

THE ROLE OF LAND TRUSTS IN BIODIVERSITY CONSERVATION ON PRIVATE LANDS

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TABLE OF CONTENTS

I. INTRODUCTION.....	453
II. THE ROLE OF LAND TRUSTS IN BIODIVERSITY CONSERVATION.....	458
III. CONCLUSION.....	468

I. INTRODUCTION

Over the past two decades there has been an explosion in both the use of conservation easements as a private land conservation tool and the number of private nonprofit organizations, typically referred to as “land trusts,” that acquire easements.¹ A conservation easement is a legally binding agreement between the owner of the land subject to the easement and the holder of the easement that restricts the development and future use of the land to achieve certain conservation goals, such as the protection of wildlife habitat or the preservation of farmland or forestland.² Land trusts can be broadly defined as local, state, regional, and national nonprofit organizations that actively work to conserve land for the public benefit through a variety of means, including, most commonly, the acquisition of land and conservation easements by gift, purchase, or bargain purchase.³

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1. See, e.g., Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND] (noting that conservation easements have earned the position of being the most widely used private sector land conservation tool across the nation); SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 5 (2001) (noting that land trusts are the fastest growing element of the conservation community).

2. For a discussion of the law of conservation easements, see Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 ENVTL. AFFAIRS 105, 108-22 (1983). For a description of the state statutes that enable the creation of conservation easements, see Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND, *supra* note 1, at 26.

3. See *Impact of Tax Law on Land Use, Conservation, and Preservation: Hearing Before the House Subcomm. on Oversight, House Comm. on Ways and Means*, 107th Cong. 40-43 (1996) (statement of Jean Hocker, President, Land Trust Alliance) [hereinafter “Hocker Statement”]; FAIRFAX & GUENZLER, *supra* note 1, at 21 (noting that while the term “land trust” has no specific legal meaning, land trusts typically are organized as nonprofits and employ a variety of techniques aimed toward land conservation). The Nature Conservancy, the Trust for Public Lands, and the American Farmland Trust are examples of land trusts that operate on a national level. The Upper Valley Land Trust, which protects land in both Vermont and New Hampshire, is an example of a regional land trust. State land trusts

The Land Trust Alliance (the "LTA") is an umbrella organization that provides technical and educational support to the nation's land trusts, educates the public about land trusts, and represents the interests of land trusts with respect to public policy issues.⁴ According to a recent census conducted by the LTA (the "LTA Census"), as of December 31, 2000, the nation's local, state, and regional land trusts had permanently protected nearly 6.5 million acres of land, and nearly 2.6 million of that 6.5 million acres is protected by conservation easements (a 476% increase over the 450,000 acres protected by conservation easements as of 1990).⁵ That 2.6 million-acre figure represents the voluntary sale or donation of over 11,670 conservation easements by private landowners to local, state, and regional land trusts.⁶ In addition, according to the LTA Census, 1,263 local, state, and regional land trusts were in operation in 2000, and more than sixty-five percent of those land trusts (832 land trusts) have been created since 1981.⁷

The explosion during the last two decades in the use of conservation easements as a private land conservation tool and in the number of land trusts that acquire easements can be attributed, in large part, to increasing development pressures, a growing disillusionment with the government's ability to adequately protect land from development, and a series of tax incentives that have been enacted to encourage landowners to donate conservation easements.⁸ The Internal Revenue Service first officially recognized the availability of a charitable income tax deduction for the donation of a conservation easement in 1964,⁹ but it was not until the Tax Reform Act of 1976 that the first express statutory authority for the deductibility of donated conservation easements was

include Utah Open Lands and the Montana Land Reliance, each of which focuses its efforts on protecting land within the state in which it operates. The Napa County Land Trust, which focuses its efforts on protecting land within Napa County, is an example of a local land trust. Each land trust has its own mission statement that is specific to, in the case of a national land trust, its overriding objective, or, in the case of a local, state, or regional land trust, its location. For a description of a bargain purchase, see *infra* note 12.

4. See <http://www.lta.org>. The LTA publishes a state by state listing of most of the nation's land trusts and has developed "Land Trust Standards and Practices," which outline the basic elements that the LTA believes are essential for the responsible operation of a land trust (i.e., one that "operates legally, ethically, and in the public interest and that conducts a sound program of land transactions and stewardship"). *Id.* The list of land trusts published by the LTA indicates which of the land trusts have formally adopted the Land Trust Standards and Practices.

5. LTA CENSUS, 2000, available at <http://www.lta.org>. National land trusts, such as The Nature Conservancy, the Trust for Public Land, and the American Farmland Trust, were not included in the LTA Census but have protected millions of additional acres of land using conservation easements. *Id.*

6. *Id.*

7. *Id.*

8. See Gustanski, *supra* note 1, at 17; Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in PROTECTING THE LAND, *supra* note 1, at 55. See also FAIRFAX & GUENZLER, *supra* note 1, at 7-8 (discussing the devolution and dispersion of governmental authority in the area of land and resource conservation).

9. See Rev. Rul. 64-205, 1964-2 C.B. 62 (allowing a charitable income tax deduction for the donation of a scenic easement that protected a wooded scenic view from a federal highway).

enacted.¹⁰ Over the next several years some modifications were made to that original deduction provision and, in 1980, section 170(h) of the Internal Revenue Code was enacted in its current form.¹¹

Under section 170(h), a private landowner who donates a conservation easement to a land trust for one or more of the conservation purposes enumerated in the statute generally will be entitled to a charitable income tax deduction equal to the value of the donated easement.¹² The landowner generally will be entitled to claim the deduction only to the extent of thirty percent of the landowner's adjusted gross income ("AGI") in any one year, and only for a period of six years (the year of the donation and the following five years).¹³ To qualify for the deduction under section 170(h), the easement must be granted in perpetuity and, thus, run with the land and bind all future owners.¹⁴ The conservation purposes for which deductible easements may be granted are: (i) the preservation of land for public recreation or education, (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, (iii) the preservation of open space that has scenic qualities benefiting the public or is consistent with clearly delineated governmental conservation policies, and (iv) the preservation of an historically important land area or a certified historic structure.¹⁵

A landowner who donates a conservation easement also may receive an estate tax benefit in the form of the removal of the value of the conservation easement from the landowner's estate for estate tax purposes.¹⁶ Additionally, in

10. I.R.C. § 170(f)(3)(B) (1976).

11. Unless otherwise indicated, all references herein to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended. For a history of the development of section 170(h), see STEPHEN J. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* (4th ed. 1997); Madden, *supra* note 2, at 125-37.

12. The value of a donated conservation easement generally is equal to the difference between the value of the land immediately before the donation of the easement and the value of the land immediately following the donation of the easement. Treas. Reg. § 1.170A-14(h)(3)(i) (2001). For a more complete description of the valuation rules applicable to easement donations, see SMALL, *supra* note 11, at 17-1 to 18-6. Land trusts also purchase conservation easements, sometimes for their fair market value and sometimes for some percentage thereof. If an easement is purchased for its fair market value, no charitable contribution has been made, and the landowner selling the easement is not entitled to a charitable income tax deduction. If an easement is purchased for less than its fair market value, the transaction is a "bargain purchase," and the landowner will be entitled to a charitable income tax deduction with respect to the portion of the easement that was donated.

13. § 170(b)(1)(C)(i). Any deduction that is not used during the six-year period is simply lost.

14. § 170(h)(1)(A), (h)(2)(C), (h)(5)(A).

15. § 170(h)(4). Treasury Regulations provide further guidance on the meaning and scope of each conservation purpose. See Treas. Reg. § 1.170A-14(d)(1)-(5) (2001). The conservation purpose requirement is intended to ensure that an income tax deduction will be allowed for the donation of an easement only when it is clear that the public will receive a clearly ascertainable benefit as a result of the donation. See Burton S. Kilman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 ENVTL. AFF. 513, 530 (1981).

16. Because a conservation easement places restrictions on the development and use of the land to which it relates, the easement generally will reduce the fair market value of the land, and it is the fair market value of the land that will be included in the landowner's estate for estate tax purposes. See Treas. Reg. § 20.2031-1(b) (2001). However, an estate tax benefit will act as an incentive only with respect to landowners who anticipate being subject to the estate tax. The Economic Growth and Tax

some jurisdictions, land subject to a conservation easement may be entitled to a lower real estate tax assessment, thus lowering the landowner's property tax liability.¹⁷

Despite the income, estate, and property tax incentives available with respect to easement donations described above, by the early 1990s many in the land trust community were concerned that those incentives were inadequate.¹⁸ In particular, there was a concern that the existing tax benefits did not provide an adequate incentive to a class of landowners who owned valuable land, but did not have sufficient income to take advantage of the typically large charitable income tax deduction generated by an easement donation (such landowners typically are referred to as "land rich, but cash poor").¹⁹ Accordingly, the LTA

Relief Reconciliation Act of 2001 (the "2001 Act"), among other things: (i) provides for a gradual reduction in the top marginal estate tax rates through 2009, (ii) increases the estate tax exclusion amount (generally, the amount each individual can transfer free of estate tax at death) as follows: \$675,000 for decedents who die in 2001, \$1,000,000 for decedents who die in 2002 or 2003, \$1,500,000 for decedents who die in 2004 or 2005, \$2,000,000 for decedents who die in 2006, 2007, or 2008, and \$3,500,000 for decedents who die in 2009, and (iii) repeals the estate tax for decedents dying after December 31, 2009. Pub. L. No. 107-16 (2001). The 2001 Act also contains a "sunset" provision pursuant to which all provisions in the 2001 Act will cease to apply to estates of decedents dying after December 31, 2010, at which time the law that was in place before the enactment of the 2001 Act will again be effective. *Id.* § 901. It is anticipated that Congress will revisit the estate tax before its scheduled repeal in 2010. Nevertheless, given the gradual decrease in marginal estate tax rates, the sizable scheduled increases in the estate tax exclusion amount, and the possibility of outright repeal of the estate tax, the 2001 Act will likely reduce the incentive effect of the estate tax benefits available with respect to easement donations.

17. If a conservation easement reduces the fair market value of the property to which it relates (which generally will be the case), it may reduce the assessed value of such property and, thus, the amount of the landowner's property taxes. JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS* 9 (1988) [hereinafter "CONSERVATION EASEMENT HANDBOOK"]. However, reductions in property taxes are unpopular with local government officials and, in some jurisdictions (even those where state law mandates that conservation easements be taken into account when making assessments), such officials may refuse to take conservation easements into account when making assessments. *Id.* at 56. In addition, some landowners hold back from seeking a property tax reduction after granting an easement for fear that the assessor may reassess the property in its entirety, which, in areas with rapidly escalating land values, could result in a higher assessment even taking the easement into consideration. *Id.* at 57. Moreover, because some jurisdictions give preferential property tax treatment to specified types of land, such as farmland, absent a conservation easement, a landowner may not receive any additional property tax benefit as a result of granting an easement. *Id.* at 25. Accordingly, it should not be surprising that a potential property tax reduction rarely provides a strong incentive to easement donors. *Id.* at 56.

18. See Small, *supra* note 8, at 60.

19. The charitable income tax deduction has been described as an "upside down" incentive because it provides upper-income donors with disproportionately greater tax savings than middle and lower-income donors and is virtually worthless to donors who have no taxable income. See, e.g., Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 720-24 (1970). A landowner with an annual adjusted gross income of \$25,000 who donates a conservation easement that reduces the value of his land by \$1,500,000 will be able to claim only \$7,500 of the \$1,500,000 deduction generated by the donation each year for a period of six years, for a total deduction of only \$45,000, which, assuming the landowner pays income tax at a marginal rate of 15%, would generate tax savings for the landowner over the six year period of only \$6,750. Alternatively, a landowner with an annual adjusted gross income of \$250,000 who donates an identical easement would be able to claim \$75,000 of the deduction generated by the donation each year for a period of six years, for a total deduction of \$450,000, which, assuming the

and others lobbied for the enactment of an additional estate tax incentive for conservation easement donors, and in 1997, section 2031(c) of the Internal Revenue Code was enacted.²⁰ Under section 2031(c), a landowner who donates a conservation easement that satisfies the requirements of section 170(h) and certain additional requirements set forth in section 2031(c) will be eligible to exclude up to an additional forty percent of the value of the land subject to the easement from their estate for estate tax purposes.²¹

During the last several years, land trusts have been increasingly active in lobbying for even greater tax incentives to encourage both the donation and sale of conservation easements, and lawmakers appear to be increasingly receptive to their pleas.²² The LTA currently lists as its highest public policy priority the enactment of several new tax incentives now under consideration by Congress.²³

landowner pays income tax at a marginal rate of 35%, would generate tax savings for the landowner over the six-year period of \$157,500.

20. See, e.g., Hocker Statement, *supra* note 3 (testifying that landowners with valuable land but low income benefit little from the charitable income tax deduction and that in areas of rapidly escalating land values the estate tax benefit of a conservation easement donation may not be substantial enough to serve as a strong incentive for such landowners, and recommending the enactment of additional tax incentives).

21. The exclusion under section 2031(c) is subject to a number of limitations and requirements that limit its usefulness as an incentive for the donation of conservation easements. For a detailed description of section 2031(c), see Nancy A. McLaughlin, *Tax Benefits of Conservation Easements*, 23 TAX MGMT ESTS., GIFTS & TR. J., 253 (1998). In addition, even though the 2001 Act expanded the coverage of the exclusion under section 2031(c) to include all land located in the United States or its possessions, as described, *supra* note 16, the 2001 Act likely will reduce the incentive effect of all estate tax benefits available with respect to easement donations.

22. See, e.g., *Impact of Tax Law on Land Use, Conservation, and Preservation: Hearing Before the House Subcomm. on Oversight, House Comm. on Ways and Means*, 106th Cong. 58-63 (1999) (statement of Michael Dennis, Vice President and General Counsel, The Nature Conservancy) (advocating the enactment of additional tax incentives to encourage private land conservation); *Impact of Tax Law on Land Use, Conservation, and Preservation: Hearing Before the Subcomm. on Taxation and IRS Oversight, Senate Finance Comm.*, 106th Cong. 33-37 (2000) (testimony of Mr. Jerry Townsend on behalf of the Montana Land Reliance); *Preserving and Protecting Our Natural Resources: Hearing Before the Senate Finance Comm.*, 107th Cong. 1-2 (2001) (opening statement of Max Baucus, Chairman, Senate Finance Committee) (noting that the hearing “proceeds from the belief that the Tax Code has been an important incentive for land conservation” and that “tax incentives may be the next wave of success in the land conservation movement”); PRESIDENT GEORGE W. BUSH, A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA’S PRIORITIES 71 (2001) (including a fifty percent capital gains tax exclusion to private landowners who voluntarily sell their land or water, or interests therein, for conservation purposes); *Tax Report*, WALL ST. J., June 27, 2001, at A1 (noting that new land conservation incentives have a better chance of winning Congressional approval because of strong bipartisan support).

23. See Memorandum by Russell Shay, Director of Public Policy, Land Trust Alliance (2001) (on file with author). One proposed incentive would exclude from federal tax fifty percent of a landowner’s gain on the sale of land or interests in land or water to a government agency or nonprofit conservation organization to protect fish, wildlife, or plant habitat or open space for agriculture, forests, outdoor recreation, or scenic beauty. *Id.* The other proposed incentives would allow a landowner who donates a conservation easement to claim the resulting charitable income tax deduction to the extent of fifty percent of the landowner’s AGI each year for as many years as it takes to deduct the entire value of the easement, and would allow donors whose incomes are predominantly from farming or ranching to claim the charitable income tax deduction resulting from an easement donation to the extent of 100% of their AGI but only for up to fifteen years. *Id.*

States also have become increasingly enamored with the use of tax incentives, and in recent years a number of states have enacted generous state tax incentives specifically designed to encourage the donation of interests in land, including conservation easements, for conservation purposes.²⁴

Given the tremendous growth in the land trust movement and our increasing recognition of the need for non-regulatory approaches to private land conservation,²⁵ it is important to assess whether, and the extent to which, land trusts and the easements they acquire offer anything of value to biodiversity conservation efforts.

II. THE ROLE OF LAND TRUSTS IN BIODIVERSITY CONSERVATION

Although land trusts are involved in a wide variety of land conservation activities,²⁶ and easements can be donated under section 170(h) for four very different conservation purposes, including habitat protection, many land trusts list the protection of habitat either as their sole focus or as one of their primary focuses.²⁷ Examples of the use of conservation easements to protect biodiversity abound.²⁸ In addition, even land trusts that focus on conservation purposes other

24. See, e.g., Philip Tabas, *Making the Case for State Tax Incentives for Private Land Conservation*, 19 EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 7 (1999) (describing the state tax benefits available for the donation of land and conservation easements in North Carolina, Alabama, and Virginia).

25. See, e.g., Robert B. Keiter, *Ecosystems and the Law: Toward an Integrated Approach*, 8 ECOLOGICAL APPLICATIONS 332, 337 (1998) (noting that “even though federal regulatory power can be invoked under existing law to protect ecological resources on private lands, federal involvement in these matters is unpopular and has fueled a property-rights backlash against the ecological management of natural resources”); Edward J. Heisel, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 ECOLOGY L.Q. 229, 231 (1998) (noting that “[t]he increasing development pressure on private lands compounds the problem of increased reluctance to regulate private property”); David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 390 (1995) (noting that “[s]ociety is not yet ready for vast regulatory incursions into the historically privileged realm of private property without some *quid pro quo*, at least when these incursions are carried out in the name of biodiversity conservation”).

26. The land trusts included in the LTA Census reported that they are involved in the protection of wetlands, river corridors, watersheds, farmland and ranchland, nature preserves, open space, endangered species habitat, scenic views, recreational trails, historic lands, coastal resources, timberland, and urban open space. LTA CENSUS, 2000 available at <http://www.lta.org>.

27. The stated mission of The Nature Conservancy, the largest land trust in the United States, is “to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.” See *Conservation by Design*, 2001. See also SMALL, *supra* note 11, at 5-5 (noting that the habitat protection sections of section 170(h) of the Internal Revenue Code and the Treasury Regulations issued thereunder are known as “The Nature Conservancy’s sections,” and that The Nature Conservancy was heavily involved in lobbying for the enactment of section 170(h) in its current form). Of the local, state, and regional land trusts participating in the LTA Census, 42% reported that they consider the protection of endangered species habitat to be one of their primary focuses, and 52% reported that they consider the protection of wetlands to be one of their primary focuses. LTA CENSUS, 2000 available at <http://www.lta.org>.

28. See, e.g., Sharon E. Richardson, *Applicability of South Carolina’s Conservation Easement Legislation to Implementation of Landscape Conservation in the ACE Basin*, in PROTECTING THE LAND, *supra* note 1, at 209 (describing how thirty-seven percent of a coastal area in South Carolina

than habitat protection can achieve incidental but nonetheless significant protection of biodiversity in the course of fulfilling their particular missions.²⁹

Conservation easements acquired by land trusts generally are not well suited to the protection of biodiversity in core areas.³⁰ The proper level of biodiversity protection in core areas often can be achieved only if the landowner agrees to refrain from most or all uses of the land or to actively manage the land for biodiversity protection purposes. In most cases landowners are not willing to accept such restrictions or responsibilities.³¹ However, conservation easements acquired by land trusts may be particularly well-suited to the protection of areas considered to be “buffer zones” around core areas, where the landowners’ retained rights to use the land are compatible with biodiversity protection goals.³² In such cases, acquiring a conservation easement may be as beneficial, more cost effective, and more feasible than obtaining fee title to the land.³³

known as the ACE Basin, which supports over 1,500 species of plants and animals, nine of which are federally listed as threatened or endangered, has been permanently protected using a variety of conservation tools, including conservation easements, and the protection of individual tracts has resulted in the landscape-level protection of large contiguous areas characteristic of the whole spectrum of habitat types); John B. Wright, *The Power of Conservation Easements: Protecting Agricultural Land in Montana*, in PROTECTING THE LAND, *supra* note 1, at 395 (describing how the Montana Land Reliance has acquired conservation easements on 115,000 acres of lower-elevation private lands in the valleys surrounding Yellowstone National Park and how these lands are an ecological extension of the park, providing critical habitat for elk, deer, moose, bison, grizzly bear, wolves, and migrating waterfowl).

29. See, e.g., Brenda Biondo, *Stand by Your Land*, 50 NATURE CONSERVANCY 26 (2000) (describing how The Nature Conservancy actively partners with local land trusts in areas targeted by the Conservancy for landscape protection because biodiversity protection often can be accomplished in connection with the protection of private land for open-space, scenic, and recreational purposes).

30. REED F. NOSS & ALLEN Y COPPERRIDER, *SAVING NATURE’S LEGACY: PROTECTING AND RESTORING BIODIVERSITY* 147 (1994).

31. See, e.g., Farrier, *supra* note 25, at 347-48 (noting that while in some situations management for biodiversity may be compatible with productive activity, such as limited grazing, in most cases land protected by a conservation easement will not be managed in a manner sensitive to biodiversity conservation unless the holder of the easement reserves access to the land and takes management responsibility itself, or the landowner agrees to manage the land and is paid for doing so); Jamie Sayen, *Limitations of Conservation Easements*, WILD EARTH, Spring 1996, at 77 (noting that there often is no substitute for full fee acquisition to safeguard sensitive species and habitat, and that conservation easements generally are not the best way to protect habitat of sensitive, rare, threatened, and endangered species and natural communities unless stringent limits are placed on permitted uses by the landowner). While some conservation easements acquired by land trusts reserve to the landowners only minimal rights to use the land subject to the easements (sometimes referred to as “forever wild” easements), such easements are relatively rare. It is far more typical for an easement to restrict real estate development, industrial uses, and certain commercial uses, but reserve to the landowner other substantial use rights, even where one of the stated conservation purposes of the easement is habitat protection. See, e.g. CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 7, 179 (noting that even the most restrictive easements typically permit landowners to continue traditional uses of the land).

32. See, e.g., Heisel, *supra* note 25, at 292 (noting that acquiring restrictive easements may particularly suit areas considered to be buffer zones around core regions in a system of biodiversity reserves, and that in some circumstances it may be that the bulk of a landowner’s use of his or her land is compatible with the preservation of biodiversity); REED & COPPERRIDER, *supra* note 30, at 149 (noting that, in most regions, a system of core reserves will be necessary but not sufficient to maintain biodiversity, that such core reserves must be complimented by multiple-use lands that provide an opportunity to integrate human activities with conservation, and that allowable activities in buffer zones

Even in a situation where a conservation easement does little more than restrict the development of the land to which it relates and, thus, may allow continued uses of the land that are not compatible with biodiversity protection goals,³⁴ such an easement can be viewed as an important first step in the protection of the land. Nothing in the sale or donation of a conservation easement to a land trust prevents the layering of additional restrictions on the use of the land subject to the easement, whether those additional restrictions are imposed by regulation or purchased from or donated by the current or a successive owner of the land.³⁵

The voluntary nature of the sale or donation of conservation easements to land trusts, the numerous conservation purposes for which deductible easements may be donated under section 170(h), and the myriad of land trusts with diverse objectives that acquire easements make it difficult to incorporate such easements into any coordinated biodiversity conservation initiative.³⁶ However, the existence of a myriad of non-governmental organizations that often are staffed and supported by community members is precisely what may make the sale or

might include nonmotorized recreation, selective forestry, light grazing, and small-scale subsistence agriculture). The Treasury Regulations interpreting section 170(h) expressly support the deductibility of easements that are donated to protect buffer zones. *See, e.g.*, Treas. Reg. § 1.170A-14(f) (2001), Example (2) (providing that the donation of an easement prohibiting further development on a farm that is contiguous and will provide a compatible buffer to a nature preserve qualifies for a deduction under section 170(h)). *See also* SMALL, *supra* note 11, at 13-3 (noting that Treasury Regulation § 1.170A-14(f) (2001), Example (2) is known as the “buffer zone” example and was submitted to the Internal Revenue Service in comments from The Nature Conservancy during the drafting of the Treasury Regulations).

33. *See* Heisel, *supra* note 25, at 292 (discussing the acquisition of restrictive easements by the federal government). *See also* FAIRFAX & GUENZLER, *supra* note 1, at 12 (noting that we cannot hope to buy enough parcels but instead must find ways to work with private landholders to ensure habitat protection); CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 7 (noting that an easement can be tailored to the protection requirements of the particular land to which it relates and to the desires of the landowner, and that easements keep property in private hands and on the tax rolls and also carry a lower initial price tag than outright acquisition).

34. *See, e.g.*, CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 179 (noting that the principal objective of most easements is to prohibit or control residential development); Farrier, *supra* note 25, at 348 (noting that easements are particularly concerned with restricting real estate development while allowing existing agricultural activities to continue, and, thus, may not go far enough because grazing and intensive cropping can significantly damage ecosystems).

35. *See* Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 424 (2001) (noting that conservation easements may be seen as a “no-lose proposition” because they do not replace or repeal any existing governmental authority to regulate conduct on private lands, and the government remains free to protect the environment on private lands by enforcing existing laws or enacting new legislation).

36. *See, e.g.*, Farrier, *supra* note 25, at 346 (noting that the sheer number of land trusts obtaining conservation easements on an ad hoc, reactive basis, along with the multitude of purposes for which easements are sought, make very difficult any attempt to produce integrated and coordinated planning). *See also* FAIRFAX & GUENZLER, *supra* note 1, at 171-72 (noting that with land trusts forming throughout many regions of the United States, questions about duplication of effort, dissipation of social capital, and fragmentation of the landscape have become important).

donation of a conservation easement to a land trust an attractive option to some landowners who otherwise would not voluntarily protect their lands.³⁷

In addition, although land trusts sometimes acquire easements in a reactive manner, letting landowner requests, imminent sales or threats of development determine which easements they accept,³⁸ an increasing number of land trusts engage in strategic planning in an effort to target their limited resources to the protection of key parcels that fit within broader programs of landscape preservation.³⁹ As the land trust movement matures, there appears to be an increasing recognition on the part of many of its members of the importance of protecting entire ecosystems, and that ad hoc, piecemeal protection of parcels will not accomplish long-term habitat and ecosystem protection goals.⁴⁰

37. See, e.g., Jean W. Hocker, *Patience, Problem Solving, and Private Initiative: Local Groups Chart a New Course for Land Conservation*, in *LAND USE IN AMERICA* 250-51 (Henry L. Diamond & Patrick F. Noonan eds., 1996) (noting that landowners are usually comfortable working with land trusts because land trust leaders are typically their neighbors or at least residents of the same region, that land trusts, having no governmental powers, are not particularly threatening, and that land trusts have credibility with, and access to, the very landowners who may hesitate to deal directly with the government); David Bezanson, *Acacia Protecting Texas Hill Country*, in *PROTECTING THE LAND*, *supra* note 1, at 259 (noting that many Texans mistrust the idea of coordinated planning for conservation, particularly if governments are involved); Morrisette, *supra* note 35, at 400 (noting that being a part of the community allows the Montana Land Reliance to accomplish much of its work “around kitchen tables with family members,” and that access to those kitchen tables is likely to be more difficult for an outside organization or government agency); Richardson, *supra* note 28, at 218 (noting that often landowners who are private about their family and land affairs seek out the Lowcountry Open Land Trust because its board of trustees is composed of local landowners, many of whom have donated conservation easements). See also Farrier, *supra* note 25, at 350 (discussing The Nature Conservancy’s unique advantage of being able to negotiate with private landowners against the backdrop of government regulation, while still remaining committed to a philosophy of voluntariness and cooperation, and that the government will never be able to escape completely from being perceived in terms of its regulatory persona, even where it approaches with offerings rather than threats).

38. See Becky Thornton, *A Land Preservation Methodology—How One Organization is Achieving its Goals*, 20 *EXCHANGE, THE J. OF THE LAND TR. ALLIANCE*, 9 (2001) (acknowledging that it is easy for local land trusts to fall into a reactive mode, but advocating the use of a priority resource inventory to target the most important parcels).

39. See, e.g., THE NATURE CONSERVANCY, *SOUTHERN BLUE RIDGE ECOREGION* (2000) (recognizing that it could not achieve its mission “one species at a time, acre by acre,” The Nature Conservancy has broadened its focus and, under a new framework entitled ‘Conservation by Design,’ now focuses on protecting entire ecological regions or “ecoregions”); Wright, *supra* note 28, at 395 (describing how the Montana Land Reliance has begun to target Montana’s key valley ecosystems in an effort to conserve entire landscapes rather than isolated remnants and works with the Greater Yellowstone Coalition, The Nature Conservancy, the Gallatin Land Trust, and the Jackson Hole Land Trust to create buffers, corridors, and linkages to maintain the biological integrity and scenic beauty of Yellowstone National Park).

40. See, e.g., Hocker, *supra* note 37, at 252 (stating that parcel-by-parcel protection will never be enough, and that whole systems, including watershed, habitat, and ecosystems, need to be protected); John B. Wright, *Reflections on Patterns and Prospects of Conservation Easement Use*, in *PROTECTING THE LAND*, *supra* note 1, at 501 (noting that “lessons derived from such fields as conservation biology, landscape ecology, historic preservation, environmental planning, and indeed agricultural economics all converge on a single fact: Small, isolated tracts of undeveloped land are insufficient to secure ecological health, agricultural continuity, and the solace of open spaces so profoundly needed by human beings”).

The proliferation of land trusts raises questions about counterproductive competition for projects as well as human and financial support.⁴¹ Given the sheer number of land trusts now in existence and the reality that some land trusts operating in the same locality or region will have overlapping land protection goals, some competition and inefficiencies are inevitable.⁴² The land trust movement is still in its early acquisition phase, and at some point there will likely be a shakeout, when some land trusts will fold, and others will merge. In addition, while competition and inefficiencies are apparent, so is cooperation and coordination,⁴³ and not only within the land trust community itself. Land trusts increasingly have been forming partnerships with government agencies and other entities with similar land conservation goals.⁴⁴ These partnerships will, of course, face difficult, ongoing management challenges,⁴⁵ and the increasing

41. See, e.g., Wright, *supra* note 40, at 501 (noting that acrimony between land trusts now simmers beneath the surface of the seemingly unified “land trust community” in some places); FAIRFAX & GUENZLER, *supra* note 1, at 5 (asking whether a proliferation of organizations is an efficient way to proceed in terms of project development, fund-raising, and volunteer effort).

42. See, e.g., Wright, *supra* note 28, at 398 (noting that occasional turf conflicts are inevitable between a statewide group such as the Montana Land Reliance and smaller local and regional trusts).

43. See, e.g., Mark Ackelson, *The Iowa Natural Heritage Foundation and The Mississippi River Blufflands Alliance: Protecting Spectacular and Threatened Natural Resource Features in the Upper Midwest*, in PROTECTING THE LAND, *supra* note 1, at 321 (describing how four land trusts formed an alliance and are collaboratively working to conserve the blufflands along portions of the Upper Mississippi River); FAIRFAX & GUENZLER, *supra* note 1, at 172 (noting that the division of labor in a land protection project in the Ossipee region of New Hampshire suggests that land trusts focus their programs to support rather than compete with one another, and describing how, in the context of the project, The Nature Conservancy focuses on rare and endangered species, the Audubon Society of New Hampshire concentrates on wetlands and wildlife corridors, and the Society for the Protection of New Hampshire Forests concentrates on key watershed and productive upland forests). See also Biondo, *supra* note 29.

44. See, e.g., Linda J. Mead, *Mackinaw Headlands: A Model in Public-Private Partnerships*, in PROTECTING THE LAND; see also *supra* note 1, at 287 (describing the protection of 600 acres of forestland in the north country of Michigan through the coordinated efforts of a regional land trust, several state and local governmental agencies, private family foundations, and various other entities); Richardson, *supra* note 28, at 209 (describing how thirty-seven percent of a coastal area in South Carolina known as the ACE Basin was permanently protected through the coordinated efforts of a variety of land trusts, government agencies, private landowners, and other entities, how the different missions of the various organizations involved contributed to the protection of the area because a variety of types of property could be protected and different organizations appealed to different types of private landowners, and how the model of cooperation from the project was successfully replicated in other coastal watersheds). See also Hocker, *supra* note 37, at 251 (noting that public agencies at all levels are increasingly turning to land trusts for help in setting aside land for open space); FAIRFAX & GUENZLER, *supra* note 1, at 13 (noting that while the federal government and national groups have not withdrawn from the conservation scene and are not likely to do so, the authors believe that the sharing of decision making authority will continue and that nonfederal and nongovernmental agencies, especially mixed organizations like public-private partnerships, cooperatives, and consensus groups, will play an increasing role in managing multiownership landscapes and watersheds).

45. See, e.g., FAIRFAX & GUENZLER, *supra* note 1, at 167 (envisioning the day-to-day management problems that may be encountered with regard to a trail that passes through three contiguous parcels, each managed by a separate entity, where hunting is forbidden on the first and last parcel, but encouraged on the middle parcel, and motorized access is forbidden on the first parcel, but not on the last two).

reliance of the government on nonprofit organizations to accomplish environmental goals raises concerns about the structure of environmental decision making and accountability.⁴⁶

It is arguable that the public funds expended on the conservation easements acquired by land trusts, at least those easements that have habitat protection as their conservation purpose, would be better spent in programs that more effectively plan for biodiversity protection by targeting land with the highest conservation value and in most critical need of protection.⁴⁷ However, as discussed by Holly Doremus, it is becoming increasingly apparent that a biodiversity conservation approach that focuses only on the protection of reserves or “hot spots” likely will not be successful over the long term because such an approach ignores and, in some respects, exacerbates the growing disconnect in our society between humans and nature.⁴⁸ Recognizing that “the more completely we isolate our daily lives from nature, the more tenuous our commitment to protecting nature is likely to become,” Doremus argues for finding ways to “focus the law, and the public, on protecting ordinary nature.”⁴⁹

Land trusts, and the conservation easements they acquire, provide a means through which individuals, families, and communities can participate in the protection of ordinary nature—the working farms, the family homesteads, the public trails and parks, the urban gardens. The variety of missions pursued by individual land trusts and the broad conservation purposes for which deductible easements may be granted under section 170(h) allows land trusts to cast a much wider net of land protection than is found in more targeted land conservation programs⁵⁰—ones that take into account and, indeed rely on, the accumulated wisdom of the local inhabitants and their personal connections to the land. Individual landowners, families, and communities are able to take an active role in and responsibility for the protection of the lands they cherish through the sale

46. See Lee P. Breckenridge, *Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management*, 25 *ECOLOGY L.Q.* 692, 706 (1999) (concluding that as nonprofit organizations acquire prominent roles in the creation and implementation of new arrangements for the governance of ecosystems, their organizational structures and decision making processes themselves become matters of national ecological policy). See also FAIRFAX & GUENZLER, *supra* note 1, at 13, 209 (concluding that institutional design will emerge as an increasingly important conservation challenge, and noting that some of the best routes to accountability are found in nonprofits who must work assiduously to appeal to potential donors, which is a form of public accountability and conjures up the familiar bumper sticker wondering what would happen if the Defense Department were forced to hold bake sales and the schools were fully funded).

47. The public contributes significantly to the acquisition of easements by land trusts by subsidizing the donations of cash and other assets, including conservation easements, that are made to land trusts through the available income, estate, and property tax benefits, and through the direct expenditure of federal, state, and local tax revenues in the form of grants made to land trusts for a variety of purposes, including the funding of easement purchase projects or programs.

48. Holly Doremus, *Biodiversity and the Challenge of Saving Ordinary*, 38 *IDAHO L. REV.* 325 (2002).

49. *Id.* at 327.

50. See, e.g., Farrier, *supra* note 25, at 334 (noting that the Wetlands Reserve Program is “confined to a narrow category of ecosystems . . .”).

or donation of conservation easements and through involvement in the founding and ongoing operations of land trusts as board members, staff members, volunteers, and donors.⁵¹ Although lacking the “flash and glamour” associated with the protection of large parcels that have undeniable scenic or habitat value, the ordinary parcels protected by land trusts constitute a significant portion of the national landscape.⁵² Their protection should be part of any biodiversity conservation initiative that recognizes the benefit of fostering connections between people and nature and the futility of relying solely on government regulation and government land acquisition.⁵³

That is not to say that no mistakes are being made. The use of conservation easements as a private land conservation tool on such a broad scale is a new development, and the land trust movement is still in the throes of its acquisition phase.⁵⁴ Some land is being improperly protected, and some landowners are being allowed to perpetuate their idiosyncratic land management preferences into the distant future.⁵⁵ However, concerns about “dead hand” control in the context of conservation easements may be misplaced given that the degradation and destruction of ecosystems as a result of development often is substantially irreversible, while those who restrict development through easements actually keep options open for future generations.⁵⁶

51. See Gustanski, *supra* note 1, at 453 (noting that the land trust model restores a level of local responsibility for managing the bioecological resources of the community that have traditionally been removed from the local people and transferred to central government agencies in offices in distant cities, and in the past abrogation of these responsibilities has frequently not only removed local communities from the decision-making process, but left them with a deep-seated apathy); Tom Quinn, *A Farm and River Greenway on the St. Croix River: Standing Cedars Community Land Conservancy and Wisconsin Farmland Conservancy*, in PROTECTING THE LAND, *supra* note 1, at 339 (noting that some of the hidden benefits land trusts can bring to a community include the process of building an organization, training board members in the nuts-and-bolts process of land protection, building a base of citizens who have first-hand experience at finding common ground on difficult issues, providing citizens and communities with the space to experiment with new ways of connecting their sense of community with their sense of place, and adding a spirit of democracy to the rights of private land ownership).

52. FAIRFAX & GUENZLER, *supra* note 1, at 175.

53. *Id.*

54. See, e.g., THOMAS S. BARRETT & STEFAN NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM THE CONSERVATION EASEMENT HANDBOOK XIII (1996) (noting that conservation easement law is still relatively uncharted territory, that today’s practitioners remain pioneers, relying on each other to report what they find out there, to share their insights and anxieties, and that enforcement experience is still sparse); FAIRFAX & GUENZLER, *supra* note 1, at 153 (noting that the current emphasis on easements is a bit of an experiment, and that it is not clear how the relevant state and federal laws will be interpreted several decades hence when landowners not involved in the original transaction want to use their lands in ways circumscribed by an easement).

55. See, e.g., FAIRFAX & GUENZLER, *supra* note 1, at 166 (describing how one landowner’s intolerance for prescribed burns or a “let-burn” approach to naturally occurring fires is still influencing, arguably improperly, the management of land subject to a conservation easement).

56. Farrier, *supra* note 25, at 344 (noting that “[l]egal arrangements, unlike physical modification, can always be reversed”). Easements generally can be amended in a manner consistent with their conservation purposes. See CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 82. In addition, the drafters of the Treasury Regulations issued under section 170(h) recognized that perpetuity in the easement context may not mean forever and provided that an easement may be extinguished by

An equally important role that land trusts and the easements they acquire can play in biodiversity conservation is that of facilitating a transition from the prevailing view of private property, where landowners are deemed to possess virtually autonomous rights to decide how to use and develop their land, to a view of private property in which individual parcels of land are seen as part of a larger landscape and landowners are deemed to owe obligations to both the natural and human community to protect the functions performed by their land as part of that landscape.⁵⁷ One of the more difficult tasks facing proponents of this latter view of private property is that of discovering a means of adopting it without unfairly hurting existing property holders.⁵⁸ Conservation easements may offer just such a means.

The use of conservation easements by private landowners to permanently protect their land does not require any change to the current legal regime because it is based on the prevailing view of private property rights as transferable commodities.⁵⁹ Under the prevailing view of private property, a landowner is free to sell a portion of the rights he holds with respect to his private property in exchange for cash, or to donate such rights to a charitable organization in exchange for tax savings and, presumably, a heady feeling from having contributed to the greater good. There is no unfair disruption in a landowner's investment expectations in the context of a sale or donation of an easement because the transaction is entirely voluntary.⁶⁰

judicial proceeding in the event of an "unexpected change in the conditions surrounding the property" that make "impossible or impracticable the continued use of the property for conservation purposes." Treas. Reg. § 1.170A-14(g)(6). In the event of such an extinguishment and sale of the property, the easement holder must be entitled to a portion of the sale proceeds attributable to the value of the easement, and such proceeds must be used by the holder in a manner consistent with the conservation purposes of the original contribution. *Id.*

57. See Keiter, *supra* note 25, at 336. See also Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 *ECOLOGY L.Q.* 631, 652 (1996) noting:

The place to begin in reconceiving land ownership is to realize that land parcels are inherently connected and that each parcel, and hence each owner, belongs to a larger community. . . . It must become clear that land ownership entails membership in a larger community, creating responsibilities as well as rights.

58. See Freyfogle, *supra* note 57, at 650 (noting that as property scholars set about constructing an ecologically sound property regime, they face the tandem task of explaining how society might embrace it, and how society might do so without unfairly hurting existing property holders). See also J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 *CORNELL J.L. & PUB. POL'Y* 37, 43 n.18 (1998) (noting that a number of prominent "environmentalist" legal commentators are beginning to confront the unfairness issue in environmental law honestly, directly, and with a sobering message to all environmentalists that continuing to ignore or write around the unfairness issue risks allowing environmental laws like the Endangered Species Act to lose all their moral force).

59. See Keiter, *supra* note 25, at 336 (discussing the prevailing view of land as a fungible commodity).

60. See FAIRFAX & GUENZLER, *supra* note 1, at 152 (noting that unlike regulations, conservation easements are negotiated with willing sellers or donors and can be tailored to achieve particular conservation goals while accommodating the needs of the individual landowner).

It is important to note, however, that landowners who donate rather than sell their easements often bear a significant portion of the cost of the protection of their land. This is due to the fact that the tax savings generated by an easement donation often represent only a small percentage of the loss in value of the land.⁶¹ Thus, while tax savings are a motivating factor, many landowners who voluntarily donate easements do so, at least in part, because they “love their land.” It obviously would be the rare (and perhaps fantastical) easement donor who would cite to “a new view of private property as part of a larger landscape,” and his “obligations to protect the functions performed by his land within that landscape” as the motive for his charitable largesse. Nevertheless, the significant charitable impulse that often is required for the donation of an easement does smack of an incipient recognition on the part of some easement donors that land may be more than simply a marketable commodity, and that private landowners owe some land stewardship obligations to the larger human and natural community. While we might hope that someday private landowners will neither expect nor be entitled to monetary compensation for fulfilling their land stewardship obligations, under our current system of private property rights landowners who voluntarily undertake such obligations do forego some of their investment expectations. The tax incentives provided for easement donations help to create a reasonable transitional phase, wherein the public offers partial compensation to private landowners for their lost investment value but also requires such landowners to share, sometimes significantly, in the cost of choosing a stewardship approach to their land.⁶²

61. For an example of the income tax savings that may be generated under section 170(h) upon the donation of a conservation easement, see Small, *supra* note 8. Because section 170(h) is structured as a deduction, the percentage of the cost of the protection of a landowner's property (that is, the percentage of the cost of the conservation easement) that is borne by the public in the form of foregone income tax revenue can never exceed the landowner's marginal income tax rate. To illustrate, if a landowner in the thirty-five percent marginal income tax rate bracket donates an easement with a value of \$1,000,000 and is able to deduct the entire value of the easement over a six-year period (which would be unlikely given the annual thirty percent of AGI deduction limitation discussed in Part I of this Article), the maximum tax savings that the landowner would enjoy over the six-year period would be \$350,000 (which is the amount of income tax the landowner would pay at a rate of thirty five percent on an additional \$1,000,000 of income in the absence of the deductions under section 170(h)). See *supra* notes 16 and 17, for a discussion of the limited estate and property tax incentives available with respect to the donation of a conservation easement.

62. See *Impact of Tax Law on Land Use, Conservation, and Preservation: Hearing Before the Oversight Subcomm., House Comm. on Ways and Means, 106th Cong. 61-63 (1999)* (statement of Michael Dennis, Vice President and General Counsel, The Nature Conservancy) (advocating the enactment of additional tax incentives to encourage private land conservation and noting that while private landowners have a stake in the quality of their community's environment, they also have the right to realize economic benefits of their investment in land, and that tax incentives for conservation provide a mechanism for meeting both of these interests). See also Freyfogle, *supra* note 57, at 658 (noting that while governments will play an active role in the protection of biodiversity, much of the work will require action by landowners, private and public, and that “legally structured processes must help bring landowners together, push them to find ways to promote wildlife, and encourage them to formulate and shoulder their fair-share burdens”).

Regardless of whether a private landowner chooses to sell or to donate a perpetual conservation easement, the transaction results in a permanent form of public/private co-ownership of the property subject to the easement.⁶³ An easement typically obligates the owner of the subject property to refrain from certain activities, such as development and industrial uses, that are inconsistent with the conservation purposes of the easement, and to engage in certain activities, such as the procurement of a forest stewardship plan, that are consistent with such conservation purposes. An easement also obligates the holder to enforce the terms of the easement in perpetuity for the benefit of the public. Accordingly, when a land trust acquires an easement, the public acquires a permanent interest in the subject property that is similar to the interest the public would have in the property under a private property rights regime that contemplates stewardship obligations as well as ownership rights.

One of the greatest challenges facing land trusts is the long term monitoring and enforcement of the conservation easements they acquire.⁶⁴ Although an in-depth review of those issues is beyond the scope of this article, it is worth noting that the land trust community is acutely aware of those issues, and many land trusts employ a variety of sometimes creative strategies to ensure they have adequate monitoring and enforcement capabilities.⁶⁵ It is also worth noting that aside from funding concerns, there is no reason to believe that a land trust necessarily would be less effective than a government agency in monitoring and enforcing an easement.⁶⁶

63. Most conservation easements are perpetual in duration because most recipient conservation organizations accept only perpetual easements and the federal tax incentives encourage the donation of perpetual easements. *See* CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 7.

64. *See, e.g.*, PROTECTING THE LAND, *supra* note 1, at 16 (noting that although transgressions occur infrequently with easement grantors, there is increased potential for easement infringement with successive landowners, and because easements have become popular only since the 1980s, there is an increasing likelihood of growth in the number of easement challenges in the future).

65. *See, e.g.*, CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 102 (recognizing that, from the standpoint of the land trust, a conservation easement is a perpetual liability, and noting that many land trusts set aside funds solely for monitoring and defending their easements, and many build such funds with each easement donation by either soliciting a cash contribution from the donor or raising money from other sources); FAIRFAX & GUENZLER, *supra* note 1, at 187 (noting that the Napa County Land Trust requires each landowner who donates a conservation easement to the trust to also make a donation to the trust's Easement Defense Fund); Unique Funding Mechanism Established, Jackson Hole Land Trust, 2001 (on file with the author) (describing an agreement between the Jackson Hole Land Trust and a homeowner's association for a "conservation" development that contains land protected by a conservation easement held by the trust, which agreement provides for a fee to be paid to the trust upon each sale or resale of the residential lots in the development for a twenty-year period, and such fees, which currently total \$136,702 from thirty-seven lot sales, help the trust to monitor the easement).

66. *See, e.g.*, FAIRFAX & GUENZLER, *supra* note 1, at 167 (discussing whether a newly formed local land trust and the U.S. Forest Service have sufficient stability to enforce the terms of perpetual easements they acquired in a partnership transaction and noting that although the newcomer land trust might appear the most likely candidate for shaking up or folding, Forest Service priorities are buffeted by both political winds and simple personnel changes that could make it the least reliable partner); Morrisette, *supra* note 34, at 391 (describing a 1999 survey of 315 conservation easements in the San Francisco Bay Area in which more violations occurred on easements held by land trusts than

Moreover, while it is true that subsequent owners of land encumbered by an easement may not have the same conservation proclivities as the easement grantor, it is also true that virtually all subsequent owners will have purchased or accepted such land with notice of the easement.⁶⁷ Accordingly, it would be difficult for a subsequent owner, particularly one who voluntarily purchased land encumbered by an easement with notice of the easement and for a purchase price that reflected the diminution in value of the land as a result of the easement, to successfully argue that his or her investment expectations are unfairly upset by the existence of the easement. The public makes an investment in land encumbered by a conservation easement⁶⁸ and, as a co-owner of that land, can quite reasonably insist that the other co-owner honor its obligations set forth in the agreement embodied in the easement.

Thus, one donation at a time, and with little fuss and fanfare, easements are altering the traditional form of private property ownership in our society. As easements gradually become more commonplace and the ecological benefits they produce become more visible and better understood, people may become more comfortable with and accepting of a view of private property that contemplates stewardship obligations as well as ownership rights.⁶⁹ Is it becoming less radical to believe that a private landowner has, along with his well-established rights, certain obligations to the larger human and natural community? Perhaps. If so, it is at least partly because easements are enabling such an idea to gain a foothold with a minimum of social disruption and angst.

III. CONCLUSION

Although conservation easements are not useful in every situation and should not be viewed as a substitute for governmental regulation or acquisition of critical lands, they can be effective in protecting land where retained private ownership and limited use is consistent with biodiversity conservation goals. Conservation easements and the proliferation of community organized, operated, and funded land trusts also foster closer, more conscious connections between people and nature, and allow individuals, families, and communities to assume

those held by government agencies, but land trusts were far more likely to monitor their easements than were public agencies and, thus, more likely to discover violations).

67. Recordation of a conservation easement is required by many state conservation easement enabling statutes and, for all practical purposes, by the Treasury Regulations issued under section 170(h). CONSERVATION EASEMENT HANDBOOK, *supra* note 17, at 202.

68. *See supra* note 47.

69. *See Hocker, supra* note 36, at 250-51 (noting that the key to changing how people think about land lies in education, that education takes place almost every time a land trust completes a project because each project becomes a demonstration of alternative land use, and that land trusts not only tell people about sound land use, they show people, on the ground, what it looks like, and that is a powerful message). *See also* ERIC T. FREYFOGLE, BOUNDED PEOPLE, BOUNDLESS LANDS: ENVISIONING A NEW LAND ETHIC 112 (1998) ("Land-use laws can evolve, yet they need to change slowly enough that property owners feel sufficiently secure . . . Ideally, change should occur so smoothly and gradually that most landowners aren't disrupted by it and don't come to fear it.").

responsibility for the protection of the lands they cherish. Perhaps most importantly over the long-term, a national landscape of privately owned land that is protected, in part, by conservation easements may prove to be fertile ground for the seeds of social and political change—helping to nurture a gradual transition from our traditional, rights-oriented view of private property ownership to a view that also contemplates responsibilities to the larger human and natural community.

Thus land trusts, and the conservation easements they acquire, have the potential to be a powerful, transformative force in our society. Yet the increasing use of conservation easements also raises a number of concerns, most of which derive from the bottom-up, slightly anarchic nature of the grassroots land trust movement. In particular, problems with the structure of environmental decision making and the long-term monitoring and enforcement of easements loom large. Such problems counsel caution and suggest that proponents of biodiversity conservation should take a more active role in shaping the land trust movement and the conservation easements that are acquired. In addressing the problems associated with the land trust movement, however, care must be taken to protect the grassroots approach to private land conservation that is the hallmark and unique strength of the movement.