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CONSERVATION EASEMENTS: A VIABLE TOOL FOR LAND PRESERVATION

Melissa Waller Baldwin¹

*Voice above,
Voice of thunder,
Speak from the
dark of clouds;
Voice below,
Grasshopper voice,
Speak from the
green of plants;
So may the earth
be beautiful.²*

The Navajo Indians have a tremendous regard for nature. The above song is an example of their deference. The song celebrates the sounds made in the natural world, with particular emphasis on those voices which beautify the earth.³ The singer comprehends the earth and air not only as part of his environment, but also as an extension of his humanity, intellectual development, and spiritual achievement as an individual and as a race.⁴

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2. N. SCOTT MOMADAY, *A First American Views His Land*, reprinted in , THE WINCHESTER READER, at 625 (Donald McQuade & Robert Atwan ed.1991).

3. *Id.*

4. *Id.* at 626.

Although the Navajo song proclaiming the earth's beauty may be generations old, the interest in the natural world continues today. Frequently, this interest manifests itself as a desire by a property owner to prevent future development on lands which many have significant sentimental, scenic, or recreational value. This article will discuss the options available to persons who wish to keep property in its present state. A focus is placed on conservation easements since this popular conservation method is common statutorily and relatively easy to use. Additionally, conservation easements are still in their infancy, with most in operation for fewer than forty years.⁵ There are, however, concerns with their use which must be addressed.

Part I of this article discusses the need for land conservation, beginning with the general concept of preserving land, then moving to the role played by public actors in land acquisition. Part II considers different options through which land may be preserved by private actors and offers a brief discussion of each option's advantages and disadvantages. Conservation easements are the focus of Part III. This section begins by discussing the differences between easements and conservation easements. The advantages of preserving land with a conservation easement will then be addressed by discussing the benefits to the grantor and the grantee, and the overall use of easements as a preservation tool. Finally, several problems associated with the use of a conservation easement will be presented. The final section of the article, Part IV, presents common and useful components to include in a conservation easement instrument.

PART I: THE MERITS OF LAND PRESERVATION AND THE GOVERNMENT'S RESPONSE

A. Land Preservation Merits

Focusing on the broad question of why land should be preserved, three examples of undesirable development may be illustrative. First, the Colonial Point Forest in northern Michigan is a 300 acre hardwood forest with 100 to 150 year old red oak, beech and white pine trees, and 300 year old sugar maples.⁶ The red oaks form the largest grouping of these

5. The idea of conservation easements for land use planning was first popularized by William Whyte in 1959. See William Whyte, *Serving Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BUL. 1 (1959).

6. LITTLE TRAVERSE CONSERVANCY, NATURE PRESERVE MINI GUIDE (undated) (on file with the *Land and Water Law Review*); LITTLE TRAVERSE CONSERVANCY, NATURE PRESERVE DIRECTO-

trees in Michigan's northern lower peninsula.⁷ This property was originally purchased by a timber company planning to log the entire area.⁸

Second, in 1989, the Hardeman Meadows part of a Jackson Hole, Wyoming cattle ranch was prepared to be sold and developed.⁹ This cattle ranch, owned by the Hardeman family, and its scenic and agricultural value, were widely recognized as a reminder of Wyoming's pioneer ranching heritage.¹⁰

Finally, a Maine farmer who owned a coastal farm realized that upon his death, his children would need to sell the property to developers to pay estate taxes.¹¹ This property, the Aldermere Farm, is a family farm and prime agricultural land.¹² However, this land also has aesthetic value; "[t]he Belted Galloway cattle grazing in the rolling green pastures . . . with the Camden Hills in the background" are frequently photographed as a scene representative of the area.¹³

Fortunately, in each case, the threatened property was preserved through some method of conservation, such as a property purchase by, or a conservation easement granted to, a land trust organization.¹⁴ This movement toward land preservation is important because, as humans, we derive great benefits from natural diversity. Our national parks, for instance, provide a place for millions of families to learn about the splendid and unique areas of the United States, while enjoying an inexpensive and memorable vacation.

The interest in the national parks has exploded over the past forty years. The National Park System counted over 37 million visitors by 1950.¹⁵ By 1960, the numbers of visitors reached 135 million, with another jump to 252 million by 1990.¹⁶ The numbers of visitors is expected to

RY 16 (undated) (on file with the *Land and Water Law Review*).

7. LITTLE TRAVERSE CONSERVANCY, NATURE PRESERVE MINI GUIDE, *supra* note 6.

8. LAND TRUST ALLIANCE, LAND TRUSTS (undated pamphlet) (on file with the *Land and Water Law Review*).

9. LAND TRUST ALLIANCE, *supra* note 8.

10. *Id.*; JACKSON HOLE LAND TRUST 5 (undated pamphlet).

11. LAND TRUST ALLIANCE, *supra* note 8.

12. MAINE COAST HERITAGE TRUST, CONSERVATION EASEMENTS IN MAINE 13 (1990) (on file with the *Land and Water Law Review*).

13. *Id.*

14. LITTLE TRAVERSE CONSERVANCY NATURE PRESERVE MINI GUIDE, *supra* note 6, at 16; JACKSON HOLE LAND TRUST, *supra* note 10, at 5; MAINE COAST HERITAGE TRUST, *supra* note 12, at 13; LAND TRUST ALLIANCE, *supra* note 8.

15. Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 9 (1992).

16. *Id.* at 9.

reach 500 million by the year 2010.¹⁷ The interest in the natural world is not limited to the United States citizenry, either. At the Grand Canyon, of the 5 million visitors to the park in 1993, three out of every ten were citizens of foreign countries.¹⁸ The parks, however, serve another purpose. As stated by Bruce Babbitt, Secretary of the Interior, "Our national parks are important because they are a gateway to the conservation ethic. In these, our most precious sites, we can engage our people in a discussion of natural conditions, and of our place in relation to them."¹⁹

B. Role of Public Actors

Congress has responded to the need for environmental protection, recognizing the value of a diverse plant and animal ecology. Plants and animals presently taken for granted, may prove to be valuable resources. Congress recognized this possibility:

The value of this genetic heritage is, quite literally, incalculable. From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are the keys to puzzles which we cannot solve, and may provide answers to questions we have not yet learned to ask.²⁰

Examples of wildlife acting as potential resources include the functions performed by freshwater mussels to reduce water pollution, such as filtering water and storing nutrients within a river system.²¹ Freshwater mussels are also resistant to tumors, a feature which may prove beneficial to tumor prevention in humans.²² The Pacific yew was considered nothing more than a junk bush growing in the clear cut areas, until paclitaxel was discovered in its bark.²³ Paclitaxel is a natural agent used to fight cancer.²⁴ Minimizing the loss of life forms, so that humans may benefit from them at some future date, and acknowledging that each organism is entitled to exist for its own sake,

17. *Id.*

18. Bruce Babbitt, *Our National Parks*, NAT'L GEOGRAPHIC, Oct. 1994, at 45.

19. *Id.* at 13.

20. *Tennessee Valley Auth. v. Hill*, 437 U.S. 157, 178 (1978) (quoting Report of the House Committee on Merchant Marine & Fisheries on H.R. 37, H.R. REP. NO. 93-412 93rd Cong., 1st Sess., at 4, 5 (1973)).

21. Douglas H. Chadwick, *Dead or Alive: The Endangered Species Act*, NAT'L GEOGRAPHIC, Mar. 1995, at 22.

22. *Id.*

23. *Id.* at 26.

24. *Id.*

are reasons recognized by Congress for protecting plants and animals from extinction.²⁵

1. Purchase Acquisitions

The federal government has long played a role in preserving land through purchase-acquisition. This involvement resulted in the purchase of over 2 billion acres of land, including Alaska, from 1781 to 1867.²⁶ Yellowstone, the first national park, was created in 1872 "as a public park or pleasuring-ground for enjoyment and benefit of the people[.]"²⁷

The movement to acquire private lands to protect scenic and natural resources has continued into the twentieth century, with the creation of programs such as the Land and Water Conservation Fund.²⁸ This fund protects about 2.8 million acres of "nationally significant scenery, wildlife habitat, and recreational lands."²⁹ The number of national parks within the federal government's control has also increased throughout the twentieth century. When the National Park Service was created in 1916,³⁰ fourteen national parks and one reserve existed. Today there are fifty-one national parks, one hundred and two national monuments, eighteen national recreational areas, fourteen national seashores and lakeshores, and twenty-four national battlefields and military parks.³¹

Although the government does remain involved in land preservation,³² the current trend has been to scale back its involvement in purchasing property.³³ The cost of acquiring and maintaining properties has be-

25. See, e.g., Endangered Species Act (hereinafter ESA), 16 U.S.C. § 1531(c) (1994) ("All Federal departments and agencies shall seek to conserve endangered species and threatened species . . .").

26. JEAN HOCKER, CUTBACKS IN PUBLIC LAND ACQUISITION: OPPORTUNITIES FOR INNOVATION 226 in MONTANA LAND RELIANCE & LAND TRUST EXCHANGE, TOOLS AND CONCEPTS FOR LAND PRESERVATION (1982).

27. 16 U.S.C. § 21 (1994).

28. 16 U.S.C. §§ 4601-4 (1994).

29. HOCKER, *supra* note 26.

30. 16 U.S.C. § 1 (1994).

31. Babbitt, *supra* note 18, at 21.

32. See, e.g., ESA, 16 U.S.C. §§ 1531-44. The ESA has been described as the strongest land-use law in the nation. Chadwick, *supra* note 21, at 22.

33. For examples of Congress' recent attempts to reduce its involvement in environmental affairs, see, e.g., NATIONAL PARK SYSTEM REFORM ACT of 1995, H.R. 3055, 104th Cong., 1st Sess. (1995) (bill requires the Secretary to reexamine the goals and mission of the park service, determine which park areas do not conform with the plan, and present alternatives to managing these areas, including modification or termination); Dave Newbart, *Babbitt Vows to Retain Environmental Progress*, CAPITAL TIMES, June 14, 1995, at 3A (statement by Interior Secretary Bruce Babbitt that "he would not allow Congress to gut the Endangered Species or Clean Water Acts[]"); John Aloysius Farrell, *Clinton and Dole Meet, Seek Common Ground on Budget; Some Agreement, but Issues Remain*, BOSTON GLOBE, March 21, 1996, at 21 (describing Clinton's stance on not accepting a budget

come prohibitive as the available funds decline.³⁴ An additional problem with governmental purchase of land is that many owners are simply unwilling to sell or donate their property.³⁵

Government preservation efforts alone cannot satisfy the need to preserve and protect. One study found that "at least twenty-four percent . . . of major terrestrial and wetland ecosystems [are] inadequately represented on land managed by federal agencies and Indian land."³⁶ Additionally, land placed into the public domain through governmental purchase is often used for timber, grazing, farming or recreation purposes, rather than for preservation of the land's natural diversity, the initial reason for public purchase.³⁷ Finally, the land which is identified, purchased and preserved by the federal government typically is acquired on an ad hoc basis, rather than under a preconceived plan, often leaving preservation efforts unfinished.³⁸

Further evidence of the government's changing role in land preservation is the creation of the National Park Foundation.³⁹ This foundation works "to further the conservation of natural, scenic, historic, scientific, educational, inspirational or recreational resources for future generations of Americans," and is a nonprofit partner to the National Park Service.⁴⁰ Its objective is to establish a public organization with the authority to accept and administer gifts of real and personal property in support of the national park system's work, without the restrictions that would accompany a gift made directly to the government itself.⁴¹

The Foundation also actively seeks to establish joint efforts with corporate sponsors to continue its mission. "Expedition into the Parks" is

compromise because of a lack of funding for environmental issues by the Republican House).

34. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 443 (1984). Generally, Korngold argues that although freedom of contract principles are reinforced through their use, conservation easements are contrary to public policy and judicial precedent. The ability of one person to determine the use of land decreases flexibility and democracy in land use controls and encourages "dead hand controls." He continues by suggesting alternatives to reduce the negative impacts of conservation easements through legislative and judicial means.

35. PHILLIP M. HOOSE, *BUILDING AN ARK; TOOLS FOR THE PRESERVATION OF NATURAL DIVERSITY THROUGH LAND PROTECTION* 27 (1981).

36. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* 19 HARV. ENVTL. L. REV. 303, 310 (1995) (focusing on the need for biodiversity conservation on our private lands).

37. HOOSE, *supra* note 35, at 1-2.

38. Farrier, *supra* note 36, at 312.

39. National Park Foundation Act, 16 U.S.C. § 19(e) (1994).

40. *Id.*

41. H.R. REP. NO. 623, 90th Cong., 1st Sess., at 2356 (1967).

a program which fosters this collaborative effort.⁴² The goals of this program are to provide a vehicle for park supporters to provide funding and volunteer hours for monitoring, research, planning and managing our national parks.⁴³ One corporation participating in this program is Canon U.S.A., Inc. Canon contributed over \$1 million, plus equipment, to support work on photographic surveys, flora and fauna sampling, mapping park lands and wildlife monitoring.⁴⁴

On the surface, the creation of this Foundation appears to be an illustration of governmental support for the national parks. The goals of the program are certainly laudable.⁴⁵ Unfortunately, the result of this is that government is allowed to abdicate responsibility for continued debate regarding utilization and preservation of our natural resources by transferring these decisions onto private individuals and the private sector. This shifting of responsibility for our natural resources from public to private sources further evidences the decreasing involvement of the government in land preservation efforts.

2. Eminent Domain

Another method for governments to preserve land is through the use of eminent domain. When a government asserts its eminent domain powers, a piece of property is condemned for "public use" and the government must pay the owner "just compensation."⁴⁶ Use of this method has been declining, just as purchasing lands for public use has declined.⁴⁷ Often the local community in proximity to the land is financially unable to purchase property due to a lack of available funds.⁴⁸ Further, this method may decrease the community's property tax base.⁴⁹ Finally, the time and expense of procuring funds and engaging in legal action to acquire the property is a detriment.⁵⁰ For instance, the Forest Service lobbied for ten

42. PARKS IN JEOPARDY, NATIONAL PARK FOUNDATION (undated) (on file with the *Land and Water Law Review*); Letter from Staci Tyler, Development Intern with the National Park Foundation (Oct. 24, 1996) (on file with the *Land & Water Law Review*).

43. PARKS IN JEOPARDY, *supra* note 42.

44. *Id.*; Letter from Staci Tyler, *supra* note 42.

45. See 16 U.S.C.A. § 19(c)(1994); H.R. REP. NO. 623, 90th Cong., 1st Sess., at 2356 (1967).

46. U.S. CONST. amend V; 6A RICHARD F. POWELL, POWELL ON REAL PROPERTY § 876.13[1] (1995).

47. See *supra* notes 32-45 and accompanying text.

48. Rebecca Rice-Osterhoudt, Note, *Farmland Preservation in Vermont and the Creative Use of Land Trusts*, 11 VT. L. REV. 603, 611 (1986).

49. *Id.*

50. Itzhak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Conserving Options*, 23 ENVTL. L. 185, 187 n.7.

years to acquire funds to purchase a particular piece of property.⁵¹ During this period, the property's value increased over 600%.⁵²

3. Zoning

Zoning regulations are another method which can be used by public bodies to ensure preservation of open space. Use of this method allows the local zoning board, through its police powers, to divide land into districts and permit only certain uses of land within these districts, consistent with the safety, health, morals and welfare of the public.⁵³ This option, however, is subject to many of the same criticisms as eminent domain,⁵⁴ and has the added complication of constitutional challenges.⁵⁵ Further, zoning regulations are created politically, the political process can also force its repeal, rezoning, or variance granting, as conditions change over time.⁵⁶ Ultimately, relying upon zoning regulations for land preservation is very risky.

The inability of the various levels of government to ensure sufficient preservation of land and ecosystems makes the need for private involvement imperative. The methods of governmental property purchase, eminent domain and zoning regulations, cannot adequately provide all the required property preservation. Thus, given that federal, state and local governments cannot be the only entities engaged in conservation. The remaining question is what form private involvement may take. This issue is addressed in the following sections.

PART II. OPTIONS AVAILABLE FOR LAND PRESERVATION BY THE PRIVATE ACTOR

A variety of methods exist for a private land owner to ensure preservation of land consistent with her personal goals. As a precursor to the discussion of land preservation methods, the land trust will be addressed. A land trust is a central component in the use of the other

51. WILLIAM H. WHYTE, JR., *THE LAST LANDSCAPE* 69 (1968).

52. *Id.*

53. 6 RICHARD F. POWELL, *POWELL ON REAL PROPERTY*, § 79C.01 (1995).

54. See *supra* notes 46-52 and accompanying text.

55. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a regulatory taking occurred when state mandated that beach front homes be built 300 feet away from the coast, violating the property owner's Fifth and Fourteenth Amendment right). See also Jon A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1, 13 (1972) (noting that zoning regulations have been subject to attack on due process, equal protection, and takings grounds).

56. Randee G. Fenner, *Land Trusts: An Alternative Method of Preserving Open Spaces*, 33 VAND. L. REV. 1039, 1040 (1980); POWELL, *supra* note 53, at §§ 79C.15[4]; 79C.16.

methods, as it is frequently the recipient of the interest in the property preserved. The focus of the discussion of land preservation methods will be on fee simple donations, bargain sales, covenants, and conservation easements.⁵⁷ Each of these alternatives will be addressed in this section, along with a discussion of the method's advantages and limitations, with the exception of conservation easements which are treated in Part III.

A. Land Trusts

The land trust has a unique role in land preservation. Unlike the other methods discussed in this section, a land trust's purpose is not to protect land, but to serve as a vehicle through which the chosen preservation method is implemented. A land trust is generally a non-profit, organization,⁵⁸ striving to protect lands important to the quality of life and environmental health of the community, state or region, through voluntary means.⁵⁹ In response to local conservation needs, the trust is typically a grantee and accepts preserved property in nearly any manner,⁶⁰ including the alternatives discussed herein.⁶¹

57. Additional options exist which are not addressed within this article. These include land exchanges, limited development agreements and deed restrictions. *See, e.g.*, ALAN D. SPADER, ET AL., NATIONAL CONSULTATION ON LOCAL LAND CONSERVATION: A REVIEW 124 *in* MONTANA LAND RELIANCE & LAND TRUST EXCHANGE, *supra* note 26; LAND TRUST ALLIANCE, *supra* note 8; LAND TRUST ALLIANCE, CONSERVATION OPTIONS FOR PRIVATE LANDOWNERS (1994) (on file with the *Land and Water Law Review*); LANCASTER FARMLAND TRUST, FARMLAND PRESERVATION GUIDE 8-13 (1992).

58. A governmental agency can act as a land trust. The non-governmental land trust is typically a nonprofit organization whereas the governmental agency is created through executive action or enabling legislation. For examples of legislation which considers governmental entities and non-profit land trust organizations as possible grantees of conservation easements, *see* UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 66 (Supp. 1995) (hereinafter U.C.E.A.); COLO. REV. STAT. § 38-30.5-104 (2) (1982); CONN. GEN. STAT. ANN. § 47-42(b) (West 1995); FLA. STAT. ANN. 704.06(3) (West 1988, Supp. 1996); KY. REV. STAT. ANN. § 382.800(2) (Michie/Bobbs- Merrill Supp. 1994); LA. REV. STAT. ANN. § 9:1272(2) (West 1991); N.Y. ENVTL. CONSERV. LAW § 49-0303(2)(3) (McKinney 1986); N.C. GEN. STAT. § 121-35(2) (1994); N.H. REV. STAT. ANN. §477:46 (1992); OHIO REV. CODE ANN. § 5301.68 (Anderson 1988); OR. REV. STAT. § 271.715(3) (1995); S.C. CODE ANN. § 27-8-20(2) (Law. Co-op. Supp. 1995); TENN. CODE ANN. § 66-9-303(2); (4) (1993); UTAH CODE ANN. § 57-18-3 (West 1994); WASH. REV. CODE ANN. § 64.04.130 (1994); W. VA. CODE § 20-12-3(b) (1996). *See also* LANCASTER FARMLAND TRUST, *supra* note 57, at 14-15.

In Maryland, a charitable state organization, the Maryland Environmental Trusts, has been established legislatively to accept real property interests when environmental appreciation and protection is promoted. MD. NAT. RES. CODE. ANN. §§ 3-201 to 211 (1989). The Internal Revenue Service also sanctions land trust usage. I.R.C. § 170(h) (1994).

59. LAND TRUST ALLIANCE, ABOUT THE LAND TRUST ALLIANCE (undated). Land trusts may take one of three forms, the charitable trust, the association, or the non-profit corporation. *See also* Kornfeld, *supra* note 50, at 204 (citations omitted). The charitable trust is the most common, *Id.*, and its use is assumed for the purposes of this paper.

60. *See* Farrier, *supra* note 36, at 346 (discussing conservation easements as within the role

Land trusts can also accept cash, bonds, or property which has little conservation value, with the condition that the items or property will be sold at fair market value to acquire more valuable land.⁶² Finally, the land trust may choose to manage the lands itself or convey the interests received to a third party.⁶³

Land trusts have the advantage of providing cost-effective conservation techniques, and offering quick responses and flexible options, especially in situations where the government is unable to fully aid in preservation.⁶⁴ The primary disadvantage to the land trust option is the confidence the land owner must have in the creators and operators of the trust. For instance, a viable trust must create articles of incorporation, practice sound financial management, and engage in activities to increase membership and fundraising.⁶⁵ The ability of the trust to establish and maintain tax-exempt status is also a necessary concern of the landowner, as is the trust's determination and selection of conservation goals and projects.⁶⁶ A property owner must exercise caution when deciding which trust organization to use, because many smaller organizations do not have the expertise or resources to establish the monitoring and management systems necessary to ensure conservation of the land consistent with the landowner's intentions.⁶⁷

The popularity of land trusts has increased dramatically, although the concept is not new.⁶⁸ A 1994 survey conducted by the Land Trust Alliance, an organization dedicated to providing "services, publications, information, and training for land trusts and other land conservation organizations, [which] work for public policies that advance land conser-

played by land trusts).

61. See *infra* notes 88-112 and accompanying text.

62. Kornfeld, *supra* note 50, at 206.

63. *Id.* at 206-07.

64. LAND TRUST ALLIANCE, *supra* note 8.

65. See, e.g., LAND TRUST ALLIANCE, *STARTING A LAND TRUST: A GUIDE TO FORMING A LAND CONSERVATION ORGANIZATION* (1990). This is a manual designed for persons starting a land trust, or as orientation literature for new board members and volunteers. The text includes advice, case studies, resource lists, and sample documents. The goal is to present the needed information for establishing and operating a successful land trust.

66. *Id.* See also LAND TRUST ALLIANCE, *THE STANDARDS AND PRACTICES GUIDEBOOK: AN OPERATING MANUAL FOR LAND TRUSTS* (1993). Although covering much of the same material as the previously cited manual, this text goes into much more detail regarding the operation of the trust, including information on board responsibilities, achieving tax exempt status, and selecting conservation projects.

67. Farrier, *supra* note 36, at 348.

68. The Trustee of Reservations, a Massachusetts Conservancy, was created in the 1800's to "preserve for the public, places of natural beauty and historic interest within the Commonwealth of Massachusetts." Fenner, *supra* note 56, at 1042 n.20 (quoting THE TRUSTEE OF RESERVATIONS, 1977 ANNUAL REPORT (1978)). This trust preserves eighty acres of Massachusetts land. LAND TRUST ALLIANCE, *supra* note 8.

vation[.]”⁶⁹ found a 23% increase in the number of trusts in four years, protecting over four million acres of land, an area larger than the size of Connecticut.⁷⁰ The survey concluded that land trusts were the fastest growing tool of the conservation movement, calculating that one trust per week was formed during the past four years.⁷¹

The highest concentration of land trusts are found in the New England area, with more than a third of the nation’s total.⁷² The West Coast saw the greatest increase in numbers, with the creation of fifty-four new land trusts.⁷³ Examples of land trusts in operation include preservation of the California coastline through the Big Sur Trust, maintenance of a covered bridge in the Brandywine Conservancy’s Laurels Reserve, Pennsylvania, and protection of open spaces in Chicago through the Open Lands Project, whose activities include planting trees.⁷⁴ One of the most well known land trust organizations which receives transferred properties is the Nature Conservancy. The Conservancy protects more than eight million acres in the United States and Canada and owns the largest private system of sanctuaries in the world.⁷⁵

Another prominent land trust is the Jackson Hole Land Trust. This organization was formed in 1980 to ensure protection of Jackson Hole’s scenic, wildlife and agricultural lands.⁷⁶ Presently, nearly eight thousand acres in and near Teton County are protected by the Trust.⁷⁷ Plans in progress, encompassing from forty-two different projects, will protect an additional twenty thousand acres.⁷⁸ This high level of success is attributed to the fact that the Trust works in cooperation with landowners in implementing voluntary, private forms of land preservation.⁷⁹

Two instances in particular have proven that the Jackson Hole Land Trust serves a valuable purpose. The first occurred in 1989, when a

69. LAND TRUST ALLIANCE, *supra* note 8.

70. LAND TRUST ALLIANCE, SPECIAL REPORT: THE 1994 NATIONAL LAND TRUST SURVEY (Fall 1994). For comparison purposes, 53 land trusts were in existence in 1950, 132 in 1965, 308 in 1975, 535 in 1985, 889 in 1990 and 1095 in 1994. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* Interestingly, the Rocky Mountain area has relatively few trusts, with a total of 27. *Id.*

74. LAND TRUST ALLIANCE, *supra* note 8.

75. THE NATURE CONSERVANCY, 1994 ANNUAL REPORT (1994) (on file with the *Land and Water Law Review*).

76. JACKSON HOLE LAND TRUST, *Status and Success of the National Land Trust Movement 2* (Spring & Summer 1996).

77. *Id.*

78. George McClelland, *Message from the President*, JACKSON HOLE LAND TRUST SPRING & SUMMER NEWSLETTER, 1996, at 1 (on file with the *Land and Water Law Review*).

79. JACKSON HOLE LAND TRUST, *supra* note 76, at 2.

developer planned to build seventy to eighty houses on a one hundred and forty seven acre haymeadow in Jackson Hole.⁸⁰ The Trust was able to negotiate with the landowner and obtained an option to purchase the land for \$1.5 million.⁸¹ Within months, private donations to the Trust from over 1000 donors raised two-thirds of property's purchase price.⁸² The remainder came from the county.⁸³

The second example of the Trust protecting valuable natural resources occurred with the acquisition of seven hundred and sixty acres in 1991. This property was located within the boundaries of Grand Teton National Park, but owned by a private individual. On this land, lived bald eagles, trumpeter swans, whooping cranes and moose.⁸⁴

The need for acquisition arose when a developer considered purchasing this acreage for a ninety-seven home subdivision.⁸⁵ Within eighteen months, the Trust raised the \$4.5 million purchase price, but not without extensive negotiating, fund raising and maneuvering.⁸⁶ For example, at the closing, fifteen people and twenty-one documents were involved.⁸⁷ Ultimately, eighty of the acres were transferred to the U.S. Forest Service.⁸⁸ The remainder of the acreage was acquired by a private buyer who granted the Trust a conservation easement.⁸⁹

B. Fee Simple Transfers

Despite the unwillingness of many owners to sell or donate their land to the government or conservation groups,⁹⁰ a transfer of an unrestricted estate in fee simple to a land trust is an effective land preservation tool. On one hand, this is an effective strategy for a grantor who does not wish to pass the land to heirs, owns unused property, has substantial property holdings and wishes to relieve estate tax burdens, or desires to

80. John Barbour, *Nature Conservancy Buys Up Land to Ward Off Development; Preservation: Conservationists with Success in Law and Business Bring Money to the Cause and Fuel Ambitious Acquisitions*, L.A. TIMES, Feb. 25, 1990, at A6; JACKSON HOLE LAND TRUST, *supra* note 10, at 5.

81. Barbour, *supra* note 80.

82. *Id.*

83. *Id.*

84. JACKSON HOLE LAND TRUST, *supra* note 10, at 11.

85. Reuter, *Land Trusts Beat Out Developers; Savvy Environmentalist Groups Use 100 Year Old Method to Save Chunks of U.S. Wilderness*, ROCKY MTN. NEWS, July 2, 1995, at 14A.

86. *Id.* JACKSON HOLE LAND TRUST, *supra* note 10, at 11.

87. Kathleen Ingley, *Paying to Protect the Desert; Land Trusts Use Money, Other Means to Preserve Property*, ARIZ. REPUBLIC, Apr. 17, 1995, at A1.

88. See Reuter, *supra* note 85.

89. *Id.*

90. See HOOSE, *supra* note 35 and accompanying text.

no longer manage and care for the land.⁹¹ The grantee's advantages, on the other hand, include outright ownership of the property and an enduring restriction on the use of the land.⁹²

Some experts favor this option because of the ease of managing the property as an owner, as compared to the landowner cooperation in property management required by other land preservation methods.⁹³ The grantee also has the flexibility to ensure that, while the ultimate purpose of the grantor's intent is fulfilled, if another property better suits conservation goals, the new property can be acquired for that purpose and the original property's use shifted to an alternate focus.⁹⁴ The largest disadvantage of this method is the faith the grantor must have in the grantee. Because the grantee has the ability to administer or dispose of the property in nearly any desired manner, the grantor must be assured that the grantee will use the property in a manner consistent with the grantor's wishes.⁹⁵ Furthermore, some experts advise against fee acquisitions as a land preservation tool, citing a lack of effectiveness and scope in private land preservation due to high purchase and maintenance costs.⁹⁶

Variations on fee simple transfer exist. For instance, the transfer to the land trust could be of a remainder interest. In this case, the donor retains the right to live on the land during some specified time period, and transfers full title of the property to an organization upon expiration of that period.⁹⁷ Another alternative is to donate the land by will.⁹⁸ If this method is chosen, an important consideration is the willingness of the recipient to accept the gift.⁹⁹ Further, negotiations to determine the arrangements between the donor and the recipient should be completed during the donor's lifetime, rather than after the donor's death, with the estate's personal representative as the interested party.¹⁰⁰

91. LAND TRUST ALLIANCE, *supra* note 57.

92. Kornfeld, *supra* note 50, at 188. However, the "in perpetuity" nature of land preservation has its detractors. See *infra* notes 180-87 and accompanying text.

93. HOOSE, *supra* note 35, at 122. For a discussion of the drawbacks of conservation easements, see *infra* notes 180-265 and accompanying text.

94. Fenner, *supra* note 56, at 1056. This alternate focus typically includes the right of the conservation organization to sell the property and apply its proceeds to the purchase of a better suited property. Kornfeld, *supra* note 50, at 206.

95. Kornfeld, *supra* note 50, at 188-89.

96. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 6 (1989).

97. LAND TRUST ALLIANCE, *supra* note 57.

98. *Id.*

99. HOOSE, *supra* note 35, at 99.

100. *Id.*

C. Bargain Sales

The bargain sale alternative is useful to an individual who needs immediate income from the property, yet still desires the land to be preserved.¹⁰¹ This option constitutes a part sale and part gift of the property to a land trust. The "sale" by the property owner is the selling price of the property, typically an amount below the property's fair market value.¹⁰² The seller's "gift," the difference between the sale price and the property's fair market value, is frequently deducted as a charitable donation from federal income taxes.¹⁰³ This alternative can be very advantageous to all parties. The seller, for instance, receives immediate income, an income tax deduction and possibly a lower tax bracket, although capital gains tax may be incurred.¹⁰⁴ The land trust purchaser also benefits, acquiring land at a significantly reduced cost.¹⁰⁵ The main disadvantage, however, is the tax code charitable deduction requirements the grantor must meet.¹⁰⁶

D. Covenants

For the land owner who prefers to not sell or transfer his property, another alternative is a covenant. Basically, a covenant is a promise by the grantee to the grantor to either perform or refrain from performing some act.¹⁰⁷ In this case, the grantee may not be a land trust, but another private individual. The benefits of a covenant include the ease with which the method may be used, since the restriction need only be included in the deed.¹⁰⁸ These restrictions are also strictly enforceable by the courts, in contrast to other alternatives.¹⁰⁹ Finally, long-term control may be accomplished if a covenant successfully meets the necessary requirements to bind and benefit subsequent purchasers.¹¹⁰

101. LAND TRUST ALLIANCE, *supra* note 57.

102. *Id.*

103. *Id.*

104. HOOSE, *supra* note 35, at 98.

105. *Id.*

106. *See infra* notes 142-50, 212-33 and accompanying text.

107. 5 RICHARD F. POWELL, POWELL ON REAL PROPERTY §§ 670[2], 671 (1995).

108. *Id.* *See also* Kornfeld, *supra* note 50, at 193.

109. Kornfeld, *supra* note 50, at 193. A defeasible fee transfer, for instance, requires forfeiture before a court will enforce the agreement. *Id.* This is not a requirement for covenant enforcement. *Id.*

110. *Id.* The requirement referred to is termed "running with the land." This requires the covenant to "touch and concern" the land, the original covenanting parties to intend for the covenant to bind subsequent purchasers, and the existence of privity of estate. POWELL, *supra* note 107, at § 673[1].

Unfortunately, covenant use has three significant limitations. First, the doctrine of changed circumstances can be asserted by a grantee if an injunction is sought to enforce compliance with the covenant.¹¹¹ This equitable defense allows the grantee to escape compliance with the covenant because current, previously unanticipated, circumstances frustrate the purpose of the promises exchanged.¹¹² Second, enforcement of the covenant is nullified if the requirements to bind the grantor or subsequent purchasers are not satisfied.¹¹³ Finally, legislation hostile to covenant use may be enacted, limiting the usefulness of this method.¹¹⁴

PART III. THE CONSERVATION EASEMENT OPTION

The final method of land preservation to be discussed is the use of conservation easements. This section will begin by defining and discussing easements, and thereby, distinguishing conservation easements from regular easements. The advantages of preserving land with this method will then be addressed by discussing the benefits to the grantor and the grantee, and the overall use of easements as a preservation tool. Finally, several problems associated with the use of a conservation easement will be presented.

A. The Nature of Easements

An easement is generally defined as a nonpossessory interest in real property, which, by creating an interest in the land of another, allows the owner of the easement limited use of the encumbered land.¹¹⁵ Easements are generally divided into two categories, appurtenant or in gross. An appurtenant easement is one which burdens the owner's land, for the benefit of another's land.¹¹⁶ The land burdened by the easement is called the servient estate whereas the land benefitted is the dominant estate.¹¹⁷

111. POWELL, *supra* note 107, at §679[2]. *See also*, *Duffy v. Mollo*, 400 A.2d 63 (R.I. 1979); *Thodos v. Shirk*, 79 N.W.2d 733 (Ia. 1956); Joseph T. Bockrath, Annotation, *Change of Neighborhood as Affecting Restrictive Covenants Precluding Use of Land for Multiple Dwellings*, 53 A.L.R. 3d 492 (1973). Change of circumstances is also called change of neighborhood. POWELL, *supra* note 107, § 679[2] n.50.

112. POWELL, *supra* note 107, § 679[2].

113. Kornfeld, *supra* note 50, at 193; Dana & Ramsey, *supra* note 96, at 15-16. *See also supra* note 110.

114. *See, e.g.*, MINN. STAT. § 500.20 (1990).

115. NATIONAL BUSINESS INSTITUTE, INC., BOUNDARY LAW IN OHIO, 29 (1992); 3 RICHARD F. POWELL, POWELL ON REAL PROPERTY, § 34.01 (1995).

116. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 113, at 32; POWELL, *supra* note 115, §34.02[2][d].

117. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 33.

The general rule applied to appurtenant easements is that the benefit transfers to subsequent owners of the dominant estate.¹¹⁸

The second category is an easement in gross. This type of easement exists for the benefit of a person, regardless of whether this person holds the property, rather than for the benefit of another piece of property.¹¹⁹ The general rule applied to these types of easements is that they are personal rights, unassignable and uninheritable.¹²⁰ Because the law prefers appurtenant easements, rather than easements in gross, the majority of easements are construed to be appurtenant.¹²¹

Easements are also delineated by whether an affirmative or negative right is created. An affirmative easement permits the holder to engage in some activity on his own land which would otherwise interfere with the grantor's interest in land.¹²² A negative easement prohibits the owner of the servient estate from engaging in some activity which would otherwise be permissible.¹²³ Negative easements are generally created relative to appurtenant easements.¹²⁴

B. The Nature of Conservation Easements

A conservation easement is typically classified as an in gross, negative easement,¹²⁵ and is, thus, a special type of easement.¹²⁶ A commonly accepted definition of a conservation easement is:

118. *Id.* See also *Shields v. Titus*, 46 Ohio St. 528 (1889).

119. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 32; POWELL, *supra* note 113, at § 34.02[2][d].

120. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 32; POWELL, *supra* note 113, at § 34.02[2][d].

121. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 33. See also *Dunn Bros., Inc. v. Lesnewsky*, 321 A.2d 453 (Conn. 1973).

122. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 33; POWELL, *supra* note 115, at § 34.02[2][c].

123. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 33; POWELL, *supra* note 115, at § 34.02[2][c].

124. NATIONAL BUSINESS INSTITUTE, INC., *supra* note 115, at 33; POWELL, *supra* note 115, at § 34.02[2][c].

125. Korngold, *supra* note 34, at 435. A more appropriate term for this interest is "conservation servitude", since a conservation easement does not fit well into any of the traditional non-possessory interests.

126. The special treatment afforded conservation easements is evidenced by statutes indicating that a conservation easement is not unenforceable for lack of privity of contract or benefit to a particular estate, is assignable, and is to be construed differently from articles of dedication, restrictions, easements, covenants or conditions. See, e.g., U.C.E.A. § 4 (Supp. 1995); OHIO REV. CODE ANN. § 5301.70 (Anderson 1988); N.H. REV. STAT. ANN. §477:46 (1992).

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 agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving historical, architectural, archaeological, or cultural aspects of real property.¹²⁷

Conservation easements can apply to varying types of property. A conservation easement, for instance, can be used to preserve the facade and surroundings of historical structures, land of historical importance, an agricultural operation, or scenic resources.¹²⁸ A conservation restriction is simply another name for a conservation easement.¹²⁹

To create a conservation easement, a contract is voluntarily made between a landowner and conservation organization.¹³⁰ This contract typically restricts the type and amount of development permitted on

127. U.C.E.A. § 1(1) (Supp. 1995). To date, the Act has been adopted in 17 jurisdictions. These jurisdictions include Alaska, ALASKA STAT. §§ 34.17.010 to .060 (1990 Supp. 1995); Arizona, ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (1989); District of Columbia, D.C. CODE ANN. §§ 45-2601 to -2605 (1990); Georgia, GA. CODE ANN. §§ 44-10-1 to -8 (Supp. 1996); Idaho, IDAHO CODE §§ 55-2101 to -2109 (1994); Indiana, IND. CODE ANN. §§ 32-5-2.6-1 to 2.6-7 (Burns 1995); Kansas, KAN. STAT. ANN. §§ 58-3810 to -3817 (1995); Kentucky, KY. REV. STAT. ANN. §§ 382.800 to .860 (Michie/Bobbs-Merrill Supp. 1994); Maine, ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-B (West 1988); Minnesota, MINN. STAT. §§ 84C.01 to .05 (1996); Mississippi, MISS. CODE ANN. §§ 89-19-1 to -15 (1991); Nevada, NEV. REV. STAT. ANN. §§ 111.390 to .440 (Michie 1993); New Mexico, N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1995); South Carolina, S.C. CODE ANN. §§ 27-8-10 to -80 (Law. Co-op. Supp. 1995); Texas, TEX. NAT. RES. CODE ANN. §§ 183.001 to .005 (West 1993); Virginia, VA. CODE ANN. §§ 10.1-1009 to -1016 (Michie 1993); and Wisconsin, WIS. STAT. ANN. § 700.40 (West Supp. 1995).

128. JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* 5-6 (1988). This manual on conservation easements provides land trust and public agency personnel detailed guidance for operating an easement program. It also is designed to help landowners understand this land preservation technique, attorneys and land appraisers comply with the law and government officials perceive, understand and accommodate competing land use opportunities. Furthermore, the text gives sample criteria for measuring the desirability of a conservation easement, describes the burdensome nature of easements and explains methods and problems with amending and terminating conservation easements. See also LANCASTER FARMLAND TRUST, *supra* note 57; NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE LAND TRUST EXCHANGE, *APPRAISING EASEMENTS* 16 (1984).

129. DIEHL & BARRETT, *supra* note 128, at 5-6. See also N.J. STAT. ANN. §§ 13:8B-1 to -9 (West 1991) (conservation restriction is the accepted terminology).

130. Examples of conservation organizations are the Nature Conservancy, Audubon Society, or Trust for Appalachian Trail Lands. These conservation organizations are typically land trusts. See *supra* notes 58-89 and accompanying text. Some state statutes authorizing conservation easements require that if the easement is to be granted to a conservation entity, the entity be a non-profit organization. See *supra* note 58. Other states permit conservation easements to be granted only to governmental agencies. See, e.g., MASS. GEN. LAWS ANN. ch 40 § 8C (West 1993) (Conservation Commissioners); MINN. STAT. § 84.033 (1995) (Commission of Natural Resources).

the property in favor of the preservation of natural features of the land or for some other conservation purpose, thus limiting the exercise of certain ownership rights.¹³¹ After the contract has been properly drawn, signed and recorded, the conservation easement, in favor of the conservation organization, has been created, and binds present and future owners of the property with regard to the restricted activity.¹³² Because each landowner, parcel of property, and preservation need is unique, the conservation easement is specially designed according to the grantor's intentions and wishes.¹³³

C. Benefits of Preserving Land with Conservation Easements

The advantages of preserving land through conservation easements will be addressed in the following areas. First, the benefits to the grantor will be addressed, looking next at the grantee. Finally, the overall advantages of conservation easements will be presented.

1. Benefits to the Grantor

Personal flexibility is the main advantage of a conservation easement for the grantor. The landowner retains all rights in the property but for those specifically relinquished, and continues to use the property in any way consistent with the restrictions.¹³⁴ For instance, a conservation easement can be drafted to protect only certain areas of property, such as the farm land but not the homestead.¹³⁵ Further, an easement to protect farmland can prohibit subdivision and development but permit structures necessary for the farming operation.¹³⁶

The easement can also be written so that it lasts forever, or, if state law allows, for a specified term.¹³⁷ As expected, the landowner is obligated to allow the grantee on the property regularly to ensure the restrictions are not violated.¹³⁸ The grantee may require the owner

131. THE NATURE CONSERVANCY, CONSERVATION EASEMENTS (1992).

132. *Id.*

133. *Id.* See *infra* notes 264-278 and accompanying text.

134. THE NATURE CONSERVANCY, *supra* note 131.

135. DIEHL & BARRETT, *supra* note 128, at 6-7.

136. *Id.*

137. *Id.* For favorable tax benefits, an easement must be granted to a qualified charitable organization and last into perpetuity. Treas. Reg. § 1.170A-14(a) (1994). See ME. REV. STAT. ANN. tit. 33, § 477(3) (West 1988), for an example of a state which permits term easements, if so stated within the easement creating instrument. Several states, however, presume the conservation easement will be for a term period unless otherwise stated. See, e.g., KAN. STAT. ANN. § 58-3811(d) (1995); N.M. STAT. ANN. § 47-12-3(D) (Michie 1995). On the other hand, West Virginia requires a conservation easement to be granted for at least twenty five years. W. VA. CODE § 20-12-4(c) (1996).

138. DIEHL & BARRETT, *supra* note 128, at 7. The right of the grantee to inspect the property

to correct any violations and restore the property to its condition prior to the infraction.¹³⁹ Ultimately, although another entity has an interest in the property, the landowner continues to pay property taxes¹⁴⁰ and retains control over the property for those activities which are unrestricted because possession and title are not relinquished.¹⁴¹

An additional advantage to the grantor is the potential for an income tax deduction and reduced estate and property taxes. The donation of a conservation easement can be a tax deductible charitable gift for income tax purposes if a "qualified real property interest" is donated to a "qualified organization" "exclusively for conservation purposes."¹⁴² A qualified property interest includes a conservation easement granted in perpetuity,¹⁴³ and a qualified organization includes a federally recognized section 501(c)(3) nonprofit organization.¹⁴⁴ Conservation purpose is defined as the preservation of land areas for outdoor recreation or education, protection of natural habitats, preservation of open space, and preservation of historically important land areas or buildings.¹⁴⁵ The value of the deduction is determined by subtracting the fair market value of the property, without the easement restrictions, from the value of the encumbered property.¹⁴⁶

Whether the gift of the conservation easement occurs prior to death or through a will, a reduction in estate taxes is possible. In either case, the value of the land is reduced, affecting either the value of the property to be included in the estate, or the value of the estate.¹⁴⁷ Use of this preservation technique can be especially valuable for heirs to large historic estates and large open spaces such as farms and ranches.¹⁴⁸ Because the

is, of course, an important affirmative right received to the grantee. Korngold, *supra* note 34, at 436.

139. DIEHL & BARRETT, *supra* note 126, at 7. The Code requires restoration as a specified remedy possibility to a violation for an easement to qualify for the tax-deduction. Treas. Reg. § 1.170A-14(g)(5)(ii) (as amended in 1994).

140. NATURE CONSERVANCY, *supra* note 131.

141. Kornfeld, *supra* note 50, at 196.

142. I.R.C. § 170(h)(1) (1994).

143. I.R.C. § 170(h)(2)(C) (1994); Treas. Reg. § 1.170A-14(b)(2).

144. I.R.C. § 170(h)(3) (1994). This would include a land trust meeting section 501(c)(3) and Treas. Reg. § 1.170A-14(c)(1) (1994) criteria.

145. I.R.C. § 170(h)(4)(A) (1994).

146. Treas. Reg. § 1.170A-14(h)(3) (1994). The amount deducted on the federal income tax return is limited, however, to thirty percent of annual gross income of the year of the gift. I.R.C. § 170(b)(1)(B); (C) (1994); Treas. Reg. § 1.170A-8(d) (1972). Any additional amounts can be deducted in subsequent years, up to five years, subject to the continuing thirty percent limitation. I.R.C. § 170(b)(1)(D)(ii); Treas. Reg. § 1.170A-10(c) (as amended in 1975). Deduction limitations of twenty and fifty percent also exist. Treas. Reg. § 1.170A-8(a); (b); (c).

147. See I.R.C. §§ 2031, 2033 (1994); Treas. Reg. § 1.170A-14(h)(3).

148. DIEHL & BARRETT, *supra* note 128, at 9. A common example of the disparity between highest and best use and current use is farm or ranch land in an area undergoing intense development. Jackson Hole, Wyoming is such a place at the present time. Bryan Hodgson, *Grand Teton*, NAT'L

estate tax is levied on the fair market value, rather than the current use value of the property,¹⁴⁹ the resulting tax without a conservation easement encumbrance can be so high that the family must sell the property to pay the taxes.¹⁵⁰

Finally, a grantor's property taxes can be reduced through use of a conservation easement because the property's market value is reduced.¹⁵¹ This occurs through the assessment process, which determines that the property's development potential is reduced due to the encumbrance.¹⁵² This area of tax reduction, however, is locally driven and has too many variations to establish general principles.¹⁵³

2. Benefits to the Grantee

The grantee also benefits from the conservation easement option in several ways. First, the cost of acquiring a conservation easement is lower than purchasing a fee simple interest in a property, since title to the property is never transferred to the grantee.¹⁵⁴ Second, the costs to maintain and manage the property are minimal, again, because title is never transferred to the grantee.¹⁵⁵ Finally, unlike covenants, easements bind parties to the terms for long periods of time without the "touch and concern" requirement.¹⁵⁶

3. General Advantages of Conservation Easements

Conservation easements are gaining popularity with state and local decision makers. Conservation easements allow the property to remain on the tax rolls, allowing continued receipt of property taxes.¹⁵⁷ Conservation

GEOGRAPHIC, Feb. 1995 at 129. For instance, "[a] 600-acre ranch might be worth \$300,000 as agricultural land but ten times that as development land." *Id.* (statement of Johnathan Schechter, a Jackson economic analyst). One rancher discovered his 2,000 acre ranch creates an estate tax liability of four million dollars. *Id.* Because family members usually do not have the sums of money needed to pay the estate taxes, the property is sold to subdividers. *Id.* For a ranch to be located in with subdivisions is not uncommon. *Id.* Paul Walton, a rancher near Wilson, Wyoming. He also says he is advertised as part of the view. *Id.* The impact of this intense development has created the Jackson Hole Land Trust which holds conservation easements on ten percent of all the private land in Teton County, thereby reducing the land's taxable value. *Id.* See also Dana & Ramsey, *supra* note 94, at 9, n.40.

149. Treas. Reg. § 1.170A-14(h)(3)(ii).

150. See *supra* note 147.

151. DIEHL & BARRETT, *supra* note 128, at 8.

152. *Id.*

153. *Id.*

154. Korngold, *supra* note 34, at 196.

155. *Id.*

156. *Id.* See also *supra* notes 107-114 and accompanying text.

157. *Id.* See also *supra* notes 46-56 and accompanying text.

easements are favored by state legislators who, through the passage of authorizing legislation, have encouraged the acquisition of easements.¹⁵⁸ The passage of this enabling legislation is clearly a trend, with forty-seven jurisdictions either enacting conservation easement legislation in or adopting the Uniform Conservation Easement Act.¹⁵⁹ This clearly leaves the remaining states in a minority, and potential donors of those states at a disadvantage.¹⁶⁰

One state which has not yet enacted enabling legislation for conservation easements is Wyoming.¹⁶¹ This is curious, given the frequent use of this land preservation tool by organizations such as the Jackson Hole Land Trust.¹⁶² In fact, this organization has had considerable success using the conservation easement.¹⁶³

However, the lack of enabling legislation makes the use of this preservation tool precarious, since grantors and grantees are implicitly relying on easement common law to ensure validity of their actions. For instance, when a Wyoming landowner chooses to create a conservation easement on the property, several steps are necessary to accomplish this task.¹⁶⁴ First, the land trust organization requires the landowner to make a gift of one acre of the property to the land trust.¹⁶⁵ Next, the easement is

158. *Id.* In addition to the states adopting the U.C.E.A., see *supra* note 125, other state enactments include, ARK. CODE ANN. §§ 15-20-401 to -410 (Michie 1994); CAL. CIV. CODE §§ 815- 816 (West 1982); COLO. REV. STAT. §§ 38-30.5-101 to -110 (1982); CONN. GEN. STAT. ANN. §§ 47-42 (a) to (c) (West 1995); DEL. CODE ANN. tit. 7, §§ 6901 to 6906 (19—); FLA. STAT. ANN. §§ 704.06 (West 1988, Supp. 1996); HAW. REV. STAT. §§ 198-1 to -6 (1996); ILL. ANN. STAT. ch. 35, para. 1-1 to 5-3 (Smith-Hurd 1993); IOWA CODE ANN. §§ 457A.1 to .8 (West 1990); LA. REV. STAT. ANN. §§ 9:1271 to :1276 (West 1991); MD. CODE ANN. REAL PROP. §2-118 (1996); MASS. GEN. LAWS ANN. ch. 184 §§ 31 to 33 (Law. Co-op. 1996); MICH. COMP. LAWS §§ 13A.2140 to .2144 (1996); MO. ANN. STAT. §§ 67.870 to .910 (Vernon 1989); MONT. CODE ANN. §§ 76-6-201 to -211 (1995); NEB. REV. STAT. §§ 76-2,111 to -2,118 (1996); N.H. REV. STAT. ANN. §§ 477:45 to :47 (1992); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West 1991); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1994); N.C. GEN. STAT. §§ 121-34 to -42 (1994, Supp. 1995); N.D. CENT. CODE §§ 47-05-01 to -12 (1978, Supp. 1995); OHIO REV. CODE ANN. §§ 5301.67 to .70 (Anderson 1988); OR. REV. STAT. §§ 271.715 to .795 (1995); R.I. GEN. LAWS §§ 34-39-1 to -3 (1996); S.D. CODIFIED LAWS ANN. §§ 1-19B-56 to -62 (1992, Supp. 1996); TENN. CODE ANN. §§ 66-9-301 to -309 (1993); UTAH CODE ANN. §§ 57-18-1 to -7 (1994); VT. STAT. ANN. tit. 10, §§ 701 to 730 (19—); WASH. REV. CODE ANN. § 64.04.130 (1994); W. VA. CODE §§ 20-12-1 to -8 (1996).

159. See *supra* notes 127 and 158.

160. These states would include Alabama, Oklahoma, Pennsylvania, and Wyoming. Pennsylvania, however, has a strong common law favoring the validity of conservation easements.

161. *Id.*

162. See *supra* notes 76-89 and accompanying text.

163. *Id.*

164. Dan Schlager, *Wyoming Conservation Easement Legislation Narrowly Fails*, JACKSON HOLE LAND TRUST SPRING & SUMMER NEWSLETTER 1996 at 6 (on file with the *Land and Water Law Review*).

165. *Id.*

created on the remainder of the property to be protected.¹⁶⁶ Thus, the common law concept of an appurtenant easement is created, allowing the grantee land trust to have a dominant estate, located next to the grantor landowner's servient estate. Passage of enabling legislation for conservation easements would make this process much less complicated and more secure for all the parties, thereby maximizing land protection efforts.¹⁶⁷

Perhaps the most compelling advantage of this method of preserving land for grantors and grantees is the lack of litigation surrounding the use of conservation easements. In several states, for instance, no issues regarding the statutorily created conservation easement provisions have been litigated.¹⁶⁸ This implies that the conservation easement option is not likely to be challenged or questioned in the future as a viable method to preserve land. Furthermore, when issues pertaining to conservation easements are questioned in court, often the validity of the easement itself is not challenged.¹⁶⁹

The most frequently cited case pertaining to the validity of conservation easements, is *Parkinson v. Board of Assessors of Medfield*.¹⁷⁰ This case illustrates the need for specificity when creating conservation easements: both the size and the location of the land subject to the easement

166. *Id.*

167. *Id.* 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. The most recent failure was this past session when the Senate defeated the measure sixteen votes to fourteen. Efforts are likely to reintroduce conservation easement enabling legislation again in the upcoming session. See *id.*; Telephone interview with Dan Schlager, Assistant Director of Protection of the Jackson Hole Land Trust (Oct. 25, 1996).

168. See, e.g., CAL. CIV. CODE §§ 815-816 (West 1982); COLO. REV. STAT. ANN. §§ 38-30.5-101 to 104 (West 1982); FLA. STAT. ANN. ch. 704.06 (West 1988, Supp. 1996); KY. REV. STAT. ANN. §§ 382.800-.860 (Mitchie/Bobbs- Merrill Supp. 1994); LA. REV. STAT. ANN. §§ 9:1272-.1276 (West 1991); MD. CODE ANN. REAL PROP. § 2-118 (1996); N.H. REV. STAT. ANN. §§ 477:45-.47 (1992); OHIO REV. CODE ANN. §§ 5301.67-70 (Anderson 1988); OR. REV. STAT. §§ 271.715-.795 (1995); S.C. CODE ANN. § 27-8-10 to 80 (Law. Co-op. Supp. 1995); TENN. CODE ANN. § 66-9-301 to 309 (1993); UTAH CODE ANN. § 57-18-1 to 7 (1994); WASH. REV. CODE ANN. § 64.04.130 (West 1994); W. VA. CODE § 20-12-1 to 8 (1996).

169. See *National Wildlife Fed'n v. Espy*, 45 F.3d 1337 (1995) (plaintiffs alleged the Farmers Home Administration should have placed a conservation easement on property taken from a delinquent borrower); *Citizens for Conservation v. Village of Lake Barrington*, 608 N.E.2d 653 (Ill. App. Ct. 1993) (determination of the owner of the conservation easement); *Fenster v. Hadi*, No. CV 87-0090482S, 1991 Conn. Super. Ct. LEXIS 2727 (Conn. Super. Ct. Nov. 22, 1991); *Sabine River Auth. v. United States Dept. of Interior*, 745 F. Supp. 388 (E.D. Tex. 1990) (plaintiffs alleging that an environmental impact statement is required for creating a reservoir on conservation easement encumbered property); *Friends of the Shawangunks, Inc. v. Clark*, 585 F. Supp. 195 (N.D.N.Y. 1984) (plaintiffs questioning the validity of granting an amendment to a conservation easement).

One of the more heavily litigated areas of conservation easements is valuation. See, e.g., Rev. Rul. 76-376, 1976-2 C.B. 53, *clarifying* Rev. Rul. 73-399, 1973-2 C.B. 68; *Clemens v. Comm'r*, 64 T.C.M. (CCH) 351 (1992); *Stanley Works and Subsidiaries v. Comm'r*, 87 T.C. 389 (1986). For further discussion of valuation of easements, see *infra* notes 163-184 and accompanying text.

170. 481 N.E.2d 491 (Mass. 1985).

must be properly described or else the easement may fail.¹⁷¹ In *Parkinson*, a property owner created a conservation easement in favor of the Medfield Trustees of Reservations.¹⁷² The easement intended to prohibit the construction of additional buildings or other structures, as well as use of its property which was inconsistent with the preservation of its natural state.¹⁷³ The easement further provided that one single family residence was not a prohibited structure nor an inconsistent property use.¹⁷⁴ Upon assessment by the tax officials, the discount in the value of the land owner's property, in the amount of the conservation easement's value, was denied.¹⁷⁵ The assessors claimed the easement was invalid because "it purported to apply not only to land, but to Parkinson's residence and out-buildings."¹⁷⁶ The Supreme Judicial Court of Massachusetts agreed that the easement was invalid, but not because of the scope of its terms.¹⁷⁷ Rather, the court found "its terms so vague that it precludes any meaningful identification of the servient estate."¹⁷⁸ Fortunately, this case is the exception, rather than the norm, and when a conservation easement is used in conjunction with a land trust organization, it is unquestionably a powerful land preservation tool.¹⁷⁹

D. Problems in the Use of Conservation Easements

Unfortunately, a conservation easement is not without problems. The issues raised by conservation easement use include the inherent tension of property versus contract rights, concerns pertaining to the monitoring and enforcement of the easement, valuing the easement for tax purposes, and terminating the easement.

171. *Id.* at 493. In further proceedings, the conservation easement was deemed valid and a real estate tax abatement, reflecting the value of the land as encumbered with the easement, permitted. *Parkinson v. Board of Assessor*, 495 N.E.2d 294 (Mass. 1986).

172. *Parkinson*, 481 N.E.2d at 492.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 493.

178. *Id.*

179. This case, however, clearly exemplifies that conservation easements may fail due to ambiguity in three ways: first, the property protected may be inadequately described; second, how the property is protected may be poorly defined; and third, the parties' responsibilities may be specified without proper detail. Dana & Ramsey, *supra* note 96, at 22 n.95. To overcome these problems, a survey and careful drafting of the easement document should be standard procedure. *Id.*

1. Competing Theories of Property v. Contract Law

The general rule, sometimes called the policy against restraints on alienability, is that restrictions on land are disfavored.¹⁸⁰ There is a conflicting policy, however, which grants property owners the freedom to contract with another regarding the use of their land.¹⁸¹ Conservation easements appear to exasperate these policies. Because of one owner's action to encumber her property, the conservation easement has the effect of hindering future economic development, marketability of the land, and subsequent purchasers ability to use the property consistently with their wishes.¹⁸²

The ability of one owner to bind future owners is further criticized in two ways. First, democratic values are demeaned because the creation of a conservation easement allows private actions to determine public goals.¹⁸³ Generally, public goals are determined through the governmental planning and zoning processes. Despite the faults of the zoning procedure, the public is granted an opportunity to express their views about the planned development. No counterpart to public participation is present within the conservation easement process, effectively allowing a single owner to determine the use of the land, to the possible detriment of the community.¹⁸⁴

The second criticism surrounds the decrease in flexibility of land use when future owners are bound by conservation easements. Although allowing private arrangements regarding land use does increase the owner's flexibility, and current trends are to preserve the environment and limit development, "today's vision of what is environmentally significant may change tomorrow."¹⁸⁵ In short, the "in perpetuity" nature of conservation easements, denies any future changes in the use of the property and can provide a court a basis on which to invalidate the easement.¹⁸⁶ Buttressing this argument is the assertion that most easement violations come from second generation property owners who feel confined by the easement's terms, precluded from activities they perceive as reasonable uses of the property.¹⁸⁷

180. See *Eagle Enters. v. Gross*, 349 N.E.2d 816 (N.Y. 1976); Korngold, *supra* note 34, at 455.

181. See *Voyager Village Property Owners Ass'n v. Johnson*, 295 N.W.2d 14, 15 (Wis. Ct. App. 1980); Korngold, *supra* note 34, at 447.

182. Korngold, *supra* note 34, at 455-57.

183. *Id.* at 459; see also *Dana & Ramsey*, *supra* note 96, at 24, 25.

184. Korngold, *supra* note 34, at 460; *Dana & Ramsey*, *supra* note 96, at 24, 25.

185. Korngold, *supra* note 34, at 461-62; *Dana & Ramsey*, *supra* note 96, at 24, 25.

186. Korngold, *supra* note 34, at 461-62; *Dana & Ramsey*, *supra* note 96, at 24, 25.

187. Korngold, *supra* note 34, at 462; *Dana & Ramsey*, *supra* note 96, at 32.

The rebuttal to these arguments maintains that by disallowing perpetual conservation easements and, ultimately, allowing development, the choices available to future generations actually decrease.¹⁸⁸ By preserving land today with a conservation easement, future decisions regarding the best use of the property can be made more competently.¹⁸⁹ Property, such as agricultural and timber lands, will be preserved to ensure future productive uses.¹⁹⁰ These decisions will be made with a full range of land use options available, rather than the limited options available after ecosystems are destroyed and the landscape changed due to development.¹⁹¹

Upholding the validity of the conservation easement also maximizes personal freedom of choice.¹⁹² With this tool, a person is able to enter into voluntary agreements with respect to private property.¹⁹³ Subsequent purchasers suffer no loss of choice: sale price of the property reflects the encumbrance, and the conservation easement is noted on the deed thereby giving notice.¹⁹⁴ Furthermore, legal arrangements can be changed, whereas actual modifications to land due to development mandate a permanent departure from its original condition.¹⁹⁵

Although there may be no solution to this debate, in practice, two factors support allowing conservation easements to remain in perpetuity. First, donations to charitable organizations are generally subject to less stringent application of common law principles.¹⁹⁶ Second, conservation easements are highly flexible conservation tools, allowing modification if needed, through renegotiation by the parties, or by court or government action.¹⁹⁷

2. Monitoring and Enforcing of Conservation Easements

The second concern regarding conservation easements is the ongoing monitoring and enforcement of the easement. Effective monitoring and enforcement of the easement are critical to the continued existence of the restriction. Unfortunately, creating the easement, and conveying it to an

188. Farrier, *supra* note 36, at 344.

189. *Id.*

190. Dana & Ramsey, *supra* note 96, at 11.

191. Farrier, *supra* note 36, at 344.

192. Dana & Ramsey, *supra* note 96, at 26.

193. *Id.*

194. *Id.*

195. Farrier, *supra* note 36, at 344; Dana & Ramsey, *supra* note 96, at 29-31. *See also infra* notes 197, 211, 278 and accompanying text.

196. Dana & Ramsey, *supra* note 96, at 28-29.

197. *Id.* at 29-31.

easement holder, is the easy part.¹⁹⁸ Guarding against violation of the easement's terms, usually into perpetuity, can be a substantial burden on the holder in terms of human and financial resources.¹⁹⁹ As such, organizations which accept conservation easements proactively monitor and enforce them in an attempt to prevent violations, by emphasizing positive relationships with the landowner.²⁰⁰ This is precisely the method and rationale used by the Jackson Hole Land Trust.²⁰¹ Additional elements include a program of regular and systematic monitoring and an easement instrument clearly delineating the restrictions.²⁰²

Preventing easement violations by second generation purchasers is often a concern since the easement may appear to the subsequent purchaser as coercion, thus encouraging violation of the easement.²⁰³ The subsequent purchaser may not have the attachment to the land or long-standing family connections as did the previous owner. The best manner in which to address this circumstance is to educate the real estate community about easements, so they can educate potential land buyers. This can be accomplished through communication to realtors, title companies, the legal community and neighbors about the positive impact of property encumbered with a conservation easement.²⁰⁴

The enforcement of a conservation easement against second generation landowners is a concern which has generated much attention. Although easement violations do occur,²⁰⁵ fortunately they occur relatively infrequently.²⁰⁶ On one hand, the rarity of actual violations may be due to positive, proactive relationships established between the landowners and

198. DIEHL & BARRETT, *supra* note 128, at 87.

199. Farrier, *supra* note 36, at 349. Examples also exist of ineffective monitoring. One owner learned that without his knowledge and in violation of a conservation easement, a timber company cleared one-third of the property's timber. BENJAMIN R. EMORY, CONSERVATION EASEMENTS: TWO PROBLEMS NEEDING ATTENTION 197 *printed in* MONTANA LAND RELIANCE & LAND TRUST EXCHANGE, *supra* note 26. The conservation holder was unaware of the easement's existence. *Id.* In another example, a federal agency never noticed in eight years of monitoring its easement that a guesthouse, not included on the list of permitted structures on the property, had been there for many years. *Id.*

200. Farrier, *supra* note 36, at 350.

201. Schlager, *supra* note 167. According to Mr. Schlager, the Trust's Stewardship Director meets with landowners on a regular basis. The goal is to establish a continuing, cordial relationship between the Trust and the property owner. One method to achieve this goal is to walk the property together, viewing the reasons for preservation (i.e. wildflowers, animal habitat, etc . . .). *Id.*

202. DIEHL & BARRETT, *supra* note 128, at 88.

203. See *supra* notes 180-195 and accompanying text.

204. DIEHL & BARRETT, *supra* note 128, at 91.

205. See, e.g., Karin Marchetti Warden, *Conservation Easement Violation Case Studies* (Oct. 1996) (presentation at the Land Trust Alliance's National Land Trust Rally 1996).

206. Wyoming, for instance, has not had any problems enforcing conservation easements when the property has changed hands. Schlager, *supra* note 167.

the trust.²⁰⁷ On the other hand, this may be an issue brewing, destined to surface in the future as the numbers of second generation landowners increase.²⁰⁸

Should an easement violation occur, the holder has several options. The first of these options is litigation. This alternative, however, is strongly discouraged as litigation is expensive and harms the relationship between the grantor and grantee further jeopardizing the easement's effectiveness by increasing the potential for further violations.²⁰⁹ Other options available to the easement holder include arbitration, mediation, and finally, restoration of the property to its condition prior to the easement violation.²¹⁰ Due to the potential need to renegotiate the conservation easement's terms, amendment clauses are sometimes included in the document. These provisions allow the landowner and the conservation easement grantee to renegotiate problematic terms and reach an amicable solution.²¹¹

3. Valuing the Conservation Easement

The third issue to be addressed is that of valuing the conservation easement. This is an important consideration because a common motivation for a landowner to create a conservation easement is to receive a corresponding decrease in the fair market value of the property for real estate tax purposes. The owner is also eligible for an income tax deduction if the appropriate criteria are satisfied. The problem with this area is two-fold. First, determining the fair market value of the easement is difficult. Second, the appraisal substantiation process, which an easement donor must engage for the income tax deduction, is cumbersome.

207. Schlager, *supra* note 167.

208. *Id.* Mr. Schlager analogized the issue of conservation easement and second generation landowners to a lifecycle. Land trusts are presently in the teen years; they have been in existence and operation for some time. However, this issue is likely to arise when land trusts are adults, and in a later stage of the organizational lifecycle. Thus, although conservation easements and second generation landowners may not be an issue at the present, in the future, this may require substantial attention. *Id.*

209. DIEHL & BARRETT, *supra* note 128, at 92. Notwithstanding this principle, third parties, such as private organizations or a governmental agency may also bring enforcement actions. See U.C.E.A. § 3(a) (providing that an action to enforce a conservation easement may be brought by the owner of an interest on real property burdened by the easement, a holder of the easement, a person having a third party right of enforcement, or a person authorized by other law); U.C.E.A. § 1(3) (a third party right to enforcement is a right "granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder").

210. DIEHL & BARRETT, *supra* note 128, at 94-95. As stated earlier, the IRS Code requires restoration as a specified remedy possibility to a violation for an easement to qualify for the tax-deduction. See also *supra* note 137 and accompanying text.

211. Dana & Ramsey, *supra* note 98, at 34, 35.

The theory behind valuing conservation easements is fairly straightforward: the fair market value of the restriction at the time of grant is the value of the easement.²¹² The Internal Revenue Service has determined the “before and after” method is the correct process for valuing conservation easements.²¹³ This method requires a comparison between the value of the property without an easement and the value of the property subsequent to the easement’s creation.²¹⁴ The difference between the two values is the fair market value of the easement.²¹⁵ A relevant factor in the fair market value appraisal, however, is that the highest and best use of the land may not be identical to the land’s current use.²¹⁶ Furthermore, although straightforward in theory, in practice, frequent litigation arises over the fair market value of an easement.²¹⁷

Another complication is that the valuation procedure requires the consideration of many factors. Among these are “[t]he nature of the restrictions on development imposed by the easement . . . [and] [h]ow developable the property is without the restrictions.”²¹⁸ The IRS Code also requires evaluation of the effects of zoning conservation or other historic preservation laws presently restricting the use of the property.²¹⁹

As an example of these considerations, an easement to prohibit development and timber cutting on the Maine coast, where soils are poor for both housing and quality timber, has a low fair market valuation.²²⁰ However, an easement prohibiting soil tilling in Iowa to protect an historic prairie site could be worth the value of the entire property.²²¹ Finally, the timing of the easement creation is relevant. The first and the final encumberancers have the largest change in fair market values.²²² The first

212. Treas. Reg. § 1.170A-14(h)(3) (as amended in 1994.)

213. *Id.* See also Rev. Rul. 76-376 (as amended in 1994), 1976-2 C.B. 53, *clarifying* Rev. Rul. 73-399, 1973-2 C.B. 68; Thayer v. Commissioner, 1977 T.C. Memo. 370 (1977).

214. Treas. Reg. § 1.170A-14(h)(3) (as amended in 1994).

215. *Id.*

216. Treas. Reg. § 1.170A-14(h)(3)(ii) (as amended in 1994). Highest and best use has been described as, “[The] reasonable and probable use that will support the highest present value for the property as of the date of the appraisal. Highest and best use is generally the most profitable, likely and legal use for a property.” NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE LAND TRUST EXCHANGE, *supra* note 128, at 16. See also *supra* notes 147-150 and accompanying text.

217. Akers v. Commissioner, 799 F.2d 243 (6th Cir. 1986), *cert. denied* (1987); McMurray v. Commissioner, 985 F.2d 36 (1993); Symington v. Commissioner, 87 T.C. 892 (Dec. 43,467); Rev. Rul. 64-205, 1964-C.B. 62; Rev. Rul. 76-376, 1976-2 C.B. 53, *clarifying* Rev. Rul. 73-399, 1973-2 C.B. 68. See also *supra* note 133.

218. HOOSE, *supra* note 35, at 122; Treas. Reg. § 1.170A-14(h)(3).

219. Treas. Reg. § 1.170A-14(h)(3).

220. *Id.*

221. *Id.*

222. ROBERT T. DENNIS, DONATED EASEMENTS: PROBLEMS AND POSSIBLE SOLUTIONS, 199 *in* MONTANA LAND RELIANCE & LAND TRUST EXCHANGE, *supra* note 26.

landowner risks holding unmarketable property through creating the easement, while the final easement grantor relinquishes significant development value.²²³ Ultimately, determining the fair market value of an easement is difficult because the appraisers must consider many factors and risk liability for errors.²²⁴ One story tells of an appraiser who charged \$8,000 to determine an easement was worth \$12,000.²²⁵

The second problem with the valuation of easements is the appraisal substantiation process, in which an easement donor must engage for the income tax deduction. The process requires the donor to obtain a "qualified appraisal," attach a "fully completed appraisal summary" to the tax return, and maintain records concerning the easement gift.²²⁶ These requirements are further defined, describing a "qualified appraiser,"²²⁷ the information to be included in the appraisal,²²⁸ the information to appear in the appraisal summary,²²⁹ and the needed records to support the deductions taken.²³⁰ This is an important stage in the easement creation process, since the donor's appraisal will likely be closely scrutinized by the Internal Revenue Service.²³¹ Furthermore, the penalty for overvaluing a conservation easement is stiff. If the valuation of the easement claimed by the donor is two hundred percent or more than the value determined by the IRS, payment of the additional tax is required, plus a penalty amounting to twenty percent of the additional liability.²³² The appraiser may also be penalized.²³³ As such, these requirements must be taken seriously.

4. Terminating the Conservation Easement

The final issue regarding the conservation easement is the termination of the easement. Typically, a conservation easement is designed to be

223. *Id.* at 201-202.

224. Treas. Reg. § 1.170A-13(c)(3)(iii) (as amended in 1989); I.R.C. § 6701(a) (1994).

225. HOOSE, *supra* note 35, at 123.

226. Treas. Reg. § 1.170A-13(c)(2). These regulations apply to donations of property exceeding \$5,000. Treas. Reg. § 1.170A-13(c). For donations valuing less than \$5,000, the donor need only maintain written records of the fair market value of the property both before and after the easement, the conservation purpose furthered through use of the conservation easement, and disclose the information on tax returns as required. Treas. Reg. § 1.170A-14(i).

227. Treas. Reg. § 1.170A-13(c)(5).

228. Treas. Reg. § 1.170A-13(c)(3).

229. Treas. Reg. § 1.170A-13(c)(4).

230. Treas. Reg. § 1.170A-13(d).

231. DIEHL & BARRETT, *supra* note 128, at 53.

232. I.R.C. § 6662(a); (b)(3); (e) (1994). *But see* I.R.C. § 6664(c) (1994) (reasonable cause exception to the penalty).

233. *See supra* notes 223-224 and accompanying text.

a perpetual restriction on the use of property.²³⁴ This characteristic of conservation easements has been recognized by the Supreme Court, and the tax code, as necessary to achieve the conservation goal.²³⁵ There are circumstances, however, when conservation easements are terminated. Furthermore, some of the methods of termination are within control of the grantor and grantee while others are not. Some states have anticipated this problem of termination and have permitted a conservation easement to be terminated in the same manner as other easements,²³⁶ while other state statutes remain silent on the issue.²³⁷

Across the states, however, there are typically five universal methods to terminate a conservation easement.²³⁸ The first is eminent domain, where the state condemns property for public use.²³⁹ If the property to be condemned is encumbered with a conservation easement, limiting the proposed use, the restrictions will likely be terminated.²⁴⁰ The second method is foreclosure of a pre-existing lien on the property, such as a mortgage or unpaid real estate taxes.²⁴¹ When the property is sold at the foreclosure sale, the purchaser takes title of the property free of any prior restrictions.²⁴² Like eminent domain, this termination technique occurs without consent of the conservation holder or landowner.²⁴³ However, because a subordination agreement from the holder of the mortgage is all that is required to avoid this result,²⁴⁴ and is required if the donor wishes a tax-deduction,²⁴⁵ this cause for termination should not occur often.

234. See *supra* notes 134-141 and accompanying text.

235. *North Dakota v. United States*, 460 U.S. 300, 318 (1983); I.R.C. § 170 (h)(1); (2).

236. See, e.g., U.C.E.A. § 3 comment; ARIZ. REV. STAT. ANN. § 33-273(13) (1989); COLO. REV. STAT. § 38-30.5-107 (1982); N.H. REV. STAT. ANN. § 477:46 (1992); UTAH CODE ANN. § 57-18-5 (1994).

237. See, e.g., CONN. GEN. STAT. ANN. §§ 47-42(a) to (c) (West 1995); §§ 13A.2140 to .2144 (1996); N.C. GEN. STAT. §§ 121-34 to -42 (1994, Supp. 1995); OHIO REV. CODE ANN. §§ 5301.67 to .70 (Anderson 1988); S.C. CODE ANN. §§ 27-8-10 to 80 (Law. Co-op. Supp. 1995); WASH. REV. CODE § 64.04.130 (1994).

238. DIEHL & BARRETT, *supra* note 128, at 131-34.

239. *Id.* at 131; Dana & Ramsey, *supra* note 96, at 42-44.

240. DIEHL & BARRETT, *supra* note 128, at 131. Some state statutes address how condemnation issues will be handled. Some states ensure for continued vitality of condemnation proceedings in conservation easements. See, e.g., DEL. CODE ANN. tit 7, § 6095 (19—); KY. REV. STAT. ANN. § 382.850 (Mitchie/Bobbs- Merrill Supp. 1994); N.Y. ENVTL CONSERV. LAW § 49-0305(7)(1)(c) (McKinney 1994). Some states specifically exempt conservation easements from a government's condemnation powers. See, e.g., FLA. STAT. ANN. § 704.06 (West 1988, Supp. 1996); IOWA CODE ANN. § 457A.1 (West 1990); UTAH CODE ANN. § 57-18-7 (1994).

241. DIEHL & BARRETT, *supra* note 128, at 131.

242. *Id.*

243. *Id.*

244. *Id.*

245. Treas. Reg. § 1.170A-14(g)(2).

The third type of termination technique involves marketable title acts, which also have the effect of terminating conservation easements.²⁴⁶ These provide that nonpossessory interests to, or restrictions on, real property expire after a certain number of years unless the holder of the interest records the interest within a prescribed period.²⁴⁷ This nullifying effect occurs despite a conservation easement instrument specifying otherwise.²⁴⁸ Some states specifically exempt conservation easements from marketable title act operations.²⁴⁹ In those states which do not provide this exemption, traditional notions of statutory construction suggest a finding that the later enacted conservation easement legislation evidences an intent to override the operation of market title rules.²⁵⁰ This result, however, is not ensured.²⁵¹

Marketable title acts can be most problematic in states which have not yet enacted conservation easement legislation.²⁵² In this case, the possibility exists that a created conservation easement will fail due to legislative authority mandating the recording of a recognized interest in property. Since the conservation easement is not a recognized interest in land in these jurisdictions, there is no valid interest to be recorded, thus the attempted conservation easement fails. This scenario would exist in Wyoming were it not for the actions of the grantor and grantee to create an interest to comport with the common law, an appurtenant easement, so as to ensure compliance with the marketable title act.²⁵³ However, the impact of this legislation is untested because the use of conservation easements in Wyoming has not yet spanned forty years.²⁵⁴

The fourth easement termination technique is the principle of changed circumstances.²⁵⁵ This equitable remedy asserted by the violator

246. DIEHL & BARRETT, *supra* note 128, at 132; Dana & Ramsey, *supra* note 96, at 20-21.

247. See, e.g., CONN. GEN. STAT. ANN. § 47-33b (West 1993); MICH. COMP. LAWS §§ 26.1271 to .1279 (1993); N.C. GEN. STAT. §§ 47B-1 to -9 (1984); OHIO REV. CODE ANN. §§ 5301.47 to .56 (Anderson 1989); UTAH CODE ANN §§ 57-9-1 to -10 (1994); WIS. STAT. ANN. §§ 841.01 to .10 (West 1994); WYO. STAT. §§ 34-10-101 to -109 (1990).

248. This problem was noted by the National Conference of Commissioners on Uniform State Laws, which advised consideration of the issue by states adopting the U.C.E.A. U.C.E.A., Prefatory Note.

249. See, e.g., GA. CODE ANN. § 44-5-60(b)-(c) (19—); MASS. GEN. LAWS ANN. ch. 184 §§ 26, 27 (Law. Co-op. 1996). The Internal Revenue Service also states that a conservation easement is unaffected by marketable title acts. Treas. Reg. § 1.170A-14(g)(3).

250. Dana & Ramsey, *supra* note 96, at 21 n.92.

251. *Id.*

252. *Id.* at 21 n.93.

253. See *supra* notes 164-167 and accompanying text.

254. The Jackson Hole Land Trust, for instance, was created in 1980, sixteen years ago. JACKSON HOLE LAND TRUST, *supra* note 76, at 2.

255. DIEHL & BARRETT, *supra* note 128, at 133.

in a court of equity, holds that violations of an easement cannot be rectified if the original purpose can no longer be fulfilled due to a change in circumstances.²⁵⁶ Although there is some question as to whether this concept applies to easements since its original application is for covenants,²⁵⁷ the current thinking suggests this is a valid termination technique.²⁵⁸

The final termination technique includes the principles of release and inaction.²⁵⁹ These are actions of extinguishment by the holder of the easement.²⁶⁰ A release occurs when the holder terminates its interest in land according to a contractual agreement. Because of the ramifications to the holder, an organization should not consider releasing an easement.²⁶¹ These ramifications would include suit by the state attorney general for violation of the original contract, and creating doubt about the integrity of the organization and easement process.²⁶² Extinguishing the easement by inaction occurs through nonuse. Although nonuse by itself should not constitute the basis for this technique,²⁶³ failing to bring enforcement actions or failure to engage in consistent monitoring can extinguish the easement.²⁶⁴ In this instance, the landowner has an estoppel argument.²⁶⁵ For these reasons, the monitoring and enforcement provisions of the conservation easement are important.

256. See *supra* notes 107-114 and accompanying text.

257. See POWELL, *supra* note 107, at § 679[2].

258. See U.C.E.A., § 3 comment; Korngold, *supra* note 34, at 485. The Internal Revenue Service has also recognized that this doctrine may be applied to conservation easements. In the event the property can no longer be used for conservation purposes, so long as proceeds from the sale or exchange of the property are used consistently with the original gift's conservation purposes, the charitable intent is recognized. Treas. Reg. §1.170A-14(c)(2). This is also true if the sale is due to judicial action. Treas. Reg. §1.170A-14(g)(6)(i).

259. DIEHL & BARRETT, *supra* note 128, at 133.

260. *Id.*

261. *Id.* at 134.

262. *Id.*

263. Fenner, *supra* note 56, at 1068 (arguing abandonment is the point of a conservation easement rather than a reason to terminate it).

264. DIEHL & BARRETT, *supra* note 128, at 134.

265. Dana & Ramsey, *supra* note 96, at 36. However, some states do not allow termination of a conservation easement without approval from a specified governmental agency. See, e.g., MASS GEN. LAWS ANN. ch. 184, § 32 (Law. Co-op 1996); NEB. REV. STAT. § 76-2,113 (1996); N.J. STAT. ANN. § 13:8B-6 (West 1991).

PART IV. COMMON ITEMS WITHIN A CONSERVATION EASEMENT DOCUMENT

This section addresses common and useful components which a landowner could include when creating a conservation easement instrument. This listing is extracted from several sources,²⁶⁶ and attempts to combine the best of all ideas. Of course, just as each parcel of land protected by a conservation easement is different, no form can fully accommodate each person's goals and needs. The following is simply a compilation of recommendations for the individual property owner to consider when creating a conservation easement.

A conservation easement document should begin with preliminary information which clearly and specifically identifies the document, date, parties and property.²⁶⁷ Also included in this section is the time period of the easement, generally for perpetuity,²⁶⁸ and language which ensures that the easement is tax-deductible.²⁶⁹ The granting of the conservation easement from the owner, the grantor, to the land trust organization or governmental agency, the grantee, should appear in the final sections of the introductory portions of the instrument.²⁷⁰

After the granting language, the provisions of the easement should follow. Consistent with the concept that each property owner is as unique as the property, this section of the document is where the most variation in terms occurs, although four broad provisions can be identified. The first provision which should appear is the purpose of the document. This could include language requiring retention of the property in its natural, scenic, historical, agricultural, forested, or open space condition, and prohibiting uses of land inconsistent with the stated purpose.²⁷¹ The second provision should discuss the rights which are conveyed to the easement holder, the grantee, from the grantor. Typically identified in this section are rights which include the ability of the grantee to enter the property for visual monitoring, inspecting to ensure the easement is not violated, and enforcing the provisions of the easement.²⁷²

The third portion of the instrument identifies the restrictions on the

266. DIEHL & BARRETT, *supra* note 128, at 147-208; NATURE CONSERVANCY, *supra* note 129; HOOSE, *supra* note 35, at 132-134; NATIONAL TRUST FOR HISTORIC PRESERVATION AND LAND TRUST EXCHANGE, *supra* note 128, at 60-62.

267. DIEHL & BARRETT, *supra* note 128, at 150.

268. HOOSE, *supra* note 35, at 132; DIEHL & BARRETT, *supra* note 128, at 156-57.

269. NATURE CONSERVANCY, *supra* note 131.

270. DIEHL & BARRETT, *supra* note 128, at 150, 157.

271. *Id.* at 157; LANCASTER FARMLAND TRUST, *supra* note 57, at 16.

272. NATURE CONSERVANCY, *supra* note 131.

landowner's use of the property. This section expresses limitations and prohibitions are listed. These can include restrictions on dumping, commercial advertising or activity, excavation or dredging,²⁷³ motor vehicles, hunting, timbering, and/or alteration of water courses.²⁷⁴ The remaining rights retained by the landowner regarding use of the property should be specified in the fourth portion of the easement document. Examples of these rights are permissions to build additional structures in specific locations, to sell the property, and to use the property for any use not inconsistent with the purpose of the easement.²⁷⁵

Also included in the document should be several provisions of general applicability. These would include language which ensures the easement is enforceable, and specifications regarding the issues of controlling law, severability, terminations of rights and obligations, and successors.²⁷⁶ Some indication as to whom formal notices should be sent and the responsible party for payment of real estate taxes should also be stated.²⁷⁷ Finally, provisions for amending, extinguishing, assigning, and recording the easement should be specified.²⁷⁸ To conclude the conservation easement document, only a few items are suggested. An habendum clause, and signatures and acknowledgements, should be included.²⁷⁹ Lastly, exhibits should be attached to the document. These would include a legal description of the property subject to the easement, and maps and mortgages on the property.²⁸⁰

PART V. CONCLUSION

The purpose of this article has been to discuss various methods through which property can be conserved, with a primary focus on the usefulness and flexibility of the conservation easement. Ultimately, despite the disadvantages of conservation easements, such as the tension between property and contract law regarding easement use, and the monitoring, enforcement, valuation, and termination issues, the use of conservation easements can be expected to continue because of several compel-

273. NATIONAL TRUST FOR HISTORIC PRESERVATION AND LAND TRUST EXCHANGE, *supra* note 128, at 60-61.

274. HOOSE, *supra* note 35, at 133.

275. NATURE CONSERVANCY, *supra* note 131.

276. DIEHL & BARRETT, *supra* note 128, at 151; LANCASTER FARMLAND TRUST, *supra* note 57, at 20.

277. DIEHL & BARRETT, *supra* note 128, at 150; *see also* NATURE CONSERVANCY, *supra* note 131.

278. DIEHL & BARRETT, *supra* note 128, at 150-51; Dana & Ramsey, *supra* note 96, at 34-35.

279. DIEHL & BARRETT, *supra* note 128, at 163.

280. *Id.*

ling characteristics. These include the benefits of legislative acceptance of the conservation easement concept, personal flexibility and tax benefits afforded the grantor of the easement, and reduced acquisition and maintenance costs to the grantee. Furthermore, the need to preserve land is as paramount as ever, with over three thousand acres of American wetlands, farms and forests lost to development each day.²⁸¹

To all persons who recognize the inherent beauty and other qualities of nature, the loss of land with ecologic, sentimental or aesthetic value, is tragic. To avoid this outcome, the same ethical regard for earth and sky that the Navajo have proclaimed for generations, must shape today's efforts for preservation of the earth and the life upon it.²⁸²

*At dusk
the grey
foxes
stiffen
in cold;
blackbirds
are fixed
in white
branches.
Rivers
follow
the moon,
the long
white track
of the
full moon.*²⁸³

281. LAND TRUST ALLIANCE, *supra* note 8.

282. MOMADAY, *supra* note 2, at 630.

283. N. SCOTT MOMADAY, *THE GOURD DANCER* 40 (1976).