COMMENT

CONSERVATION EASEMENTS: NOW MORE THAN EVER— OVERCOMING OBSTACLES TO PROTECT PRIVATE LANDS

BY
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Farmland, forestland, ranchland, wildlife habitat, and open space all continue to disappear at an alarming rate. Millions of acres of these valuable lands will change hands in the next 15 years. Preserving these lands is vital, and the use of conservation easements is essential in achieving this goal. Conservation easements have grown in popularity quicker than any other private land protection instrument. By permanently restricting development and land uses, conservation easements ensure traditional land-use values remain in place for the enjoyment of future generations. Do we need another strip mall replacing a forestland? Another suburban housing tract in place of a family farm? Pressure to sell to the highest bidder leaves many private landowners little choice, despite their desire to preserve land for future generations. Private landowners need every incentive possible to preserve their lands, and conservation easements provide security and tax relief. However, barriers to the effective use of conservation easements remain in place, and tax incentives are insufficient for many private landowners of low to moderate income. This Comment discusses the history of conservation easements up to the present, and analyzes several barriers preventing even broader use of this valuable private land protection instrument.

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I. INTRODUCTION

Conservation easements are one of the most important and fastest growing instruments used to protect private land in the United States.[1] Even so, conservation easements must assume an even larger role in private land conservation due to increasing land turnover and urban sprawl.[2] To this end, increasing their appeal and effectiveness is essential.[3] Further population

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[1] Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND 9, 14 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

[2] *See* 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, 64 (discussing factors contributing to increasing land turnover in the United States); discussion *infra* Section II.A (discussing the role of urban sprawl in loss of open space).

[3] *See* discussion *infra* Section IV (discussing potential barriers to use of conservation easements).

growth is inevitable,[4] and with the nation as a whole growing older, aging private landowners must decide what is to become of their land.[5] One expert anticipates that "between 2005 and 2020 *many millions of acres* of farmland, forestland, ranchland, wildlife habitat, *of important family land* will change hands and potentially change use."[6] More than any other land management tool, a conservation easement is best suited to protect these private lands.[7]

A dramatic example of the capacity of conservation easements to protect valuable private lands is evidenced by the American Land Conservancy's pursuit of a section of 18 miles of California coastline owned by the William Randolph Hearst empire.[8] The goal is to establish a conservation easement on the land while allowing the Hearst Corporation to retain ownership of the property.[9] Acquisition of the development rights to this land would preserve in perpetuity a "vast, unspoiled tract" of ecologically rare and vital coastline.[10] This is a perfect example of how a conservation easement can protect valuable private land under increasing development pressure.[11]

A conservation easement is a legal agreement in which a landowner agrees to permanently restrict the development and possible uses of the land in furtherance of conservation values.[12] A landowner creates an easement by conveying a deed[13] to a qualified easement holder, such as a government agency or a qualified tax exempt land trust.[14] While changing landowners leads to changes in land protection and land use in some instances, general land-use trends also provide the impetus for the use of conservation easements.

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[4] *See* TOM DANIELS, WHEN CITY AND COUNTRY COLLIDE 8 (1999) (referring to a Census Bureau estimate that the population of the United States will increase by 34,000,000 between 1996 and 2010, then stating that most of this growth will be felt in the outer fringes of metropolitan areas).

[5] Small, *supra* note 2, at 64.

[6] *Id.* (emphasis original).

[7] *Id.* at 65.

[8] Erica Werner, *Public May Get Hearst's Coastline*, OREGONIAN, Dec. 22, 2002, at A25. An agreement was reached in February 2003 whereby both parties (Hearst Corporation and the American Land Conservancy) would have one year to "determine a value for the development rights and to find buyers." Katharine Q. Seelye, *Hearsts Negotiate Sale of Huge Ranch's Development Rights*, OREGONIAN, July 6, 2003, at A14. The California Coastal Conservancy appears to be the frontrunner in the search for a buyer. *Id.*

[9] Seelye, *supra* note 8.

[10] Werner, *supra* note 8.

[11] *Id.* This portion of coastline is "one of the last undeveloped pieces of California's coast," and is under increasing pressure from Los Angeles to the south and San Francisco to the north. *Id.*

[12] Gustanski, *supra* note 1, at 9; s*ee also* JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 5 (1988) (explaining the basic concepts of conservation easements).

[13] The deed itself is executed in the same manner as other real estate conveyances. Gustanski, *supra* note 1, at 14.

[14] *Id.*

Urban sprawl is the spread of population and associated infrastructure away from metropolitan areas and into surrounding lands.[15] Many communities are wrestling with preserving natural resources, wildlife, farmland, and open space while housing developments and new roads push farther from urban centers to accommodate people seeking a suburban lifestyle.[16] Instead of metropolitan city centers, suburban fringe areas bore the brunt of growth in the United States during the twentieth century.[17] As a result, natural resources, open space, and traditional land uses faced much pressure.[18] In the quest to preserve open space and existing land uses in the face of continued growth and changing landowners, conservation easements must maintain a leading role.[19]

Ultimately, the private landowner decides whether an easement is placed on the land; therefore, incentives encouraging use of conservation easements are vital.[20] Various forms of federal, state, and local legislation facilitate the use of conservation easements.[21] Essentially, federal laws provide that a permanent conservation easement qualifies landowners for certain tax benefits.[22] However, it was left to state law to provide solutions to common law problems posed by conservation easements.[23] Although almost every state now has a statute enabling conservation easements,[24] landowners and easement holders alike must familiarize themselves with potential limitations on the effectiveness and popularity of conservation easements. Unfortunately, readily available resources are in short supply for private owners wishing to ensure their land is protected long after they are gone.[25]

Conservation easements can fail to meet landowner expectations or lose their appeal in the face of various adverse scenarios and shortcomings.[26] While not addressing every potential problem conservation easements may entail, this Comment attempts to apprise easement donors and holders of several potentially threatening situations and flaws in tax incentives. Conservation easements can lose effectiveness in the face of

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15 *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 15–16 (1999) (discussing urban sprawl and its effects).

16 *See infra* Section II.A.

17 FREILICH, *supra* note 15, at 2.

18 *See* DANIELS, *supra* note 4, at xiii (discussing ramifications of urban sprawl).

19 *See infra* Sections II.B, III.D.

20 *See* Gustanski, *supra* note 1, at 15.

21 *See* discussion *infra* Section III.

22 *See generally* 26 U.S.C. § 170(h) (2000) (providing basis for federal income tax benefits for donation of a conservation easement); American Farm and Ranch Protection Act, 26 U.S.C. § 2031(c) (2000) (providing basis for estate tax benefits available to conservation easement donors in addition to benefits provided by § 170(h)).

23 Robert H. Squires, *Introduction to Legal Analysis*, *in* PROTECTING THE LAND, *supra* note 1, at 69, 70.

24 Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV'T 244, 245 (2001).

25 Small, *supra* note 2, at 64–65. Contrast this with the abundance of resources available for those wishing simply to sell their land. *Id.*

26 *See* discussion *infra* Section IV.

eminent domain, abandonment, and other scenarios.[27] Another concern is the prospect of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[28] Potential conflicts can arise over easement appraisals.[29] Tax incentives are a contradiction in terms for low to moderate income landowners wishing to donate highly valuable conservation easements.[30] This Comment discusses available and prospective solutions to these problems to encourage private landowners, in the face of possible roadblocks, to focus on what is needed to ensure a successful, long-term easement.[31]

Section II provides background on conservation easements, briefly describes the threat to open space and existing land uses created by increasing population and development, and explains why conservation easements are well suited to alleviate this threat. Section III discusses the statutory basis for conservation easements, including state enabling statutes intended to assuage the wary landowner, and briefly touches on the importance of land trusts in making the system work. Section IV alerts landowners and easement holders to several legal and policy concerns creating barriers to the effectiveness and appeal of conservation easements. Section V investigates available and potential resolutions to these concerns. Section VI concludes by encouraging increased use and understanding of conservation easements, and advocating for enhanced incentives in coming years as private land is subjected to increased turnover and further development pressure.

II. BACKGROUND

Although not known by the term at the time, the first American conservation easement was implemented in the 1880s in the Boston area with the goal of permanently protecting parkways.[32] Conservation easements were formally developed over the last 45 years with the specific goal of preserving open space and scenic and historic areas.[33] Beginning in the 1980s, conservation easements rapidly gained popularity as land trusts began to gain a foothold in the conservation easement movement.[34]

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[27] *See* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND, *supra* note 1, at 26, 40–48 (surveying state taxation and legal treatment of conservation easements); DIEHL & BARRETT, *supra* note 12, at 130–34 (discussing limitations on conservation easements' effectiveness).

[28] 42 U.S.C. §§ 9601–9675 (2000).

[29] *See, e.g.*, Johnston v. Comm'r, 74 T.C.M. (CCH) 968, 981 (1997) (landowner submitted a conservation easement appraisal of $1,131,438; on audit IRS valued the easement at $407,000).

[30] Press Release, Land Trust Alliance, LTA Calls for Broader Tax Incentives for Land Conservation (Apr. 30, 2002) [hereinafter LTA Calls for Broader Tax Incentives], *available at* http://www.lta.org/publicpolicy/wentworth_testifies_033002.htm.

[31] *See* discussion *infra* Section V.

[32] Gustanski, *supra* note 1, at 9.

[33] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 856 (4th ed. 1998).

[34] Gustanski, *supra* note 1, at 14–18. Land trusts are nonprofit organizations that work with private landowners to protect and conserve their land, typically by acquiring "land, conservation easements, management agreements, or other interests in real property for the

Initially, the legal community viewed conservation easements with skepticism because they were not typical easements.[35] They are primarily negative easements, run in perpetuity, are transferable, and are usually "in gross" (benefit the public at large as opposed to adjacent property owners).[36] A negative easement gives the easement owner the right to prevent the landowner from doing something on the servient land, and conservation easements prevent uses incompatible with conservation values.[37]

Restrictions on land titles are not generally favored by common law.[38] Traditionally, English or common law courts only recognized four types of negative easements.[39] The right to prevent development in order to conserve land was not one of these four types. However, in the United States, conservation easements were recognized as a legitimate form of negative easement,[40] and have grown into the most vital tool for protecting private land in the nation.[41] To create a conservation easement, a landowner protects a particular area of land by transferring a portion of his property rights to a third party via a written deed, and the third party becomes responsible for meeting the conditions of the easement.[42]

A. Land Losing Ground

Protecting and conserving private land has become increasingly important as a rural lifestyle supported by an urban income has become the new American dream.[43] Many communities across the United States seek ways to maintain open space and existing land uses in the face of spreading houses and highways that accommodate the desire of residents to live a suburban life with the amenities of an urban center. More than any other factor, urban sprawl is responsible for the disappearance of open space and farmlands.[44] Urban sprawl is "'low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent[, and] designed without regard to its surroundings.'"[45] The consequences of urban sprawl include increased air and water pollution, loss of wildlife habitat, loss of farmland and timberland, and inflated

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purpose of enabling public benefit from the land." *Id.* at 12.

35 Jean Hocker, *Foreword* to PROTECTING THE LAND, *supra* note 1, at xvii, xvii.

36 DUKEMINIER & KRIER, *supra* note 33, at 856. There can also be affirmative aspects to a conservation easement, such as requiring the landowner to allow hiking or fishing. DIEHL & BARRETT, *supra* note 12, at 7–8.

37 DUKEMINIER & KRIER, *supra* note 33, at 854.

38 *See id.* (explaining why English common law judges strictly limited negative easements to four recognized types).

39 *Id.*

40 *Id.* at 856.

41 Gustanski, *supra* note 1, at 9.

42 Roderick H. Squires, *Preface* to PROTECTING THE LAND, *supra* note 1, *at* xxi, xxviii.

43 *See* FREILICH, *supra* note 15, at 15–16.

44 *Id.* at 28.

45 *Id.* at 16 (quoting Richard Moe, President of the National Trust for Historic Preservation).

transportation and infrastructure spending.[46] Sprawl impacts environmentally sensitive areas that provide invaluable functions such as flood control, groundwater recharge, and wildlife breeding grounds.[47] Often unpublicized and unnoticed despite their vital roles, these functions are gaining appreciation on a large scale.[48] At the same time, many suburban communities have benefited from sprawl and remain interested in continued growth.[49] Nonetheless, sprawl creates serious problems when it competes with open space and existing land uses.[50]

More than eight square miles of natural lands are lost in the United States each day.[51] While "core city" growth remains stagnant or even declines, the overall populations of metropolitan regions continue to grow.[52] This trend is especially disturbing considering the low-density settlement patterns evident in outlying ("fringe") areas of metro regions.[53] Low-density development means that "the land area covered by the fringe increases dramatically and the amount of open space declines in tandem."[54] The amount of land per person for new housing has almost doubled in the last twenty years.[55] Developed land increased by almost thirty million acres between 1982 and 2001.[56] Several factors influence this trend away from urban centers, including an abundance of land, technology allowing people to live and work anywhere they want, a new post-industrial era favoring horizontal buildings or linear designs, and the ever-increasing use of automobiles.[57] The political power of development interests, legislation facilitating the building of single-family homes, and rampant consumerism only pour gasoline on the fire.[58]

Conservation easements ease the burden on landowners. Landowners are under constant pressure to yield to increasing demand for more housing,

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46 DANIELS, *supra* note 4, at xiii.

47 *Id.* at 231.

48 *Id.*

49 FREILICH, *supra* note 15, at 25. Suburban communities argue that "real growth is occurring within the metropolitan area and . . . commercial and residential decisions are based on the free market system . . . ." *Id.*

50 *See, e.g.*, *id.* at 15–16 (describing crises caused by sprawl in America's major metropolitan areas).

51 RAND WENTWORTH, EDITORIAL VIEWPOINT: MAKING THE NATURAL CONNECTION (2002), *at* http://www.lta.org/newsroom/oped0802.htm. Natural lands include "wilderness, farms and natural areas." *Id.*

52 *See* DANIELS, *supra* note 4, at 6. Only 11 of the 30 largest core cities have seen population rise since 1970. *Id.*

53 *See id.*

54 *Id.* For instance, population increase is steepest in the outlying counties of the greater Washington D.C. area, with over 300,000 acres of open land expected to be lost between 1990 and 2020. *Id.* (citing Glenn Frankel and Stephen C. Fehr, *As the Economy Grows, the Trees Fall*, WASH. POST, Mar. 23, 1997, at A20).

55 Press Release, Land Trust Alliance, America is Losing Its Best Farmland (Oct. 23, 2003), *available at* http://www.lta.org/newsroom/aft_farming_on_edge.htm.

56 Hocker, *supra* note 24, at 244.

57 Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 VA. ENVTL. L.J. 333, 343–44 (2000).

58 *See* FREILICH, *supra* note 15, at 16 (discussing forces promoting urban sprawl).

transportation, and business space as the population continues to spread out from urban centers.[59] The lure of deep-pocketed developers is hard for landowners to resist as population increases around them.[60] Landowners are also confronted with rising property taxes to pay for increasing public service demands such as schools and roads.[61]

Meanwhile, the American public expresses an overwhelming desire to maintain existing land uses such as farming and forestry, and to preserve what natural resources and open space remain in and around metropolitan areas.[62] In 2001, 137 of 196 local and state ballot measures promoting open space were approved by voters, resulting in almost $1.7 billion of funding for open space conservation and parks.[63]

Growth trends and the various idiosyncrasies of the American lifestyle point towards the continued proliferation of sprawl.[64] Preserving open space has proven difficult, with many approaches, ideas, and regulations falling by the wayside.[65] Anticipating and planning for sprawl are essential. Conservation easements can be one of the most effective tools to limit the effect of sprawl on open space and traditional land uses.[66]

B. Why Conservation Easements?

Conservation easements provide an attractive option for landowners, government, and conservationists in the search for an effective, long-term method of protecting land.[67] Among other benefits, the landowner retains ownership of the land, the easement holder avoids the cost of purchasing the land outright, and the land itself is guaranteed to retain its conservation values.[68] Perhaps most appealing to all involved are the flexibility and

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[59] *See* DANIELS, *supra* note 4, at 8 (referring to a Census Bureau estimate that the population will increase by 34 million between 1996 and 2010, and stating that most of this growth will be felt in the outer fringes of metropolitan areas).

[60] *See id.* at 2 (discussing the changes newcomers from cities and suburbs cause in rural areas).

[61] *Id.*

[62] Gustanski, *supra* note 1, at 12–14. Table 1.1 compiles data from a survey done by Gustanski in 1996 and demonstrates Americans' strong belief in open space and land conservation. *Id.* at 13.

[63] TRUST FOR PUBLIC LAND & LAND TRUST ALLIANCE, LANDVOTE 2001: AMERICANS INVEST IN PARKS & OPEN SPACE 1 (2002), *available at* http://www.lta.org/publicpolicy/LandVote2001.pdf.

[64] William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 367 (2000).

[65] *See* John Casey Mills, *Conservation Easements in Oregon: Abuses and Solutions*, 14 ENVTL. L. 555, 556 (1984) (explaining how consensual scenic and conservation easements can be a more effective means of preserving open space); Hocker, *supra* note 24, at 244 (proposing the use of land trusts as a viable solution to prevent further loss of open space and to help control urban sprawl).

[66] *See* Hocker, *supra* note 24, at 245 (discussing the value of conservation easements and the limitations they may place on land).

[67] *See* DIEHL & BARRETT, *supra* note 12, at 2 (discussing the utility of conservation easements).

[68] *See* discussion *infra* Section II.A, *supra* Section II.B.

diversity of conservation easements.[69] Easements are generally more acceptable to private citizens than zoning or outright purchase because an easement allows the individual landowner to retain a majority of the "sticks" in the property rights bundle.[70] Essentially, the "private, voluntary aspect of an easement" is what makes it different from other resource protection tools less favored by private landowners.[71]

Land-use restrictions are particular to each easement and are designed with the specific property and interests of the landowner in mind.[72] For instance, an easement designed to protect an unspoiled natural area will be more restrictive than one designed to maintain existing farm land.[73] Regardless, continuation of traditional uses of the land usually is allowed by even the strictest easements.[74] However, no matter how much government or conservationists encourage the use of conservation easements, ultimately the private landowner decides whether an easement is placed on the land.[75] Easements are purely discretionary; they cannot be imposed on landowners by anyone—including government.[76] This creates the need for incentives to donate or sell a conservation easement.

Numerous incentives encourage private landowners to donate or sell conservation easements on their land. The main reason people grant an easement is that it protects their property *forever*, regardless of what happens to the grantor.[77] Additionally, the underlying property remains in private ownership.[78] Easements are tailored to the particular situation of the individual property and landowner.[79] Another incentive is that easements can result in monetary gain, via either outright sale of the easement or tax benefits associated with donation of an easement.[80] Potential benefits can be found in possible savings on some or all of the following: estate, property, gift, and federal and state income taxes.[81] In some instances, granting an easement and staying on the land can be far more lucrative than simply selling to the highest bidder.[82] Conservationists and government alike hope the combination of these incentives are enough to overcome the influence of

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[69] *See* DIEHL & BARRETT, *supra* note 12, at 2 (discussing the appeal of conservation easements).

[70] *See Id.* at 5 (explaining the concept of property rights and how an easement can be tailored specifically to fit the needs of the landowner and easement holder).

[71] *Id.* at 38. For instance, government can use the power of eminent domain simply to take ownership of land it deems necessary for a "public use." *See* discussion *infra* Section IV.A.1.

[72] *Id.* at 5.

[73] *Id.* at 7.

[74] *Id.*

[75] Gustanski, *supra* note 1, at 15.

[76] *Id.*

[77] DIEHL & BARRETT, *supra* note 12, at 37.

[78] *Id.* at 38.

[79] *Id.* at 5.

[80] *Id.* at 39–40.

[81] *Id.* at 51–57 (providing a concise description of tax benefits and the requirements easements must meet to be eligible for those benefits).

[82] *See* FREILICH, *supra* note 15, at 293 (noting the tax benefits to the landowner in retaining land with an easement).

money-wielding developers eager to turn farms and fields into housing developments and strip malls.

Governments encourage the use of conservation easements for many of the same reasons landowners are receptive to donating or selling them. The government reaps financial benefits because it gets the land protection the public seeks without paying to purchase the land outright, while the property remains on local tax dockets.[83] When purchasing land outright, the government loses a source of property taxes since the land is no longer privately owned. Additionally, the government is not forced to wield a heavy hand over private interests as it is when utilizing eminent domain or zoning restrictions.[84]

Conservation easements are a much less threatening land-use control tool, and their "private, voluntary aspect" separates easements from other land-use tools.[85] In slicing a segment of interest from the whole, land-use control is maintained by limitation.[86] Citizen concerns over government impinging on private property rights are significantly dampened when the action is voluntary and the landowner retains a majority of the sticks in the property bundle. In an effort to defuse a situation potentially fraught with tension between the government and a public vigilant in its protection of private property, the government should be more than willing to promote the use of conservation easements to protect open space and existing land uses.

III. STATUTORY AUTHORITY FOR CONSERVATION EASEMENTS

Several states enacted legislation regarding conservation easements prior to any federal action.[87] In 1976, federal legislation established conservation easements as a tax-deductible land conservation instrument.[88] Federal legislation provided monetary incentives while state legislation established conservation easements as valid property interests.[89]

A. Federal Legislation

Congress enacted the first federal statutory authority for the deductibility of conservation easement donations in 1976, and has amended it several times.[90] Internal Revenue Code section 170(h) provides that, for

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83 DIEHL & BARRETT, *supra* note 12, at 2.

84 *See* Squires, *supra* note 42, at xxi–xxii (discussing the appeal of using conservation easements to protect land).

85 DIEHL & BARRETT, *supra* note 12, at 38.

86 RUSSELL L. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 20 (1967).

87 Squires, *supra* note 23, at 70.

88 26 U.S.C. § 170(h) (2000); *see* STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS 1-2 (3d ed. 1994) (providing a concise legislative history of Internal Revenue Code § 170(h)).

89 Squires, *supra* note 23, at 70.

90 SMALL, *supra* note 88, at 1-2; *see generally* 26 U.S.C. § 170(h) (2000).

tax deduction purposes, a "qualified conservation contribution"[91] is a contribution of a "qualified real property interest, . . . to a qualified organization, . . . exclusively for conservation purposes."[92] Most importantly for conservation easement donors, the statute provides that a "qualified real property interest" includes "a restriction (granted in *perpetuity*) on the use which may be made of the real property."[93] "Conservation purposes" include land protected for preservation of wildlife and plant habitat, scenic values, and preservation of open space.[94] In 1980, the Senate specifically acknowledged the vital role conservation easements could play in preserving natural resources.[95]

In 1986, the Treasury Department promulgated final regulations pursuant to section 170(h).[96] The regulations reiterated congressional intent to make qualified conservation contributions a tax deductible land protection tool.[97] The regulations incorporated statutory guidance regarding "qualified conservation contributions,"[98] and provided further insight regarding which conservation purposes conservation easements may protect while qualifying for deductions.[99] Additionally, the regulations provided requirements for valuation and appraisals of conservation easements.[100]

By 1986, federal tax benefit schemes were in place to facilitate the use of conservation easements. Yet questions remained whether a conservation easement would pass muster when confronted with traditional common law constraints on restrictions of private property rights.[101] For conservation easements to succeed on a broad scale, they would need to rely on state legislation to remove common law hindrances.[102] Only then would private landowners feel free to take advantage of the federal tax benefits associated with conservation easements.

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91 26 U.S.C. § 170(f)(3)(B)(iii) (2000) (stating that a "qualified conservation contribution" is considered a valid partial interest in property for purposes of claiming tax deductions).

92 *Id.* § 170(h)(1).

93 *Id.* § 170(h)(2)(C) (emphasis added). This subsection provided that a permanent conservation easement was a qualified real property interest. *See* discussion *infra* Sections I, II.

94 *Id.* § 170(h)(4)(A). Open space protection was added as a valid "conservation purpose" in 1980. SMALL, *supra* note 88, at 4-1.

95 S. REP. NO. 96-1007, at 9 (1980).

96 26 C.F.R. § 1.170A (2002). Essentially, this subsection allows a taxpayer to establish a conservation easement on his property for a charitable organization and treat it as a charitable contribution for federal tax purposes. Richard B. Nettler, *Conservation Easements as a Development Tool*, SG040 A.L.I.-A.B.A. 1023, 1044 (2001). For an extensive discussion and analysis of § 1.170A, see SMALL, *supra* note 88 (3d ed. 1994, Supp. 1996 & Supp. 2000).

97 *See generally* 26 C.F.R. § 1.170A-14 (2002) (allowing deductions for qualified conservation contributions).

98 *Id.* § 1.170A-14(a)–(b).

99 *Id.* § 1.170A-14(d)(1)–(5).

100 *Id.* § 1.170A-14(h)–(i).

101 *See supra* notes 6–11 and accompanying text.

102 *See* Squires, *supra* note 23, at 70.

B. State Legislation and the Uniform Conservation Easement Act

Early on, common law problems were an area of concern in the use of conservation easements.[103] However, the fact that a conservation easement was "novel" or did not fall "within set categories" did not render the easement ineffective.[104] Indeed, some states had passed legislation facilitating the use of conservation easements before the 1976 federal legislation.[105] For instance, the Maryland Environmental Trust was created in 1957 to conserve and perpetuate the state's natural environment.[106] Although federal tax benefits were in place after 1976, it remained up to individual states to address common law land-use problems and make conservation easements a *legally* enduring land management tool.[107]

In order to help states "develop statutory language that would permit landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements,"[108] the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA) with the "primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential *common law impediments*."[109] Specifically, the UCEA provides:

> A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.[110]

The UCEA was intended to "maximize[] the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them."[111] Among other things, it provides that a conservation easement is unlimited in duration and should be treated the

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103 *See* BRENNEMAN, *supra* note 86, at 22–25 (discussing possible bounds for the subject matter of easements).

104 *Id.* at 24.

105 Squires, *supra* note 23, at 69–70.

106 T. Heyward Carter, Jr. et al., *Conservation Easements in the Fourth Federal Circuit*, *in* PROTECTING THE LAND, *supra* note 1, at 186, 190. One of the Trust's purposes is determining whether donation of a conservation easement qualifies for property tax deductions. *Id.*

107 Squires, *supra* note 23, at 70.

108 *Id.*

109 UNIF. CONSERVATION EASEMENT ACT Prefatory Note, 12 U.L.A. 166 (1996) (emphasis added).

110 *Id.* § 4, 12 U.L.A. 179.

111 *Id.* Prefatory Note, 12 U.L.A. 164. Additionally, the UCEA was intended to allow for affirmative aspects in conservation easements if needed to meet goals of land use. *Id.*

same as other easements.[112] The UCEA was intended to serve as a template for various state legislatures.[113] It had the desired effect, as almost all states have enacted statutes to ensure the legitimacy of conservation easements.[114] As of 2001, 48 states had statutes officially recognizing conservation easements as legally binding interests in real property.[115] Due to the differences in land management history and ecological and economic conditions among states, there are considerable variances in state conservation easement enabling statutes.[116]

C. A Sampling of State Conservation Easement Enabling Legislation

The effectiveness of conservation easements in the long run depends largely on state laws.[117] State statutes dictate how a conservation easement in a given state can function.[118] Various states have taken different approaches in enacting statutes permitting conservation easements. Statutes vary as to what an easement can protect and obligations an easement may impose on the landowner.[119] Twenty-one states have adopted the UCEA in one version or another, while the other states with easement provisions reflect the goals of the UCEA (even though they may bear little resemblance to it).[120] The following summaries provide an overview of the conservation easement enabling statutes of two states that have adopted the UCEA (Oregon and Alabama), and two that have not (Maryland and New York).

1. Maryland

Maryland long has been recognized as a state on the cutting edge of conservation and land-use management.[121] Conservation easements have been a valid land conservation tool in Maryland since 1957, predating the UCEA.[122] Maryland's legislature has approved several entities and programs to facilitate protection of open space and existing land uses through conservation easements.[123] In 1997, the legislature developed the Rural

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112 *Id.* § 2(a), (c), 12 U.L.A. 173.

113 Squires, *supra* note 23, at 71.

114 DUKEMINIER & KRIER, *supra* note 33, at 856.

115 Hocker, *supra* note 24, at 245. For a quick reference to specific conservation easement enabling statutes for 46 states, see Tables 4.1 and 4.2 in Squires, *supra* note 23, at 72–73.

116 Squires, *supra* note 23, at 74; *see* discussion *infra* Section III.C.

117 Hocker, *supra* note 35, at xviii.

118 Mayo, *supra* note 27, at 31.

119 *Id.* at 27. For a comprehensive listing of the various values different states allow conservation easements to protect, see *id.* at 28–30 tbl.2.1.

120 Squires, *supra* note 23, at 71–72.

121 Carter, Jr., *supra* note 106, at 186–89; *see generally* Parris N. Glendening, *Maryland's Smart Growth Initiative: The Next Steps*, 29 FORDHAM URB. L.J. 1493 (2002).

122 MD. CODE ANN., REAL PROP. § 2-118 (1996) (original enabling statute, provides for creation and enforcement of conservation easements in Maryland).

123 Carter, Jr., *supra* note 106, at 189. Starting the Maryland land conservation movement in earnest, the Maryland Environmental Trust was created in 1957 "to conserve, improve, stimulate, and perpetuate the aesthetic, natural, health and welfare, scenic, and cultural

Legacy Program out of concern that sprawl was impacting land at a disturbing rate; the Program was established to "enhance natural resource, agricultural, forestry, and environmental protection."[124] The state legislature funneled $71.3 million into the Rural Legacy Program from fiscal years 1998 through 2002, to enable land trusts and local governments to acquire property (including conservation easements) in specified rural legacy areas.[125]

The state legislature provided an additional incentive to donate conservation easements in 1991, allowing for potential property tax credits on land "subject to a perpetual conservation easement donated to a land trust."[126] Among other requirements, to qualify for a property tax credit, the land trust (easement holder) must be certified by the Maryland Environmental Trust as a "land trust in good standing," and the land trust must "obtain a written certification [of good standing] every 5 years."[127] Maryland's conservation easement enabling statute is effective, not because of its language or allowances, but because of its unique support structure, consisting largely of successful programs encouraging government, land trusts, and private landowners to work together to meet land conservation goals.

2. New York

Although New York enacted its conservation easement enabling statute after the UCEA, it adopted only two provisions of the UCEA.[128] New York adopted the provisions mandating that 1) traditional common law defenses do not apply to conservation easements, and 2) that standing is valid for designated third parties to enforce the terms of the easement.[129] A potentially important departure from the UCEA requires the Department of Environmental Conservation (DEC) to establish regulations setting

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qualities of the environment, including . . . land . . . scenic qualities, [and] open spaces." MD. CODE ANN., NAT. RES. I § 3-201(a) (2001). The Trust also administers a fund that makes grants to land trusts with the goal of facilitating protection and preservation of natural areas and open spaces. MD. CODE ANN., NAT. RES. I § 3-2A-02 (2001). In 1986, the Heritage Conservation Fund was created to enable the state to acquire and manage conservation easements (among other interests) on lands demonstrating a variety of desired conservation attributes. MD. CODE ANN., NAT. RES. I §§ 5-1502 to 5-1504 (2001).

124 MD. CODE ANN., NAT. RES. I § 5-9A-01(a)–(b) (2001).

125 Carter, Jr., *supra* note 106, at 191. A "rural legacy area" is a "region within or outside a metropolitan area designated . . . as rich in a multiple of agricultural, forestry, natural, and cultural resources." MD. CODE ANN., NAT. RES. I § 5-9A-02(i) (2001).

126 MD. CODE ANN., TAX–PROP. § 9-220(a)(2) (2001).

127 *Id.* § 9-220(d)(1)–(2).

128 N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to 49-0311 (McKinney 1991). Karin Marchetti & Jerry Cosgrove, *Conservation Easements in the First and Second Federal Circuits*, *in* PROTECTING THE LAND, *supra* note 1, at 78, 93.

129 N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney 1991); *see also* UNIF. CONSERVATION EASEMENT ACT §§ 3(a)(3), 4, 12 U.L.A. 177, 179 (1996). Following statutory guidance, the court in *Bleier v. Board of Trustees of Village of East Hampton* held that a landowner abutting a conservation easement had no standing to sue to enforce a scenic easement, as the owner was not a party or successor to the easement itself. 595 N.Y.S.2d 102 (N.Y. App. Div. 1993).

standards for conservation easements in New York.[130] Also unlike the UCEA, New York requires that nonprofit conservation organizations be tax exempt under section 501(c)(3) of the Internal Revenue Code if the easement donor intends to reap the tax benefits associated with the donation.[131]

New York's conservation easement statute protects several values not mentioned in the UCEA,[132] although it also omits a couple that are included in the UCEA.[133] Unless the DEC promulgates regulations that limit their effectiveness, conservation easements should continue to enjoy a successful life in New York.

3. Oregon

Long involved in supporting land protection efforts of private landowners,[134] Oregon enacted legislation encouraging the use of conservation easements in 1967.[135] The state essentially replaced the original enabling statute with the UCEA in 1983.[136] However, important provisions were added to Oregon's statute, some of which potentially hinder the government's pursuit of conservation easements, while others add significant incentives for private landowner donation of easements.[137] For instance, state and local governmental entities may acquire conservation easements whenever they "determine that the acquisition will be in the public interest."[138] The governmental entity pursuing the easement must give notice and "hold one or more public hearings on the proposal and the reasons therefor,"[139] and may *not* acquire easements by power of eminent domain.[140]

As a property tax incentive, one section of the enabling statute provides that "real property subject to a conservation easement . . . shall be assessed on the basis of the real market value of the property less any reduction in

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130 N.Y. ENVTL. CONSERV. LAW § 49-0305(7) (McKinney 1991). A concern is that the DEC will establish regulations limiting the appeal of conservation easements—however, regulations have yet to be promulgated, due in large part to the influence of land conservation organizations. *See* Marchetti & Cosgrove, *supra* note 128, at 98–99.

131 N.Y. ENVTL. CONSERV. LAW §§ 49-0305(3), 52-0101(16) (McKinney 1991).

132 Wetlands, archaeological sites, and "natural beauty" are included as desirable uses in New York's enabling statute. *Id.* § 49-0301.

133 Air quality and water quality are included in the UCEA, UNIF. CONSERVATION EASEMENT ACT § 1, 12 U.L.A. 170 (1996), but not in New York's enabling statute. N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney 1991).

134 William T. Hutton et al., *Conservation Easements in the Ninth Federal Circuit*, *in* PROTECTING THE LAND, *supra* note 1, at 354, 354.

135 OR. REV. STAT. § 271.725(1) (2001); Mills, *supra* note 65, at 559.

136 Mills, *supra* note 65, at 562.

137 *See* Hutton, *supra* note 134, at 379.

138 OR. REV. STAT. § 271.725(1) (2001). The term "public interest" is not further defined in the statute, thus making this requirement somewhat obscure. *See* Hutton, *supra* note 134, at 379.

139 OR. REV. STAT. § 271.735(1)–(2) (2001). Conservation easements acquired by charitable organizations or pursuant to a metropolitan service district bond measure are exempted from the notice and hearing requirement, allowing most charitable easement donors to avoid a complicated approval process. *See id.* § 271.735(4).

140 *Id.* § 271.725(1).

value caused by the conservation easement," and "[s]uch an easement shall be exempt from assessment and taxation the same as any other property owned by the holder."[141]

Oregon does not have as many conservation easements as surrounding states, although this is not the result of an ineffective enabling statute or landowners disfavoring the idea of easements themselves.[142] Rather, Oregon relies largely on other land conservation methods to achieve its goals of maintaining open space and existing land uses.[143]

4. Alabama

Alabama only recently passed legislation officially recognizing conservation easements. The Alabama Conservation Easement Act,[144] enacted in 1997, was modeled after the UCEA, but contains several additional provisions that severely weaken the protective capacity of conservation easements in Alabama.[145] Specifically, the statute limits the duration of an easement (when no term is expressed in the deed) to the "lesser of 30 years or the life of the grantor, or upon sale of the property by the grantor."[146] Without language in the easement expressly stating that it is perpetual in nature, the presumption is that it is *not*, and the easement eventually will be terminated.[147]

Several omissions also hurt conservation easement legislation in Alabama.[148] The statute is only applicable to an interest specifically described as a "conservation easement."[149] Additionally, the statute is not retroactive, thus limiting its protection to conservation easements created

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141 *Id.* § 271.785. Unfortunately, private landowners have had difficulty getting the reassessments needed to take advantage of this provision. Hutton, *supra* note 134, at 380; *see* discussion *infra* Section IV.B.2.

142 *See* Hutton, *supra* note 134, at 382.

143 *Id.* For instance, urban growth boundaries are utilized to control growth and protect rural land. *See, e.g.*, METROPOLITAN SERVICE DISTRICT, REGIONAL FRAMEWORK PLAN 33, 39 (1997). The Metropolitan Service District (Metro) is authorized to "acquire, develop, maintain, and operate a system of parks, open space, and recreational facilities." *Id.* at 84. In 1995, Oregon voters endorsed Metro's conservation goals by approving a $135.6 million bond measure, for use in acquisition of natural areas and open space. *Id.* at 92. As of January 1, 2004, Metro had acquired over 7,960 acres of ecologically valuable land. METRO, OPEN SPACES ACQUISITION PROGRAM, *at* http://www.metro-region.org/article.cfm?articleid=144 (last visited Feb. 22, 2004).

144 ALA. CODE § 35-18 (Supp. 2002).

145 Beth Davis et al., *Conservation Easements in the Fifth and Eleventh Federal Circuits*, *in* PROTECTING THE LAND, *supra* note 1, at 238, 238; *see generally* ALA. CODE § 35-18 (Supp. 2002). It is fortunate Alabama has a conservation easement statute at all, as the governor nearly vetoed the current statute, which took more than ten years to enact, largely because of fears surrounding the impact of the statute on the timber industry. Davis, *supra*, at 241–42.

146 ALA. CODE § 35-18-2(c) (Supp. 2002).

147 Davis, *supra* note 145, at 238.

148 *Id.* at 240–41.

149 ALA. CODE § 35-18-5(a) (Supp. 2002). Thus, conveyances describing "conservation servitudes," or any other land interest other than a conservation easement, would not be protected by the statute. Davis, *supra* note 145, at 240.

after its enactment.[150] On a positive note, conservation easements in Alabama can protect land for silvicultural and paleontological purposes, which are *not* provided for in the UCEA.[151] However, on the whole, careful drafting is a strict necessity when attempting to create an effective conservation easement in Alabama.[152]

D. Federal and State Legislation Gives Life to Land Trusts

With the creation of the UCEA, states had an effective model to follow to ensure that "the granting of a conservation easement to a qualified organization is ensured the same treatment under federal law as other charitable contributions."[153] State legislation formed the legal backdrop allowing land trusts, working together with every level of government, to protect over 2.5 million acres of private lands via conservation easements through the year 2000.[154] Today, lands protected via conservation easements donated to land trusts exceed those protected by the government in the same manner.[155]

Land trusts protect far more land through conservation easements than outright fee ownership.[156] Since 1990 there has been almost a 500% increase in the amount of land protected by conservation easements.[157] With the availability of the UCEA (and enactment of associated state laws) and the land protection entities in place to facilitate them, conservation easements have seen a dramatic rise in popularity in the United States.[158]

Conservation easements should continue to be successful as a land protection instrument. The incentives are compelling—the landowner retains his property while receiving tax breaks via charitable deductions stemming from the Tax Reform Act of 1976[159] and subsequent amendments.[160] Potential common law roadblocks are addressed through provisions of the UCEA and affiliated state laws.[161] Increasing numbers of land trusts, along with government agencies, serve as easement holders.

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150 Davis, *supra* note 145, at 241; *see* ALA. CODE § 35-18-5 (Supp. 2002). Section 5 of the Alabama statute omits UCEA section (5)(b), which provides for retroactivity. UNIF. CONSERVATION EASEMENT ACT § 5(b), 12 U.L.A. 181 (1996).

151 ALA. CODE § 35-18-1(1) (Supp. 2002).

152 Davis, *supra* note 145, at 242; *see generally* ALA. CODE § 35-18 (Supp. 2002).

153 Gustanski, *supra* note 1, at 17.

154 LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS (2001) [hereinafter CENSUS], *at* http://www.lta.org/aboutlt/census.shtml. Overall, 6.2 million acres of land had been protected by land trusts, with over 1,200 trusts in operation, by the end of 2000. *Id.*

155 Gustanski, *supra* note 1, at 14 (citing 1998 National Land Trust Census by the Land Trust Alliance).

156 *Id.* at 20 (table showing acreage breakdowns for land trusts by state).

157 CENSUS, *supra* note 154.

158 *See* Gustanski, *supra* note 1, at 22 (discussing mechanisms available to facilitate conservation easements).

159 Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered sections of 26 U.S.C.).

160 *See* discussion *supra* Section III.A.

161 *See* discussion *supra* Sections III.B–C.

Landowners, the essential force behind conservation easements, have taken the encouragement of local, state, and federal governments and, to this point, have made conservation easements a largely successful land protection tool.[162] However, potential problems loom as conservation easements become more prevalent.

IV. LEGAL AND POLICY CONCERNS

Conservation easements are favored by landowners, are encouraged by government, and are gaining in popularity.[163] However, potential problems exist, possibly hindering the effectiveness of conservation easements and casting a shadow on their potential for success as part of a long-term plan to maintain open space and traditional land uses. Several of these problems are discussed in the following section.

A. Termination Methods

Under certain circumstances, conservation easements may not be permanent.[164] The UCEA and several state statutes specifically provide that conservation easements can be terminated in the same manner as other easements.[165] Methods by which easements may be terminated include eminent domain, abandonment, and the doctrine of changed conditions.[166] Additionally, marketable title acts affect the permanency of conservation easements.[167] Each of these potential termination methods are described below.

1. Eminent Domain

Conservation easements can be terminated by government exercising its power of eminent domain.[168] Eminent domain is the power of the government to "force transfers of property from owners to itself" for public purposes.[169] It is superior to all other property rights,[170] and "has been regarded in the United States as an inherent attribute of both the national and state governments."[171] When land is needed for a public purpose, the

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162 Gustanski, *supra* note 1, at 22.

163 *See* discussion *supra* Sections I.C, II.A, II.D.

164 DIEHL & BARRETT, *supra* note 12, at 130.

165 *Id.*; UNIF. CONSERVATION EASEMENT ACT § 2, 12 U.L.A. 173 (1996).

166 DIEHL & BARRETT, *supra* note 12, at 130–34.

167 *Id.* at 132.

168 *Id.* at 131.

169 DUKEMINIER & KRIER, *supra* note 33, at 1102. The government may also transfer the property to "other entities commonly invested with the power of eminent domain, such as public utilities and public schools." *Id.*

170 Terri Finkbine Arnold, *Condemnation and Conservation Easements*, THE BACK FORTY, Nov./Dec. 1992, at 11.

171 STEVEN J. EAGLE, REGULATORY TAKINGS 34 (2d ed. 2001). Many states have statutes officially recognizing that eminent domain can be exercised on land subject to a conservation easement. Dana M. Landrum, *Eminent Domain: Valuation of Property Subject to a Conservation*

government may take it regardless of whether the landowner objects.[172] The term "public purpose" is construed very broadly, so the government's power of eminent domain is almost always upheld.[173] Specific uses deemed public are widely varied and include railroads, telecommunications, water supply, public buildings, schools, highways, and cemeteries.[174]

Many states have laws expressly authorizing the use of eminent domain over conservation easements,[175] and the UCEA provides that conservation easements may be terminated just as any other easement under the power of eminent domain.[176] Even the clearest conservation easement does not prevent the government from exercising eminent domain to take the easement along with the underlying property.[177]

Combined with the effects of increased build-out of infrastructure due to urban sprawl, eminent domain can have a major impact on the effectiveness of conservation easements. As more people commute to an urban center from their rural homes, the state or local government may feel it is in the public's interest to build a new road or highway to accommodate increased traffic. Eminent domain provides the land needed for the highway, regardless of the presence of conservation easements that were designed to prevent just this sort of development.

The power of eminent domain over conservation easements recently underwent scrutiny during a challenge to the granting of a utility easement over land burdened by a conservation easement. In *Johnston v. Sonoma County Agricultural Preservation and Open Space District*,[178] a citizen challenged the conveyance of a utility easement (for a wastewater pipeline and pump station) across a portion of a mountain sanctuary owned by the National Audubon Society but subject to a conservation easement held by the Sonoma County Agricultural Preservation and Open Space District (District).[179] The city of Santa Rosa, California asked the District to approve the utility easement as consistent with the conservation easement, but also threatened to use eminent domain if necessary.[180] Although determining that

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Easement, THE BACK FORTY, Mar./Apr. 1997, at 6.

172 DIEHL & BARRETT, *supra* note 12, at 131. However, the government must compensate the landowner for the loss. U.S. CONST. amend. V.

173 DIEHL & BARRETT, *supra* note 12, at 131.

174 Arnold, *supra* note 170, at 11.

175 Landrum, *supra* note 171, at 6.

176 Mayo, *supra* note 27, at 47.

177 Jeffrey A. Blackie, *Do Conservation Easements Last Forever? Conservation Easements and the Doctrine of Changed Conditions*, THE BACK FORTY, July/Aug. 1990, at 1.

178 123 Cal. Rptr. 2d 226 (2002).

179 *Id.* at 228. The District was formed to facilitate open-space preservation via acquisition of conservation easements, such as the one granted by the National Audubon Society. *Id.* at 229. Over the years, development around the sanctuary increased, as did worries about what to do with wastewater generated by a burgeoning population. *Id.* To deal with the increased wastewater, the city of Santa Rosa approved a wastewater disposal project that would result in a portion of pipeline along with a pump station being built in the sanctuary, and thus on the conservation easement. *Id.* at 229–30. After filing a lawsuit against the City, Audubon settled and conveyed a utility easement for pipeline construction. *Id.* at 230.

180 *Id.* at 231.

the utility easement was inconsistent with the conservation easement, the District recognized that the City may use eminent domain to take ownership of the pipeline route. After much debate, the District approved the utility easement across the conservation easement, subject to numerous favorable settlement terms.[181] Citing threats of eminent domain made by the city of Santa Rosa, California, the court held that the utility easement conveyance granted by the conservation easement holder was "clearly involuntary, in lieu and under the credible threat of condemnation."[182] Although formal condemnation proceedings were never initiated, the court found that "under the law of eminent domain, the District had a right to negotiate a resolution of the looming threat of the easement's condemnation."[183] Eminent domain is always a threat to the protective capacity of a conservation easement.

2. Abandonment

Commitment of the easement holder to monitor and enforce the conservation easement is essential to the easement's long-term success in protecting open space and desired land uses.[184] Abandonment—an easement holder's failure to enforce conservation easement restrictions—can result in termination of the easement.[185] This problem can arise when a land trust dissolves and fails to transfer the easements to another land trust, or when the easement holder simply fails to enforce easement terms and the landowner flaunts the restrictions.[186] Additionally, if the easement holder fails to bring an enforcement suit within statutory limits, the easement is extinguished via inaction.[187] When a conservation easement is accepted by a government entity or qualified organization, it becomes responsible for enforcement, and in turn, the duty to prevent termination by abandonment.[188]

Monitoring a conservation easement can take a significant amount of time and impose a financial burden on the easement holder.[189] Those involved in the conservation easement process note that "[t]he monitoring, management, and enforcement of the easements acquired will be the most difficult and long-term stage of the process. . . . [O]nce we have acquired an

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181 *Id.* at 230–31.

182 *Id.* at 238. The resolution reached by the District allowing the conveyance explained that "[b]ecause of the City's determination to use its power of eminent domain, the District's approval of the utility easement . . . is not voluntary and thus not subject to the limitations on conveyances of lands dedicated for open space set forth in Public Resources Code section 5540." *Id.* at 233 (emphasis and citation omitted). As explained in the case, section 5540 grants open space districts the power to acquire interests in real property, as well as strictly limiting districts' power to convey those interests. *Id.* at 234.

183 *Id.* at 237.

184 Mayo, *supra* note 27, at 31.

185 *Id.* at 46.

186 *Id.*

187 DIEHL & BARRETT, *supra* note 12, at 134.

188 *Id.*

189 *See id.* at 93, 101 (discussing costs to monitor and defend against legal challenges to conservation easements).

easement, our involvement in the easement has just begun."[190] The larger and more complex the conservation easement, the more burdensome the monitoring requirements.[191] As land trusts increase in number and must keep track of more and more conservation easements, the problem of failing to properly monitor easements, and their subsequent termination by abandonment, becomes more relevant.[192]

Even if the conservation easement is clearly written and monitoring is a priority for the easement holder, enforcement problems can still arise.[193] Landowners might seek permission from the easement holder to take action that is not allowed under the easement agreement, and maintaining a good relationship between the parties can be difficult under these circumstances.[194] If the request is denied and the landowner files a claim, it is not certain that the easement will be upheld, as "courts acting in equity have recognized equitable defenses . . . to set aside development restrictions imposed by negative easements."[195]

3. Doctrine of Changed Conditions

The doctrine of changed conditions allows the landowner to prevent enforcement of restrictions on land if the surrounding area has changed to the extent that the restrictions no longer make sense.[196] Traditionally, the doctrine only applied to equitable servitudes and real covenants, so a conservation *easement* should not fall under control of the doctrine.[197] However, in situations where land value in a given area has increased substantially due to development, a landowner tempted by great financial gain may pursue removal of a conservation easement under the doctrine of changed conditions.[198]

In considering whether the doctrine should apply to terminate a conservation easement, courts typically consider intent of the parties, foreseeability of changes, effect of restriction on economic productivity of

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190 *Id.* at 93. (quoting Art Reese, Chief of Habitat and Technical Services for Wyoming Department of Game and Fish).

191 *See* Christine Thisted, *Easements and Public Access on the Ice Age National Scenic Trail*, *in* PROTECTING THE LAND, *supra* note 1, at 343, 348–49 (discussing problems encountered in successfully monitoring conservation easements obtained for the Ice Age Trail corridor in Wisconsin). The Trail stretches through 31 counties and over 25% of the entire state population lives within 10 miles of the Trail. When completed, it will cover over 1,000 miles. *Id.* at 343.

192 *See* Mayo, *supra* note 27, at 46 (discussing the irony that perpetual easements may potentially be extinguished by abandonment).

193 *See* Geoffrey Pay, *From Handshakes to Handwriting: Approving Easement-Permitted Activities*, THE BACK FORTY, Nov./Dec. 1996, at 12, 12 (noting waiver and estoppel have been used to break conservation easements).

194 *Id.*

195 *Id.*

196 DIEHL & BARRETT, *supra* note 12, at 133.

197 Blackie, *supra* note 177, at 1–2.

198 *See id.* at 3–4. (providing the example of rancher donating easement at a time when land was worth little, then watching land values skyrocket as the general area is developed over time).

land, comparative burden on landowner and benefit to easement holder, location of changes, and the duration of the restriction.[199] However, most of these factors are overcome by the nature of the conservation easement itself.[200] Although the doctrine of changed conditions should not apply in most instances involving conservation easements (since the easement's purpose is typically to maintain land in its original state *despite* changes around it), the goals of the easement need to be detailed clearly or the landowner may be able to invoke the doctrine.[201]

4. Marketable Title Acts

Most state statutes provide that if an easement is silent as to duration, it is presumed to be perpetual.[202] However, several state statutes require the automatic termination of restrictions on property (such as conservation easements) after a certain amount of time; these statutes are called "marketable title acts."[203] The land conservation community frowns upon marketable title acts, and conservationists consider them "traps for the unwary, and land trusts should have specific procedures . . . to insure that conservation easements . . . do not expire."[204]

B. Complications for Landowners

Additional difficulties impact the appeal of conservation easements to private landowners. Conservation easements can lose their luster when landowners are presented with complicated easement valuation and appraisal requirements, along with deduction limits that can severely impact potential tax benefits.[205] Additionally, state and local governments have an incentive to maintain land values at the highest levels possible.[206] These complicating factors can discourage landowners who are otherwise amenable to conservation easements.

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199 *Id.* at 4–5.

200 *See* discussion *infra* Section IV.

201 DIEHL & BARRETT, *supra* note 12, at 133.

202 *See* Mayo, *supra* note 27, at 40–41 (listing the default duration of conservation easements by state). Federal tax law discourages nonperpetual conservation easements. *See* 26 U.S.C. § 170(h)(2)(C) (2000) (providing that a restriction on the use of real property is only considered a qualified property interest if it is granted in perpetuity).

203 DIEHL & BARRETT, *supra* note 12, at 132. *See, e.g.*, *supra* note 146, and accompanying text (Alabama's conservation easement enabling statute limits the duration of easements unless specified otherwise); KAN. STAT. ANN. § 58-3811(d) (1994) (Kansas statute providing that "a conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at grantor's request"); W. VA. CODE ANN. § 20-12-4(c) (Michie 2002) (West Virginia statute providing that a conservation easement must be for a duration of at least 25 years).

204 William Ginsburg, *Conservation Easements Threatened in Some States by Marketable Title Acts*, THE BACK FORTY, Jan./Feb. 1992, at 18.

205 *See* discussion *infra* Sections IV.B.1, B.3.

206 *See* discussion *infra* Section IV.B.2.

1. Valuation Conflicts

Under the tax code regulations discussed earlier, valuation of a donated conservation easement is essential in determining the financial benefits available to a landowner, because the amount of the tax deduction depends on the fair market value of the easement at the time of the donation.[207] No deduction is allowed unless the easement donor meets certain requirements, including obtaining an appraisal from a qualified appraiser, attaching a completed appraisal summary to the donor's tax return, and maintaining specific records regarding the donation.[208] A "before and after" approach is used, in which the easement value is determined by the difference in the fair market value of the property before the restriction[209] and the value of the property after the easement donation.[210]

Unfortunately, factors determining the fair market value of an easement are difficult to reconcile as they are at once "objective and subjective, economic and aesthetic."[211] Ideally, comparable conservation easement donations exist in the area, as the regulations provide that "the fair market value of the donated easement is based on the sales price of such comparable easements."[212] Treasury Department regulations also provide for *no* deduction when the conservation easement restriction may "have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property."[213] Government audits may result in appraisals that differ considerably from appraisals submitted by landowners, resulting in significant problems for the easement donor.[214]

Although audits of conservation easement valuations have decreased in recent years,[215] there remains the specter of IRS action, requiring the subsequent defense of a valuation in court.[216] Abiding by the substantiation

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207 26 C.F.R. § 1.170A-14(h)(3)(i) (2004).

208 *Id.* § 1.170A-13(c)(2)(i).

209 This value is determined by the "highest and best" use of the property. *Id.* § 1.170A-14(h)(3)(ii). The highest and best use is "generally the most profitable, likely and legal use for a property." APPRAISING EASEMENTS 16 (Nat'l Trust for Historic Pres. and the Land Trust Exch. ed., 3d ed. 1999).

210 26 C.F.R. § 1.170A-14(h)(3)(i) (2004). The deduction for a conservation easement donation that covers a portion of contiguous property owned by the donor is "the difference between the fair market value of the entire contiguous parcel" before and after the restriction. *Id.*

211 SMALL, *supra* note 88, at 17-5. Factors include current use of the property, likelihood the property would actually be developed were there no restriction, effects of zoning, and anything else that could impact the property's potential highest and best use. 26 C.F.R. § 1.170A-14(h)(3)(ii) (2004).

212 26 C.F.R. § 1.170A-14(h)(3)(i) (2004).

213 *Id.* § 1.170A-14(h)(3)(ii).

214 *See, e.g.*, Johnston v. Comm'r, 74 T.C.M. (CCH) 968, 981 (1997) (landowner submitted a conservation easement appraisal of $1,131,438; on audit IRS valued the easement at $407,000).

215 *See* SMALL, *supra* note 88, at 1 (Supp. 2000) (noting anecdotal evidence of fewer IRS easement audits from 1996 to 2000).

216 *See* DIEHL & BARRETT, *supra* note 12, at 53 (cautioning that a donor claiming a value over $5,000 will "most likely be scrutinized"); *see, e.g.*, Strasburg v. Comm'r, 79 T.C.M. (CCH) 1697, 1703 (2000) (differing easement comparisons resulting in IRS appraiser giving lower

requirements is essential, as the valuation will undergo IRS analysis.[217] Several cases provide illustrations of IRS valuation practices creating problems for conservation easement donors.

In *Strasburg v. Commissioner*, IRS and landowner appraisals of a conservation easement differed substantially, even though both appraisers used a before and after approach involving analysis of comparable conservation easement sales in the area.[218] The disparity arose because the landowner's appraiser determined values based on the "highest and best use" of the unencumbered property as a rural recreational development, whereas the IRS appraiser concluded that the "highest and best use" both before and after the donation was as a recreational homesite.[219] Although the final court decision was generally favorable to the landowner, the court gave some credence to IRS's theory that restrictions on land in highly desirable, low availability areas would not result in a decrease in overall property value.[220] IRS appraisers determining a different "highest and best use" than that of landowners' appraisers, as occurred in *Strasburg*, is not uncommon.[221]

Obtaining a valid appraisal is vital to avoiding substantial financial impacts due to overvaluations of conservation easements, as the landowner may face penalties beyond simply paying the tax that should have been paid under a proper valuation.[222] Conflicts between landowner appraisals and IRS

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conservation easement value than that of landowner's appraiser). Additionally, IRS penalized Strasburg for a gross valuation misstatement based on its own much lower appraisal. The court overturned the penalty as it found Strasburg's appraisal more correct than the IRS appraisal. *Id.* at 1705.

217 DIEHL & BARRETT, *supra* note 12, at 53.

218 *Strasburg*, 79 T.C.M. (CCH) at 1700.

219 *Id.* at 1701–03. The court analyzed each prior "comparison" easement the differing parties had used to determine their respective valuations. It found that only five of the previous easement sales—4 of 31 landowner comparisons and 1 of 15 IRS comparisons—were actually comparable to the Strasburg easement, and it averaged these five sales to determine a final conservation easement value much closer to that asserted by the landowner. *Id.* at 1702–03.

220 SMALL, *supra* note 88, at 14 (Supp. 2000). The court, in averaging valid comparable easement sales to reach a final valuation, relied in part on a comparable easement sale proffered by IRS that showed *no* decrease in property value due to the easement (the theory being that buyers are not deterred from paying full market value for restricted land given certain real estate conditions). *Strasburg*, 79 T.C.M. (CCH) at 1700.

221 *See* SMALL, *supra* note 88, at 14 (Supp. 1996) (discussing differing tax court use of determinations made by appraisers); *see, e.g.*, Higgins v. Comm'r, 60 T.C.M. (CCH) 1314 (1990) (holding landowner appraiser was correct that use for four-lot subdivision was proper, where IRS appraiser said highest and best use was as single-family residential lot); Johnston v. Comm'r, 74 T.C.M. 968, 968 (1997) (holding landowner appraiser was correct that use for rural development was proper where IRS appraiser said property had no future development potential and highest and best use was thus for recreational purposes only).

222 *See* 26 U.S.C. § 6662(e)(1) (2000) (applying penalties whenever the value of a conservation easement is 200% or more of the appraisal deemed correct—a "substantial valuation misstatement"). A "gross valuation misstatement," wherein the easement is overvalued by 400% or more, is subject to even greater penalties. *Id.* at § 6662(h)(2). Lacking a demonstration of reasonable cause and good faith, *id.* § 6664(c)(1), the landowner is subject to a penalty of 20% of the portion of unpaid tax. *Id.* § 6662(a). Gross valuation misstatements are subject to 40% penalties. *Id.* § 6662(h)(1).

appraisals, even if the landowner appraisal is ultimately deemed proper, create a disincentive as landowners are forced to validate their conservation easement donations via the court system, resulting in significant time and financial losses.

2. Concerns Over Local Government Commitment

Another problem concerning appraisals is the reluctance of state and local government appraisers to value conservation easements at an appropriate level for purposes of property tax benefits.[223] When land values decrease due to conservation easements, an appraisal determines not only the tax benefits available to the landowner but also property tax revenue loss for governments.[224] The specter of declining property tax revenues creates an incentive for local assessors to minimize property tax losses by delaying appraisals or finding that overall property values have decreased little, if at all, despite easement burdens.[225] A bad economy (*e.g.*, high unemployment, depressed real estate market, etc.), resulting in revenue shortfalls for state and local governments, would only serve to increase pressure on government appraisers to minimize decreased property tax revenues resulting from valuations of conservation easements.

3. Incentive Limitations

Although federal tax incentives encourage landowner donation of conservation easements, there are significant limits to their effectiveness. Current provisions limit the deduction for charitable property donations to thirty percent of the donor's adjusted gross income (AGI).[226] These limits pose major drawbacks for landowners—especially low to moderate income landowners—wishing to donate substantial conservation easements, as they cannot realize tax benefits nearly equal to the full value of the easements.[227] For instance, suppose a landowner with an AGI of $100,000 donates a

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223 *See* Mills, *supra* note 65, at 568–70 (discussing how appraisers assess property value and the problems that arise in the process); Marchetti & Cosgrove, *supra* note 128, at 98 (citing problems encountered by easement donors in Vermont in attempting to get proper appraisals to reduce local property taxes); Hutton, *supra* note 134, at 380 (citing problems encountered by easement donors in Oregon in attempting to get proper appraisals to reduce local property taxes); *see, e.g.*, Adirondack Mountain Reserve v. Bd. of Assessors of Town of North Hudson, 471 N.Y.S.2d 703 (N.Y. App. Div. 1984) (holding that an easement did not diminish the value of the property).

224 Mills, *supra* note 65, at 567–70.

225 Marchetti & Cosgrove, *supra* note 128, at 98; Mills, *supra* note 65, at 568–69. For instance, in Oregon, assessors are left with a great deal of discretion in valuing conservation easements, as nothing prevents an assessor from determining no reduction in value, because the property tax exemption provision provides no guidance regarding determining the "reduction in value caused by the conservation easement." 25 OR. REV. STAT. § 271.785 (2001).

226 26 U.S.C. § 170(b)(1)(B) (2000). The annual limit for corporations is ten percent, *id.* § 170(b)(2), and it can only be rolled out over six years. *Id.* § 170(b)(1)(B), (d). *See* SMALL, *supra* note 88, at 20-3 (discussing limits on deductions for property contributions).

227 LTA Calls for Broader Tax Incentives, *supra* note 30.

conservation easement valued at $750,000. Currently, the landowner could only deduct a total of $180,000 ($30,000 per year spread out over six years), a paltry sum compared to the value of development rights foregone.[228] Of special concern is the impact current deduction limits have on ranchers and farmers, who own large tracts of land ripe with conservation potential but whose AGI is limited.[229] Little incentive exists for a landowner to donate a conservation easement when he cannot enjoy tax benefits anywhere close to the value of the land itself. When tax incentives do not have much influence, the lure of the developer dollar becomes more attractive to the landowner in financial straits.

C. Conservation Easement Holder Liability Under CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) was enacted to decrease the likelihood of hazardous waste contamination by creating widespread liability for spills and dumping.[230] CERCLA provides a potential source of great trouble for conservation easement holders.[231] Concern stems from broad sweeping provisions of CERCLA that hold essentially all parties in the chain of title to a contaminated site potentially responsible for cleanup.[232] Potentially responsible parties (PRP) include present landowners and operators, past landowners and operators, persons arranging for disposal of hazardous waste, and transporters of such waste.[233] Fault or responsibility for contamination is irrelevant.[234] Additionally, CERCLA prohibits a PRP from transferring liability by private contract, thus preventing a conservation easement holder from protecting itself from liability in the language of the deed itself.[235]

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[228] *See generally* 26 U.S.C. § 170(b)(1)(B) (2000) (numbers are based on a thirty-percent limit and five succeeding years beyond the initial year to realize excess gains). Land Trust Alliance President Rand Wentworth, testifying before the Subcommittee on Select Revenue Measures of the House Ways and Means Committee, strongly encouraged legislation to boost tax incentives for land conservation, stating "we need to accelerate the pace of conservation if we hope to keep pace, and succeed in protecting a heritage of land for our children." LTA Calls for Broader Tax Incentives, *supra* note 30.

[229] *See* LTA Calls for Broader Tax Incentives, *supra* note 30 (citing a USDA Economic Research Service report showing that "the average income of a rancher or farmer is about $34,000 a year").

[230] ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 266 (3d ed. 2000). CERCLA is binding on all states and serves as the model for many state environmental cleanup statutes. Gail Secor, *Coping with Environmental Liability Risks in Land Trust Transactions*, THE BACK FORTY, Feb. 1991, at 1.

[231] THOMAS S. BARRETT & STEFAN NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT 67 (1996) (supplementing THE CONSERVATION EASEMENT HANDBOOK, published in 1988).

[232] *Id.* at 67–68; *see* 42 U.S.C. § 9607(a) (2000) (detailing potentially responsible parties).

[233] 42 U.S.C. § 9607(a)(1)–(4) (2000).

[234] Richard D. Jones, *The Genesis and Growth of Insurance for No-Fault Enviornmental Liability in Real Estate Transactions*, *in* 6 THE ACREL PAPERS 135, 137 (1994).

[235] 42 U.S.C. § 9607(e)(1) (2000). Although part of this provision seems to allow such liability-limiting contracts, courts have held that "private parties may enter into enforceable

Investigation and cleanup costs can be high, easily exceeding the value of the property itself, let alone the value of a conservation easement on the property.[236] Hazardous waste contamination is not limited to industrial property; for instance, leaking underground storage tanks could be virtually anywhere,[237] and assumptions to the contrary can result in great expenses.[238] Whether CERCLA liability applies to conservation easement holders remains unsettled, although certain conservation easements may be much more at risk for liability than others.[239]

No case law specifically addresses whether a conservation easement holder may be liable for cleanup costs under CERCLA.[240] However, several cases have addressed easement holder liability regarding other types of easements, and these cases support the notion that conservation easement holders would *not* be considered "owners" under CERCLA.[241] Under this case law, the remaining question for conservation easement holders is whether they can be found liable as operators under CERCLA.[242]

The more active the role undertaken by the conservation easement holder (*i.e.*, the more "affirmative" the easement), the more likely the holder can be considered an "operator."[243] Also unsettled is whether stewardship (*i.e.*, monitoring and maintenance) of a conservation easement alone is enough activity to render the easement holder liable as an "operator."[244] If the conservation easement holder is deemed an "operator," defenses to liability under CERCLA are extremely limited.[245]

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indemnity or release agreements with respect to CERCLA liability, but that such agreements do not prevent the federal government from pursuing CERCLA claims against an indemnitee." Susan M. Reid & Anne S. Hilleary, *Indemnification and Contribution for Environmental Liability*, *in* 6 THE ACREL PAPERS 63, 70 (1994).

236 Secor, *supra* note 230, at 1; *see* 42 U.S.C. § 9607(a)(4)(A)–(D) (2000) (detailing all aspects of hazardous material spill and cleanup for which PRPs are liable).

237 Secor, *supra* note 230.

238 *See id.* at 2 (referring to the broad extent of strict liability under CERCLA and the few defenses available).

239 *See id.* (reasoning that liability could hinge on the extent of the easement holder's access rights).

240 Jeffrey A. Kodish, *Restoring Inactive and Abandoned Mine Sites: A Guide to Managing Environmental Liabilities*, 16 J. ENVTL. L. & LITIG. 381, 391 (2001).

241 *See* Marc Brainich, *CERCLA Update: Easement Holder's Liability as an "Owner" or "Operator,"* THE BACK FORTY, Mar./Apr. 1999, at 11, 11 (outlining three cases where the right to use land, including the right to use land for waste disposal, did not qualify easement holders as owners for CERCLA purposes).

242 Secor, *supra* note 230, at 2; BARRETT & NAGEL, *supra* note 231, at 68. Importantly, it is undisputed that a conservation easement holder would be liable under CERCLA if it became involved in the cleanup of hazardous materials on the property. *Id.*; *see* 42 U.S.C. § 9607(a)(3) (2000) (covering arrangers of disposal or treatment).

243 Secor, *supra* note 230, at 2; BARRETT & NAGEL, *supra* note 231, at 68. For instance, a conservation easement requiring that the landowner allow hiking and fishing on the easement may put the easement holder more at risk of being an "operator."

244 Matthew Ruyak, *CERCLA Update: Recent Court Decisions Interpreting Liability Provisions*, THE BACK FORTY, Mar./Apr. 1995, at 10, 12.

245 *See* 42 U.S.C. § 9607(b) (2000) (discussing defenses to a finding of liability).

There are limited exceptions to CERCLA liability for an operator.[246] The operator must establish that the contamination did not result from his own acts but from an act of God, war, or a third party.[247] However, the "third party defense" is typically disallowed, unless the operator

> establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[248]

The level of due diligence required on the part of the easement holder, if deemed an operator, to satisfy the "appropriate inquiry" requirement will depend on the variations of each case,[249] but likely requires at least "a physical inspection of the property and surrounding property and an investigation into their land use history through interviews and a documentary review."[250] However, even a seemingly valid "innocent purchaser" defense may be rejected by courts.[251] A due diligence investigation prior to accepting or purchasing a conservation easement is a strict necessity in enabling the future easement holder to minimize potential liability.[252] Thus, a conservation easement holder must commit to a time consuming and potentially expensive process at the outset.[253]

V. ADDRESSING CONCERNS

Although the problems discussed above raise valid concerns, conservation easements by and large still can serve as enduring land protection instruments and will increase in importance in coming years.[254]

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246 *See id.* (discussing defenses to a finding of liability).

247 *Id.*

248 *Id.* § 9607(b)(3). Even then, the "third party defense" is barred if the easement holder acquired the contaminated property via a "contractual relationship" (*e.g.*, a conservation easement deed) with a third party, when that third party was responsible for the pollution. *Id.*; Secor, *supra* note 230, at 3. In turn, this "contractual relationship bar" is voided only if the easement holder can prove it was an "innocent purchaser" (or, in the case of a conservation easement, an innocent grantee), and made "all appropriate inquiry into the previous ownership and uses of the property." Secor, *supra* note 230, at 3; 42 U.S.C. § 9601(35)(B) (2000). By definition, an innocent purchaser would not have known, or had any reason to know, that the property was polluted at the time of easement acquisition. *See* 42 U.S.C. § 9607(35)(A)(i) (2000) (discussing showing required by defendant to prove innocent purchaser status).

249 Secor, *supra* note 230, at 3–4.

250 BARRETT & NAGEL, *supra* note 231, at 68.

251 *See* PERCIVAL ET AL., *supra* note 230, at 282 (citing several cases where courts rejected the innocent purchaser defense for a variety of reasons).

252 BARRETT & NAGEL, *supra* note 231, at 68. CERCLA's liability provisions have resulted in an abundance of environmental assessments in conjunction with real estate transactions. PERCIVAL ET AL., *supra* note 230, at 283.

253 *See* BARRETT & NAGEL, *supra* note 231, at 68 (discussing necessity of performing due diligence investigations prior to purchasing real estate).

254 *See* discussion *infra* Section VI.

Several options available to landowners and easement holders alike can minimize the possibility of an ineffective or short-lived conservation easement.[255]

A. Ensuring an Effective Conservation Easement

Several of the problems discussed in Section IV can be mitigated to a great extent, or even eliminated entirely, by carefully tailoring the easement upon creation. Termination of an easement due to changed conditions or abandonment becomes a remote possibility when the written document establishing the easement specifically addresses these potential problems and the easement grantee ensures the terms of the easement are followed.[256]

Landowners seeking to remove conservation easement restrictions via the doctrine of changed conditions are frustrated when the purposes of the restrictions are clearly stated in the deed.[257] For example, if the easement's stated purpose is preservation of open space for scenic, recreational, and animal habitat values, a landowner faces difficulty in proving that all of these purposes have been thwarted by changes in the surrounding area.[258] Even when the easement's purposes have truly become obsolete, some maintain that the public nature of the easement requires alternatives to outright termination.[259]

Preventing termination by abandonment is the responsibility of the conservation easement holder, who is responsible for perpetual stewardship of the easement.[260] Ensuring terms and conditions of the easement are followed is one of the most important roles of the holder.[261] Experts encourage the holder to ensure several essential elements are in place in order to prevent violation of easement conditions,[262] including maintaining a good relationship with the property owner, creating an easement document with clearly stated restrictions, and implementing a program of routine and systematic monitoring and recordkeeping.[263] Regardless of how well a conservation easement is maintained, problems inevitably arise.[264] The best

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255 *See* discussion *infra* Section V.A.

256 *See* DIEHL & BARRETT, *supra* note 12, at 130–34 (discussing various methods of termination).

257 *Id.* at 133.

258 *Id.* While a claim that wild animals no longer inhabit an area due to development may have merit, the goal of preserving the land for its scenic and recreational values is likely enhanced by increased development in the surrounding area. *Id.*

259 Blackie, *supra* note 177, at 5. The author suggests that either the "court reform the easement grant . . . or the owner pay the holder the easement's value and require reinvestment of the proceeds in an equivalent conservation activity." *Id.*

260 DIEHL & BARRETT, *supra* note 12, at 87.

261 *Id.*

262 Unchecked violations can lead to termination by abandonment. *See* discussion *supra* Section IV.A.2.

263 DIEHL & BARRETT, *supra* note 12, at 88. For detailed information on how best to monitor and enforce a conservation easement, see *id.* at 87–110.

264 *Id.* at 89. As land changes hands while the easement restriction remains, it is best to assume that eventually someone will want to unburden the land. BARRETT & NAGEL, *supra* note

weapon for a conservation easement holder seeking to enforce the terms of the easement is a well-drafted easement.[265]

Including a provision for third-party enforcement in the easement deed can help permanently prevent termination by abandonment.[266] If the easement holder fails to enforce the terms of the easement, a third-party organization can undertake responsibility for enforcement, thus ensuring that the easement does not go untended and fall victim to termination by abandonment.[267] Use of third-party enforcement is suggested in the UCEA,[268] and this method of ensuring enforcement of conservation easement terms is commonly used throughout the United States.[269]

Monitoring and enforcing conservation easements is an expensive endeavor.[270] Many easement-holding organizations plan ahead and have funds specifically for monitoring and defending easements.[271] Ways to build the funds include soliciting money from the easement donor[272] or other sources, or reserving a portion of revenues.[273]

While termination via eminent domain remains a potential concern no matter how a conservation easement is tailored,[274] it may be possible to influence the location and frequency with which the government exercises its power.[275] For instance, land trust organizations are developing land-friendly alternatives for federal transportation policy.[276] Highway construction has a huge impact on the development of open space,[277] and the federal government can exercise eminent domain to put the highway wherever it sees fit.[278] Efforts to encourage conservation friendly transportation planning could have a significant effect on the amount of open space devoured by highway projects every year.[279] This type of

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231, at xiii.

265 DIEHL & BARRETT, *supra* note 12, at 89.

266 *See* Mayo, *supra* note 27, at 48 (discussing the importance of third-party enforcement in ensuring the long-term survival of conservation easements, and noting that the burden of an easement holder's failure to enforce can fall on the third party).

267 *Id.* at 46, 48.

268 UNIF. CONSERVATION EASEMENT ACT § 4, 12 U.L.A. 179 (1996).

269 Mayo, *supra* note 27, at 50. Widespread use occurs despite the lack of statutory authority for third-party enforcement rights in many states. *Id.*

270 DIEHL & BARRETT, *supra* note 12, at 101. Basically, the easement holder assumes a perpetual liability by agreeing to uphold the terms of the easement. *Id.*

271 *Id.* at 102.

272 To encourage donor contributions, many easement holders press the fact that providing money for monitoring ensures that the donor's plans for the land will be carried out in perpetuity. *Id.* at 103–04.

273 *Id.* at 102.

274 *See* discussion *supra* Section IV.A.1.

275 The Land Trust Alliance is lobbying the federal government in an attempt to influence federal transportation policies. LAND TRUST ALLIANCE, PUBLIC POLICY, *at* http://www.lta.org/publicpolicy/index.html (last visited Feb. 22, 2004).

276 *Id.*

277 *Id.*

278 *See* discussion *supra* Section IV.A.1.

279 LAND TRUST ALLIANCE, PUBLIC POLICY, *supra* note 275. Congress is scheduled to re-formulate the federal transportation program in 2003. *Id.*

conservation lobbying has the potential to influence any number of projects where eminent domain gives the government complete control over the location of a given project.[280]

Although eminent domain is a concern, the ultimate power of the government to control how certain lands are used is not always a negative from a conservationist's perspective. In some instances, governments have prevented the development of conservation-valuable lands via their land control authority. In *360 Degrees Communications Co. of Charlottesville v. Board of Supervisors of Albemarle County*,[281] the Fourth Circuit upheld the county's denial of a special-use permit allowing construction of a wireless communications tower on an area mountain.[282] The county decided that the proposed tower was inapposite to the land-use values the county held dear, and one citizen even testified that he had placed a conservation easement on his land so this specific type of activity would not occur.[283] The court held that the county's denial of the permit was supported by substantial evidence in the record, thus validating the county's land conservation ideals.[284]

One potential way to limit the sweep of eminent domain is to sell or donate a conservation easement to a local, state, or federal governmental entity. For example, in *Sabine River Authority v. United States Dept. of Interior*,[285] state and local agencies wanted to turn a high-quality wetland and wildlife area into a reservoir.[286] Before the state could exercise eminent domain to acquire the land, the landowners donated a conservation easement on the area to the United States Fish and Wildlife Service.[287] The federal government's acquisition of the land eliminated the State of Texas's option of taking the property via eminent domain.[288] While this scenario is not feasible for the average citizen who simply wants to protect his back forty acres, the situation in *Sabine River Authority* demonstrates that using the federal government as a conservation easement holder is a viable way to prevent termination of an easement via eminent domain.

While concern over potential CERCLA liability is warranted,[289] there are steps conservation easement holders can take to substantially limit potential liability. As an initial matter, the written easement should provide indemnity protection against any potential liability incurred as a result of

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280 *Cf. id.*

281 211 F.3d 79 (4th Cir. 2000).

282 *Id.* at 88.

283 *Id.* at 82. The county Open Space Plan encouraged the protection of mountains and rural areas while at the same time discouraging activities that would alter mountain ridgelines and natural systems. *Id.* at 82, 84.

284 *Id.* at 88. The court stated that while Congress stressed the importance of the growth of wireless communications in the Telecommunications Act, it also intended to allow state and local control over the siting of towers and wireless facilities. *Id.* at 86.

285 951 F.2d 669 (5th Cir. 1992).

286 *Id.* at 673.

287 *Id.* at 672–73. The Fish and Wildlife Service established the National Wildlife Refuge System to protect and acquire areas such as the wetland at issue in this case. *Id.*

288 *Id.* at 673.

289 *See* discussion *supra* Section IV.C.

contamination.[290] Although no court cases have directly addressed the liability of a conservation easement holder under CERCLA,[291] since the mid-1990s several cases have addressed whether holders of other types of easements are liable.

In *Long Beach Unified School District. v. Dorothy B. Godwin California Living Trust*,[292] the Ninth Circuit held:

> To be an operator of a hazardous waste facility, a party must do more than stand by and fail to prevent the contamination. It must play an *active* role in running the facility, typically involving hands-on, day-to-day participation in the facility's management. Exercising the right to pass a pipeline over someone's property is . . . much less than the active control we require before someone will be held liable as an "operator" under CERCLA.[293]

The court also addressed whether the easement holders in the case (companies with pipeline easements across contaminated property) could be held liable as "owners" under CERCLA.[294] In finding the companies were not "owners," the court noted that the term "owner" should be given its common law and common sense meaning. In turn, this meant that the companies were not owners of the site because they only retained a right to use property for a particular purpose on land actually owned by another.[295] The rationale used by the court creates "a bright-line rule of non-liability for passive easement holders, at least with respect to the 'owner' category of CERCLA liability," providing some measure of reassurance for conservation easement holders.[296]

Following the reasoning in the cases addressing easement holder liability under CERCLA, it appears unlikely that a basic, negative conservation easement creates liability as either an "owner" or "operator" of a contaminated site.[297] However, there are few federal cases, and no Supreme Court rulings, addressing easement holder liability, and the

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290 Brainich, *supra* note 241, at 12. It is important to remember that indemnity protection does nothing to prevent the government from seeking recovery from PRPs. Reid & Hilleary, *supra* 235, at 69–70.

291 *See supra* note 240 and accompanying text.

292 32 F.3d 1364 (9th Cir. 1994).

293 *Id.* at 1367–68 (internal citations omitted) (emphasis added).

294 *Id.* at 1368–69.

295 *Id.*; *see also* Grand Trunk Western R.R. v. Acme Belt Recoating, Inc., 859 F. Supp. 1125, 1131 (W.D. Mich. 1994) (holding that owner of easement for ingress and egress purposes not "owner" or "operator" for CERCLA liability purposes); Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1483–84 (E.D. Wisc. 1994) (holding that owner of easement allowing disposal of waste material deemed not an owner of the land, but only owner of a right to use the land of another).

296 Tara L. Mueller, *Court Holds Easement Holder Not Liable Under CERCLA*, THE BACK FORTY, Nov./Dec. 1994, at 14.

297 *See* Sabine River Auth. v. United States Dep't of Interior, 951 F.2d 669, 680 (5th Cir. 1992) (noting that the court has "serious doubts as to whether the adverse impact on water quality and supply . . . can be attributed to the Fish and Wildlife Service's acquisition of [a negative easement]").

precedential authority of state cases is limited to states.[298] Extreme care must be taken with any affirmative conditions attached to a conservation easement, as a court is more likely to deem the holder an "operator" in this circumstance.[299] Affirmative conditions in an easement necessitate extreme care in investigation and oversight of the property, as CERCLA liability becomes a greater possibility the more actively involved the holder is in managing the land.[300] Even if a conservation easement holder is found liable as an "owner" or "operator" under CERCLA, all is not lost. A court can use its discretion in allocating cost burdens to various PRPs to require no contribution, or only minimal contributions from the easement holder.[301] Ideally, the court would take into account the conservation values promoted by the easement holder to hold other PRPs primarily liable.[302] When properly accounted for, CERCLA should not pose insurmountable difficulties for the astute conservation easement holder.

B. Taxes: Allaying Concerns and Enhancing Incentives

Concerns over tax related problems are somewhat obviated by the majority of recent IRS rulings and Tax Court decisions, which are largely favorable to landowners.[303] There are progressively fewer reported cases concerning disputed conservation easement valuations.[304] In the few valuation controversies that arise, one expert posits that "well-prepared landowners and experienced appraisers generally win against a poorly prepared IRS."[305] Additionally, conservation easement audits are increasingly remote occurrences, rendering this less of a concern for easement donors.[306] Regardless, careful and professional appraisals remain essential in avoiding any potential tax-related problems.[307]

Shortcomings in tax incentives for conservation easements[308] are potentially remedied by government action. In recent years Congress has taken steps to enhance benefits associated with donations of conservation

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298 *See* Brainich, *supra* note 241, at 11, 13 (summarizing three federal district and appellate cases that hold that easement owners are not "owners" under CERCLA).

299 *See* discussion *supra* Section IV.C.

300 *Id.*; *see* Secor, *supra* note 230, at 2 (noting that land trusts should be conscious that CERCLA liability can result from affirmative easements); 42 U.S.C. § 9607(a)(4) (2000) (assigning liability to "any person who accepts . . . hazardous substances for transport to disposal or treatment facilities, incineration vessels or [other] sites").

301 *See* 42 U.S.C. § 9613(f)(1) (2000) (providing that a court may "allocate response costs among liable parties using such equitable factors as the court determines are appropriate").

302 *See id.* This assumes that the court has other PRPs from which to choose, specifically those with money to pay for cleanup costs.

303 SMALL, *supra* note 88, at 1, 9 (Supp. 2000); *see* discussion *supra* Sections IV.B.1, B.3; Strasburg v. Comm'r, 79 T.C.M. (CCH) 1697, 1705 (2000) (agreeing with the majority of the landowner's figures, where IRS appraiser based lower conservation easement value on different easement comparisons than those used by landowner's appraiser).

304 SMALL, *supra* note 88, at 1, 9 (Supp. 2000).

305 *Id.* at 1.

306 *See id.* (discussing anecdotal evidence of the low number of IRS easement audits).

307 *See* discussion *supra* Section IV.B.1.

308 *See* discussion *supra* Section IV.B.3.

easements. In 1997, Congress established section 2031(c) of the Federal Tax Code, which provides that estate tax benefits may be available in association with a qualified conservation easement.[309] The law allows an exemption of up to forty percent of the value of that portion of a decedent's estate subject to a conservation easement, provided several qualifications are met.[310]

Federal legislation in 2001 and 2002 encouraged the donation of conservation easements via increased tax incentives. To address shortcomings in deduction limits,[311] proposed bills allowed landowners to deduct up to fifty percent of their AGI, over as many years as it took to realize the full deduction value of the donation.[312] This significantly enhances the appeal of a conservation easement for low to moderate income landowners with large property holdings.[313] Additional bills prohibited taxation on half the gains from any sale of land or a conservation easement provided the sale is to a land trust or government conservation agency.[314] Importantly, the promotion of sales of land for conservation purposes encourages local governments to start development rights purchase programs.

These bills were modified and included as part of a larger tax bill that was approved by the Senate Finance Committee.[315] Although the modifications decreased the incentives found in the original bills, the changes still held great potential for encouraging the use of conservation easements.[316] Ultimately, however, the final bill was never passed, and any

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309 26 U.S.C. § 2031 (2000); *see* SMALL, *supra* note 88, at 16–17 (Supp. 2000) (summarizing the background and motivation for enacting § 2031(c)). The new section did nothing to impact the existing conservation easement rules found in section 170(h); it only served to provide potential benefits in addition to those offered by existing rules. *Id.* at 17.

310 26 U.S.C. § 2031 (2000). In addition to meeting the requirements of section 170(h), the land must have been owned by the decedent or a member of the decedent's family for at least three years prior to death. The easement itself must prohibit virtually all commercial recreational use of the land, be perpetual in nature, and have been donated by the decedent or a member of the decedent's family. *Id.* § 2031(c)(8).

311 *See* discussion *supra* Section IV.B.3.

312 *See* H.R. 1309, 107th Cong. (2001) (purpose of the bill was "to encourage contributions by individuals of capital gain real property for conservation purposes, to encourage qualified conservation contributions"); S. 701, 107th Cong. (2001) (the equivalent bill in the Senate). For instance, under these bills a landowner making $50,000 a year could donate a $1 million conservation easement and realize the full value of the donation in tax benefits. *Compare with supra* note 212 and accompanying text (discussing the difficulty of determining the fair market value of a conservation easement).

313 *See* discussion *supra* Section IV.B.3.

314 *See* H.R. 2290, 107th Cong. (2001) (purpose of the bill was "to provide a tax incentive for land sales for conservation purposes"); S. 1329, 107th Cong. (2001) (the equivalent bill in the Senate).

315 Press Release, Land Trust Alliance, Land Trust Alliance and Land Trusts Laud Approval of Tax Incentives for Land Conservation (June 18, 2002), *available at* http://www.lta.org/newsroom/pr_061802.htm.

316 *See id.* (discussing the Senate Finance Committee's approval of four tax incentives for land conservation). The final bill retained the increased deduction allowed of 50% of AGI, but limited the carryover to 15 years (although farmers and ranchers could deduct 100% of income). *Id.* Additionally, only 25% of the gains from a sale of land or a conservation easement to a conservation organization or government agency could escape taxation. *Id.*

legislation promoting the use of conservation easements must go through the 108th Congress.[317] It is vital that conservation easement incentives be enhanced as soon as possible, as increasing amounts of private lands are poised for disposal in coming years.[318] Private landowners are the final arbiters of what becomes of these lands. Increased incentives can tip the balance in favor of protecting open space and existing uses for future generations, rather than simply selling out to the highest bidder.

VI. CONCLUSION

Conservation easements are one of the most vital and effective tools available to protect private lands.[319] In coming years, they must assume an even larger role in conserving open space and existing land uses. Development and sprawl continue to swallow up large tracts of land.[320] As increasing amounts of private land change hands,[321] landowners must be aware of the availability of conservation easements and understand how to use them effectively to ensure their land is protected in perpetuity.[322]

Several potential problems loom for uninformed landowners automatically assuming that a conservation easement, once executed, protects their land forever.[323] Many of these problems are minimized by astute landowners and reliable, diligent conservation easement holders.[324] State laws vary regarding proper use of conservation easements, and landowners and easement holders should familiarize themselves with any vagaries and idiosyncrasies existing in their locales.[325] Avoiding and planning for legal and policy pitfalls are essential to the long-term, effective use of conservation easements.

As real estate values increase, more landowners consider using conservation easements to take advantage of tax benefits.[326] As many private landowners grow older, immense amounts of land will change hands.[327] Enactment of federal legislation increasing incentives associated with

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317 In 2003, after completion of this Comment, H.R. 7 was introduced and included measures to increase the deduction landowners could take for donating land or a conservation easement, and to cut capital gains taxes on land or easements sold to a land trust or government agency. H.R. 7, 108th Cong. (2003). However, in September 2003, the House Ways and Means Committee approved a version of H.R. 7 that *no longer contained* these land conservation incentives for landowners. LAND TRUST ALLIANCE, ADVOCATES ALERT: H.R. 7 MOVES FORWARD, *at* http://www.lta.org/publicpolicy/adv_091003.htm (last updated Sep. 10, 2003).

318 *See* SMALL, *supra* note 88, at 2 (Supp. 2000) (stating that millions of acres of land are expected to change hands in the next two decades).

319 *See* Gustanski, *supra* note 1, at 9, 14.

320 *See* discussion *supra* Section II.A.

321 Small, *supra* note 2, at 64.

322 *See id.* at 64–65 (discussing need for infrastructure facilitating private land protection, as opposed to promoting private land sale and development).

323 *See* discussion *supra* Section IV.

324 *See* discussion *supra* Section V.A.

325 *See* discussion *supra* Section III.B, III.C.

326 SMALL, *supra* note 88, at 2 (Supp. 2000).

327 *See supra* note 5 and accompanying text.

conservation easements is necessary to enhance the appeal of this already immensely popular land conservation vehicle.[328]

This Comment should elucidate a point made by Jean Hocker, former President of the Land Trust Association, who states, "[U]sed wisely and well, easements will continue to be a major conservation tool for the twenty-first century, protecting precious natural areas and green space for generations to come."[329] By understanding how to use conservation easements properly to avoid legal and policy pitfalls, landowners can ensure their land is protected forever.

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[328] *See* discussion *supra* Section V.B.

[329] Hocker, *supra* note 35, at xix.