such as the Green River Valley Land Trust and the Wyoming Stock Growers Agricultural Land Trust. *See generally* The Nature Conservancy, *Landscapes: The Green River Valley*, *available at* http://www.tncwyoming.org/where/greenriver.shtml (noting that the Green River Valley Land Trust was established in 2000) (last visited Oct. 3, 2003); Wyoming Stock Growers Agricultural Land Trust, *Organizational Description*, *available at* http://www.wyostockgrowers.com/wsgalt/ (last visited Oct. 3, 2003).

> [The] Wyoming Stock Growers Agricultural Land Trust (WSGALT) was founded by the Wyoming Stock Growers Association in response to a growing need within the ranching community to provide voluntary, pri-

successful partially because of the perception that open spaces in Wyoming are decreasing rapidly.[349] According to the William D. Ruckelshaus Institute of Environment and Natural Resources, Wyoming agricultural lands are being converted to residential lands at an alarming rate.[350] Because the loss of agricultural land is perceived to be harmful to Wyoming, lawmakers are under pressure to enact legislation that aids in the preservation of agricultural land and open space.[351]

If the Wyoming Legislature enacted conservation easement enabling legislation which allowed conservation easements to be granted in perpetuity, the legislature may not be facilitating the decreased alienability of land or the dead hand control of the land. Other protective measures are in place which provide a disincentive to tie up land in perpetuity, such as the federal estate tax.[352] The federal estate tax operates by taxing "the transfer of property between generations."[353] In addition to the federal estate tax, Congress

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> vate sector mechanisms to assist landowners in retaining their land in agriculture and in passing it on to succeeding generations. WSGALT was incorporated as a nonprofit organization in Wyoming in December 2000 and became a federally registered charity in July 2001.

Id.

349. *See generally* WILLIAM D. RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, OPEN SPACE ISSUES IN WYOMING AND THE WEST, *available at* http://www.uwyo.edu/enr/ienr/OpSp.htm (last visited Oct. 3, 2003). The Ruckelshaus Institute states:

> In Wyoming, many people have become increasingly alarmed over the past decade about urban and rural sprawl, the associated loss of open spaces, and changes in the tangible and intangible values that Wyoming's wide open spaces provide. Early on, concerns were triggered by observing the explosive growth in neighboring states, particularly the developments along Colorado's front range and those around Salt Lake City. But more recently the causes for concern have been closer to home, extending from the proliferation of 40-acre ranchettes around our southeastern communities to the skyrocketing real estate values and trophy homes in northwestern Wyoming.

Id.

350. DAVID T. TAYLOR & SCOTT LIESKE, WILLIAM D. RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, SECOND HOME GROWTH IN WYOMING, 1990-2000 (2002), *available at* http://www.uwyo.edu/openspaces/docs/second%20Homes.pdf (Last visited on Mar. 13, 2003). For example, "[t]he number of second homes in Wyoming increased by more than 30%[,] nearly twice the national average," during 1990-2000." *Id.*

351. The loss of agricultural land may be harmful in Wyoming for numerous reasons, such as the idea that "[r]ural residential developments tend to demand more in public services than they contribute in tax revenue." *Id.* The fact that Wyoming legislators have attempted numerous times to enact conservation easement enabling legislation demonstrates that they are under pressure by some constituents to help facilitate the use of conservation easements.

352. Shively, *supra* note 266, at 372 & n.9 (stating that the purpose of the estate tax was to compensate for loss revenue due to World War I and to help pay for the costs of the war).

353. *Id.*

> adopted the generation-skipping transfer tax [in 1978] based on the philosophy that wealth should be subject to the estate tax at least once in each generation. The generation-skipping tax levies a tax on any conveyances of property to a generation more than once removed from the donor. This tax is calculated at the maximum estate tax rate. Therefore, it creates a disincentive to the gifting of future interests, which in turn promotes the free alienation of property.[354]

In support of the view that allowing conservation easements in perpetuity will not lead to decreased alienability of land, some states have already abolished the rule against perpetuities.[355] These states have abolished the rule against perpetuities because of, among other reasons, the rule's rigidity, its complexity, and its confusing effect on practitioners.[356] For example, the rule against perpetuities "invalidates an interest if there is any possibility, however unrealistic, that the interest may vest outside of the perpetuities period."[357] Additionally, the rule against perpetuities is susceptible to crafty manipulation which in some circumstances may allow a drafter to "create an interest that would last for over one-hundred years without technically violating the Rule."[358]

By allowing conservation easements in perpetuity, the Wyoming Legislature would essentially be codifying the existing practice of granting conservation easements under the common law. Currently, the common law as it operates in Wyoming allows conservation easements to be granted in perpetuity.[359] This fact is evidenced by the hundreds of successful, perpetual conservation easements that have been granted and gone unchallenged in Wyoming.[360] In addition, the Wyoming Legislature could permit the use of perpetual conservation easements and enable landowners to receive valuable federal estate and income tax benefits, which are currently only available for perpetual conservation easements.[361]

CONCLUSION

The use of conservation easements, in Wyoming and nationwide, is prevalent: "Backed by the wealth of the major land trusts and powerful

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354. *Id.*; I.R.C. §§ 2601-2663 (1998) (enactments of the generation-skipping transfer tax).
355. Some of the states that have currently abolished the rule against perpetuities include Alaska, Arizona, Delaware, Idaho, Illinois, Maryland, South Dakota, and Wisconsin. John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 HOFSTRA L. REV. 23, 85 n.273 (2002).
356. Shively, *supra* note 266, at 380.
357. *Id.*
358. *Id.* at 381.
359. *See generally* Lindstrom, *supra* note 53, at 23.
360. *Id.*; *see also* Anderson, *supra* note 60, at 424, 438-39.
361. *See generally* PERRIGO, *supra* note 64.

foundations such as the Pew Charitable Trusts, the conservation easement movement has gathered seemingly unstoppable momentum during the past two decades."[362] However, Wyoming is only one of two states in the Nation that has succeeded in fending off conservation easement enabling legislation, thus proving to be a thorn in the side of both the conservation easement movement and supporters of conservation easements.

First, the Wyoming Legislature seemed to fear the effect of conservation easement enabling legislation on Wyoming's real property tax revenues. However, ample authority suggests that the use of conservation easements will not threaten a state's real property tax revenues. Not only is it difficult to predict the effect of conservation easements on the state's real property tax revenues, but county assessors are often hostile to downward reassessments of real property. Furthermore, the significance of real property tax revenues to a county's budget depends on the county's mineral wealth, whether conservation easements are placed on agricultural or non-agricultural lands, and the cost of providing community services to lands burdened by conservation easements versus non-encumbered lands. Finally, the loss of property tax revenues may be mitigated by an increase in value of the burdened land and of lands surrounding conservation easement burdened lands.

If the Wyoming Legislature continues to view conservation easements as a threat to state property tax revenues, then the legislature has options on how to enact meaningful conservation easement enabling legislation. The legislature could provide for a real property tax system that taxes the conservation easement holder for the value of the easement, that ignores the conservation easement when assessing the land, that mandates county assessors consider the effect of the conservation easement on the value of the land, or that provides for the state to reduce the amount of real property taxes owed based upon the fulfillment of certain conditions precedent. The latter approach, where the legislature provides that real property taxes will be reduced conditionally, would provide the legislature with a means to influence the use of conservation easements while minimizing the impacts on state and county revenues. By using a conditional approach, the legislature would have a meaningful tool to influence both where conservation easements are granted and what terms and conditions are included in a conservation easement conveyance.

Further, the 2003 Wyoming Legislature exhibited fears that conservation easement enabling legislation would violate the Wyoming Constitution's prohibition against perpetuities. The Wyoming Constitution prohibits perpetuities, and the Wyoming courts have interpreted its provision as embodying the traditional rule against perpetuities. The rule against perpetui-

362. LaGrasse, *supra* note 263.

ties essentially prohibits interests in land from vesting too remotely, thus is not a blanket prohibition against perpetual property interests. Since it is generally accepted that conservation easements vest upon the completion of the underlying transaction, any conservation easement enabling legislation that provides for perpetual conservation easements would likely neither violate the Wyoming Constitution or the statutory prohibition against perpetuities. Thus, the legislature should work to form practical and beneficial conservation easement enabling legislation that reflects the will of the Wyoming people while furthering compelling state interests.

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