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# An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law

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# An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law

Federico Cheever\* & Nancy A. McLaughlin\*\*

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## I. Introduction

**T**he idea of a conservation easement – a bundle of restrictions on the development and use of land designed to protect the land’s conservation or historic values – can be relatively easily understood. More significant and more challenging is the complex body of state and federal law that shapes the

creation, funding, tax treatment, enforcement, modification, and termination of conservation easements. Understanding how conservation easements actually work requires understanding a mosaic of legal authority. This article will provide a “quick tour” through some of the most important aspects of the developing mosaic of conservation easement law. It cannot be comprehensive, but it touches on the essential points, at least in the authors’ opinion. It should also give the reader a sense for the complex interjurisdictional dynamics that shape conservation transactions and disputes about conservation easements.

The explosion in the number of conservation easements over the past four decades has made them one of the most popular land protection mechanisms in the United States. The National Conservation Easement Database (NCED), a public-private partnership, is in the process of compiling information on conservation easements.<sup>1</sup> As of October 2014, the NCED contained basic information on more than 105,000 conservation easements encumbering more than 22.2 million acres in the United States.<sup>2</sup> The easements included in the NCED are held primarily by charitable conservation organizations (generally referred to as “land trusts”) and federal, state, and local government entities.<sup>3</sup> In addition, the vast majority of these ease-

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<sup>1</sup> The National Conservation Easement Database (NCED) is an initiative of the U.S. Endowment for Forestry and Communities. National Conservation Easement Database, <http://conservationeasement.us/> (last visited March 20, 2015).

<sup>2</sup> National Conservation Easement Database, NCED At A Glance, <http://conservationeasement.us> (last visited March 20, 2015).

<sup>3</sup> National Conservation Easement Database, All States and All Easements, Easements by Easement Holder Type, <http://conservationeasement.us/reports/easements> (last visited March 20, 2015). Other holders include, for example, tribes, universities, private foundations, the Boy Scouts of America, and the Daughters of the American Revolution. *Id.*

ments have been created since 1984 (i.e., in just the past thirty years).<sup>4</sup>

The NCED database is incomplete.<sup>5</sup> While the NCED currently contains information on conservation easements encumbering more than 22.2 million acres in the United States, it estimates that a total of 40 million acres are encumbered.<sup>6</sup> For size comparison, the State of Washington contains a little more than 42 million acres of land<sup>7</sup> and the entire National Park System, including Alaska, includes 84 million acres of land.<sup>8</sup> Unlike either the State of Washington or the National Park System, however, the number of acres encumbered by conservation easements is continuing to grow rapidly.

In the 21<sup>st</sup> century, conservation easements rank with mortgages and real covenants as the most ubiquitous non-possessory interests in land. They also now constitute a national conservation system that rivals national parks, national forests, and state parklands in its capacity to protect biological, scenic, and historic resources. As a result of their rapid rise to prominence, however, conservation

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<sup>4</sup> National Conservation Easement Database, All States and All Easements, Easements by Acquisition Date, <http://conservationeasement.us/reports/easements> (last visited March 20, 2015).

<sup>5</sup> Without registries of conservation easements in most states, NCED has to rely, in part, on land trusts and government entities voluntarily participating in the database. See National Conservation Easement Database, Completeness, <http://nced.conservationregistry.org/about/completeness> (last visited March 20, 2015).

<sup>6</sup> National Conservation Easement Database, What is the NCED?, <http://conservationeasement.us> (last visited March 20, 2015).

<sup>7</sup> U.S. Department of the Interior, Bureau of Land Management, Mineral and Surface Acreage Managed by the BLM, [http://www.blm.gov/wo/st/en/info/About\\_BLM/subsurface.html](http://www.blm.gov/wo/st/en/info/About_BLM/subsurface.html) (last visited March 20, 2015).

<sup>8</sup> National Park Service, Frequently Asked Questions, How many acres are there in the national park system?, <http://www.nps.gov/faqs.htm> (last visited March 20, 2015).

easements are not as well understood as other more traditional real property interests, nor has the law developed to keep pace with their explosive growth.

The mosaic of federal and state law does establish, however, consistently and repeatedly, that conservation easements are authorized, encouraged, and subsidized because they further the public interest by ensuring the preservation of naturally and historically significant lands and buildings. Many of the laws are also designed to ensure protection of the public's investment in these instruments and the conservation and historic values they preserve. Once we understand these organizing principles, an image emerges from the tiles of the mosaic.

## II. The Legal Mosaic

In a typical "simple" conservation easement transaction, a landowner transfers a non-possessory real property interest (shaped by state statutory and federal tax law) to a qualified conservation easement "holder" (qualified under state statutory and federal tax law) for a period of time (subject to state and federal statutory mandates and presumptions) for a specified purpose (in conformity with state statutory and federal tax law). The transferor is often (but not always) motivated by federal or state tax benefits.

The law in the conservation easement context is made more complex by the many different purposes for which conservation easements can be created. These purposes can include, for example, protection of wildlife habitat, wetlands, forestlands, working farms, historic sites, scenic landscapes, paleontological resources, burial sites, water rights, airspace, recreational facilities, or the more generic "open space." Sometimes the purpose of a conservation easement is very specific, such as the protection of habitat for the

Red-cockaded woodpecker. At other times, the purpose is broad and multi-faceted, for example, the protection of the “natural, ecological, agricultural, habitat, open space, scenic, and aesthetic values” of the subject land.

The contexts in which conservation easements are created are also varied. Some conservation easements are conveyed for mitigation purposes or exacted as part of development approval processes (i.e., in *quid pro quo* transactions). Some conservation easements are donated in full as charitable gifts and the donors often receive federal or state tax benefits. Some conservation easements are purchased either in whole or in part, often with funds from federal, state, or local conservation easement purchase programs. When conservation easements are purchased for less than their full “value” (typically the difference between the fair market value of the land immediately before and immediately after the easement conveyance), the landowner may be eligible for tax incentives for the donation component of the transaction. Such part-gift, part-sale transactions are generally referred to as “bargain sales.”

Conservation easements are also created for a variety of durations. Some are drafted to last for a specified term, such as twenty or thirty years. Term easements automatically expire at the end of the specified term.<sup>9</sup> Some easements are drafted to terminate upon satisfaction of specified conditions. For example, conservation

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<sup>9</sup> The conservation community has generally disfavored term easements because term easements offer only temporary land protection and, even if they are repeatedly renewed, can cost far more in the long run than perpetual easements. See, e.g., ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 190 (2D ED. 2005) [hereinafter 2005 CONSERVATION EASEMENT HANDBOOK]; Jeff Jones et al., *Common Questions on Conservation Easements*, 13 (Center for Collaborative Conservation, Sept. 2009), available at <http://www.landtrustalliance.org/conservation/documents/Bulletin%2001-09%20rd-8.pdf> (last visited March 22, 2015).

easements purchased before September of 2004 pursuant to a Maryland agricultural easement purchase program may be terminated at the request of the landowner after twenty-five years if, among other things, the state agency holding the easement determines that profitable farming on the subject property is no longer feasible.<sup>10</sup>

Based on the information available, most of the conservation easements conveyed to date were drafted to protect the particular land they encumber “in perpetuity” or “forever.”<sup>11</sup> The bias in favor of perpetual conservation easements is the result of a number of factors, including the requirement that an easement be perpetual for the grantor to be eligible for federal (and in many cases state) tax benefits, and the desire on the part of many easement grantors to ensure permanent protection of the conservation and historic values of land that has special significance to them, their families, and their communities.

Conservation easements are also conveyed to a variety of entities to be held for the benefit of the public. State and federal legislators have endeavored to assure public benefit by generally limiting authorized “holders” of conservation easements to government entities and charitable organizations. Under conservation easement statutes in 50 states, authorized holders include local, state, and federal government entities. Authorized holders also include local, state, regional, and national land trusts, as well as a variety of other

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<sup>10</sup>MD. CODE ANN., AGRIC. § 2-514. This statute was amended in 2004 to provide that easements, the purchase of which is approved on or after October 1, 2004, “shall be held by the [state agency] in perpetuity.” *Id.* § 2-514.1.

<sup>11</sup> See National Conservation Easement Database, All States and All Easements, <http://conservationeasement.us/reports/easements> (last visited April 18, 2015) (the database contains 105,885 conservation easements and 86,066 of those easements – just over 81% – are perpetual).



charitable entities, such as universities and foundations. In a few states, authorized holders also include Native American Tribes.<sup>12</sup>

Given the variety of conservation easements, it is not surprising that the mosaic of laws that may affect them is extensive and includes:

- state statutes authorizing the creation of conservation easements (generally referred to as conservation easement “enabling” statutes),
- state laws authorizing state easement purchase programs,
- state laws authorizing state tax benefits for easement donations,
- state real property and contract laws,
- state laws governing the operations of charitable organizations,
- state laws governing the administration of charitable gifts,
- federal laws authorizing federal tax benefits for easement donations,
- federal laws authorizing federal easement purchase programs, and
- federal laws governing the tax-exempt status of charitable organizations.

Understanding conservation easements requires understanding when these different laws apply and how the laws interact with one another. Conservation easement law is new and some important issues have not been fully resolved.

A conservation easement donated as a federally deductible charitable gift to a local land trust for the purpose of protecting wildlife habitat and open space “in perpetuity” will be fundamentally different from a conservation easement purchased for its full

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<sup>12</sup> See CAL. CIV. CODE § 815.3(c); OR. REV. STAT. § 271.715(3)(c).

value by a state agency for the purpose of protecting economically productive farmland for a term of thirty years as part of the state's agricultural easement purchase program. However, both fall within the broad definition of a "conservation easement" and we will refer to both as such.

### III. History

The term conservation easement did not emerge until the late 1950s when journalist William Whyte advocated using private land use controls to accomplish landscape preservation.<sup>13</sup> By the time Whyte coined the term "conservation easement," however, the property interest he described was already relatively well established. During the 1930s and 1940s, the National Park Service purchased easements encumbering almost 1,500 acres in Virginia and North Carolina to protect scenic vistas along the Blue Ridge Parkway, and easements encumbering another 4,500 acres in Mississippi, Alabama, and Tennessee to protect scenic vistas along the Natchez Trace Parkway.<sup>14</sup> The federal government discontinued its practice of purchasing scenic easements to protect those parkways in the 1950s.<sup>15</sup> But the concept of a conservation easement as a land protection tool remained.

In 1965, the federal government provided the states with a significant incentive to enact legislation facilitating the use of scenic

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<sup>13</sup> WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 2-14 (1968).

<sup>14</sup> See Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 *DENV. L.J.* 167, 181 (1968).

<sup>15</sup> As a result of friction with landowners, difficulty in policing the easements, and difficulty in persuading courts to grant injunctive relief, the National Park Service discontinued its practice of purchasing scenic easements along the parkways in the 1950's and turned to a full fee simple purchase program. *Id.* at 183.

easements in the form of the Federal Highway Beautification Act.<sup>16</sup> That Act, which provided that 3% of the funds appropriated to a state during any fiscal year for the construction of highways had to be used for landscaping and scenic enhancement or such funds would lapse, inspired states to enact legislation facilitating the use of scenic highway easements.<sup>17</sup> Coincident with the growth of scenic highway easement legislation, states began enacting legislation that authorized the use of conservation easements to accomplish a broader range of land conservation goals.<sup>18</sup> The earliest easement enabling statutes were enacted by California in 1959<sup>19</sup> and New York in 1960.<sup>20</sup> By 1979, 40 states had enacted some type of conservation easement enabling statute.<sup>21</sup>

At about the time states began enacting easement enabling legislation, the Internal Revenue Service (IRS) announced that federal tax benefits were available to landowners who made charitable gifts of conservation easements. In 1964, the IRS published a Revenue Ruling authorizing a federal charitable income tax deduction for the donation of a conservation easement to the United States for the purpose of protecting scenic land adjacent to a federal highway.<sup>22</sup> A year later the IRS issued a news release advertising the availability of the charitable income tax deduction for the donation of scenic easements to government agencies and charitable organi-

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<sup>16</sup> POWELL ON REAL PROPERTY §34A.02 (Michael Allan Wolf ed., Matthew Bender 2003).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing Cal. Gov't Code §6953 (West 1959)).

<sup>20</sup> *Id.* (citing N.Y. Gen. Mun. Law §247 (McKinney 1960)).

<sup>21</sup> *Id.* (citing Schwartz, *The Federal Government's Use of Conservation Easements*, in "Report on 1985 National Survey of Government and Non-Profit Easement Programs," 4 LAND TRUSTS' EXCHANGE No. 3, Dec. 1985, at 30).

<sup>22</sup> Rev. Rul. 64-205, 1964-2 C.B. 62.

zations.<sup>23</sup> In 1980, following the enactment of a number of temporary provisions, Congress made the conservation easement deduction provision a permanent part of the Internal Revenue Code.<sup>24</sup> Pursuant to Internal Revenue Code § 170(h) (§ 170(h)), which has changed little in the ensuing thirty-five years, a landowner donating a qualifying perpetual conservation easement to a government entity or charitable organization is eligible for a federal charitable income tax deduction generally equal to the value of the easement.<sup>25</sup>

In 1981, one year after Congress made the deduction provision a permanent part of the Internal Revenue Code, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) promulgated the Uniform Conservation Easement Act (UCEA),<sup>26</sup> which has since been adopted in 23 states, the United States Virgin Islands, and the District of Columbia.<sup>27</sup> Wyoming adopted a version of the UCEA in 2005, making it the last state to adopt a conservation easement enabling statute of some sort.<sup>28</sup> Because aspects of the UCEA often appear in the enabling statutes of states that did not expressly adopt the UCEA,<sup>29</sup> the

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<sup>23</sup> I.R.S. News Release No. 784 (Nov. 15, 1965).

<sup>24</sup> See POWELL ON REAL PROPERTY §34A.04[2] (Michael Allan Wolf ed., Matthew Bender 2013) (outlining the history of Internal Revenue Code § 170(h) (§ 170(h)).

<sup>25</sup> See I.R.C. § 170(h); Treas. Reg. § 1.170A-14(h)(3)(i).

<sup>26</sup> UNIF. CONSERVATION EASEMENT ACT (last revised or amended in 2007) [hereinafter UCEA], available at [http://www.uniformlaws.org/shared/docs/conservation\\_easement/ucea\\_final\\_81%20with%2007amends.pdf](http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf).

<sup>27</sup> Uniform Law Commission, Conservation Easement Act, Legislative Fact Sheet, available at <http://www.uniformlaws.org/Act.aspx?title=Conservation%20Easement%20Act> (last visited March 22, 2015). Although not listed on the Uniform Law Commission's website, Georgia and Oklahoma have adopted the UCEA. GA. CODE ANN. §§ 44-10-1 to -8; OKLA. STAT. ANN. tit. 60, §§ 49.1 to .8.

<sup>28</sup> WYO. STAT. ANN. §§ 34-1-201 to -207.

<sup>29</sup> See, e.g., 32 PA. CONS. STAT. ANN. §§ 5051-5059 (Conservation and Preservation Easements Act); MO. ANN. STAT. § 442.014 (Private Landowner Protection Act).

UCEA is generally considered the dominant source for state statutory conservation easement law.

Coincident with the growth in the number of acres encumbered by conservation easements has been the growth in the number of land trusts acquiring easements. Originally, land trusts were charitable organizations that worked to preserve scenic landscapes by purchasing land in fee simple. Most American land trusts recognize as their earliest progenitor the Trustees of Reservations, a Massachusetts nonprofit organization established in 1891 by the state legislature at the behest of landscape architect Charles Norton Eliot.<sup>30</sup> In the ensuing years, land trusts have evolved dramatically. By the end of the twentieth century they had acquired, through purchase and donation, land and conservation easements for the purpose of preserving ecological communities, agricultural and forest lands, historic sites, scenic vistas, and the fabric of human communities. The estimated 1,700 land trusts operating in the United States today vary in size from large sophisticated national and international organizations, such as the Trust for Public Land and The Nature Conservancy, to small local organizations run exclusively by volunteers.<sup>31</sup>

The federal tax incentives and the state enabling statutes have been the primary drivers of growth in both the use of conservation easements as a land protection tool and the number of land trusts operating in the United States, and they are discussed in detail below. Federal, state, and local easement purchase programs as well

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<sup>30</sup> The Trustees of Reservations, Trustees History, <http://www.thetrustees.org/about-us/history/> (last visited March 22, 2015).

<sup>31</sup> See 2010 National Land Trust Census Report 5, 17 (Land Trust Alliance) [hereinafter 2010 Census], available at <https://www.landtrustalliance.org/land-trusts/land-trust-census/2010-final-report>; Land Trust Alliance, Find a Land Trust, <http://findalandtrust.org>.

as state tax incentive programs have also played a significant role, and they too are discussed below, albeit more briefly.

#### IV. Federal Tax Incentives

Federal tax incentives have been central to the development of the law regarding conservation easements. Unlike most real estate interests, influenced almost entirely by state law, conservation easements have developed as a composite of federal and state law. Although federal tax benefits are not necessarily part of every conservation easement transaction, they influence many aspects of conservation easement law. Even when a conservation easement transaction does not involve potential tax benefits, the practices of the parties involved (particularly the holders) are often shaped by the desire to enter into other transactions that may involve tax benefits. In addition, many state tax incentive programs require satisfaction of the federal requirements of § 170(h). These federal and state laws evidence the organizing principle underlying conservation easements—they are authorized, encouraged, and subsidized because they further the public interest.

##### *A. Section 170(h)*

The primary federal tax incentive for the donation of a conservation easement is the federal charitable income tax deduction under § 170(h). Pursuant to § 170(h), a landowner who donates a qualifying conservation easement is eligible for a deduction generally equal to the value of the easement. The value of the easement is generally determined using the “before and after” method, pursuant to which an appraiser determines the fair market value of the

land immediately before and immediately after the donation. The difference between those two values is the value of the easement.<sup>32</sup> Thus, if a landowner donates a qualifying conservation easement and the fair market value of the subject land before the donation is \$10 million and the fair market value of the subject land after the donation is \$7 million, the value of the easement is \$3 million. The landowner can claim a charitable income tax deduction of \$3 million, subject to limitations keyed to the landowner's adjusted gross income.<sup>33</sup>

### *B. The Requirements*

When Congress made § 170(h) a permanent part of the Code in 1980 it was concerned about the potential for abuse. Among other things, there was concern that conservation easements would be conveyed with respect to properties that had little or no conservation or historic value or were already subject to other types of restrictions on their development and use. There also was concern that the easements would not continue to be enforced on behalf of

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<sup>32</sup> See Treas. Reg. § 1.170A-14(h)(3)(i).

<sup>33</sup> As a general rule, a landowner can claim the deduction generated by a conservation easement donation to the extent of 30% of the landowner's adjusted gross income in each of the year of the donation and the following five years. Pursuant to the Pension Protection Act of 2006, Congress enacted more favorable, but temporary, percentage limitations rules for conservation easement donors (generally, easement donors were permitted to claim the resulting deduction to the extent of 50% of the donor's adjusted gross income in each of the year of the donation and the following 15 years, or, for qualifying farmer and rancher donations, 100% of the donor's adjusted gross income in each of the year of the donation and the following 15 years). For an explanation of these rules, see *Technical Explanation of H.R. 4, The "Pension Protection Act of 2006,"* prepared by the Staff of the Joint Committee on Taxation 274-77 (Aug. 3, 2006, JCX-38-06) [hereinafter JCT Explanation of PPA], available at <https://www.jct.gov/publications.html?func=select&id=20>. The enhanced incentives, which have been repeatedly extended for temporary periods, expired at the end of 2014.

the public over the long term.<sup>34</sup> Accordingly, Congress included substantial requirements in § 170(h) designed to address potential abuses. These requirements, discussed below, have greatly influenced the manner in which conservation easements are both drafted and administered.

Pursuant to § 170(h), a landowner donating a conservation easement is eligible for a federal charitable income tax deduction only if the easement is “a restriction (granted in perpetuity) on the use which may be made of the real property” that is granted to a “qualified organization” (defined as a governmental unit, a publicly-supported charity, or satellite of such charity) “exclusively for conservation purposes.”

The four “conservation purposes” for which a tax-deductible easement can be donated are habitat protection, preservation of open space, historic preservation, and preservation of land for outdoor recreation by or education of the general public.<sup>35</sup> Congress also specified that a contribution shall not be treated as “exclusively for conservation purposes” unless the conservation purpose is “protected in perpetuity.”<sup>36</sup>

In 1986, the Treasury Department finalized extensive regulations interpreting § 170(h).<sup>37</sup> The regulations contain descriptions of the four qualified conservation purposes that are designed to ensure that only conservation easements protecting properties with unique or otherwise significant conservation or historic values will

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<sup>34</sup> See, e.g., *Miscellaneous Tax Bills: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong. 3-13 (1979) (statement of Hon. Daniel I. Halperin, Deputy Assistant Secretary for Tax Policy, Department of the Treasury); S. Rep. No. 96-1007, at 9-15 (1980).

<sup>35</sup> I.R.C. § 170(h)(4).

<sup>36</sup> *Id.* § 170(h)(5)(A).

<sup>37</sup> Treas. Reg. 1.170A-14 (1986).



be eligible for the deduction.<sup>38</sup> The regulations governing the open space and historic preservation conservation purposes are particularly elaborate.<sup>39</sup>

The regulations indicate that public access is generally not required to satisfy the habitat protection or open space conservation purposes tests, although some visual public access is necessary in the case of an open space easement protecting scenic property.<sup>40</sup> Preservation of land for outdoor recreation or education is the only conservation purpose that requires “substantial and regular use of the general public.”<sup>41</sup>

The regulations also contain numerous requirements intended to ensure that the conservation purposes of tax-deductible easements will, in fact, be “protected in perpetuity” for the benefit of the public. For example, a tax-deductible easement can be granted only to a “qualified organization” that has both a commitment to protect the conservation purposes of the donation and the resources to enforce the restrictions.<sup>42</sup> The easement must expressly prohibit the donee organization from transferring the easement except to another “eligible donee” that agrees to continue to enforce the easement.<sup>43</sup> The easement must prohibit all uses of the subject property that would be inconsistent with the conservation purposes of the donation<sup>44</sup> and, with one limited exception, all uses that would permit destruction of any “other significant conservation

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<sup>38</sup> Treas. Reg. § 1.170A-14(d); S. Rep. No. 96-1007, at 9-13 (1980).

<sup>39</sup> Treas. Reg. § 1.170A-14(d)(4) and (5).

<sup>40</sup> *Id.* § 1.170A-14(d)(3)(iii), (4)(ii)(B), (4)(iii)(C).

<sup>41</sup> *Id.* § 1.170A-14(d)(2)(ii).

<sup>42</sup> *Id.* § 1.170A-14(c)(1).

<sup>43</sup> *Id.* § 1.170A-14(c)(2).

<sup>44</sup> *Id.* § 1.170A-14(g)(1).

interests.”<sup>45</sup> The easement must generally prohibit surface mining and other destructive methods of mining on the subject property.<sup>46</sup> And any outstanding mortgages on the subject property must be subordinated to the rights of the holder at the time of the easement’s donation.<sup>47</sup>

If the donor of a tax-deductible easement reserves rights, the exercise of which may impair the conservation values protected by the easement (which often will be the case<sup>48</sup>), “baseline documentation” establishing the condition of the property at the time of the gift must be prepared; the donor must agree to notify the donee, in writing, before exercising such reserved rights; the easement must grant the donee reasonable rights to access the property to ensure the landowner is complying with the easement; and the easement must grant the donee the right to enforce the easement by appropriate legal proceedings, including the right to require restoration

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<sup>45</sup> *Id.* § 1.170A-14(e)(2). For example, the preservation of farmland will not qualify for a deduction if, under the terms of the easement, a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. *Id.* A use that is destructive of conservation interests is permitted only if the use is necessary for the protection of the conservation interests that are the subject of the contribution, such as allowing site excavation that may impair scenic values on property preserved as an archaeological site. *Id.* § 1.170A-14(e)(3).

<sup>46</sup> *Id.* § 1.170A-14(g)(4). If ownership of the surface estate and the mineral estate has long been separated, a deduction will be allowed if the donor can demonstrate that the probability of surface mining is “so remote as to be negligible” because, for example, there are no valuable minerals present or the expense associated with their removal would be prohibitive. *Id.* § 1.170A-14(g)(4)(ii).

<sup>47</sup> *Id.* § 1.170A-14(g)(2). The mortgage subordination requirement ensures that the easement will not be extinguished if the landowner defaults on the mortgage and the lender forecloses on the property.

<sup>48</sup> Many conservation easements contain provisions authorizing the grantor to, for example, construct additional residential or agricultural structures on the subject property and engage in certain agricultural, recreational, and even commercial uses, subject to limitations intended to ensure that the exercise of such rights will not be inconsistent with the purpose of the easement.

of the property to its condition at the time of donation.<sup>49</sup> These requirements are intended to ensure that the donee or its successor has the information, as well as the notice, access, and enforcement rights necessary to enforce the easement on behalf of the public over its perpetual life.

Finally, the Treasury Department recognized that—in rare circumstances—changed conditions might frustrate the purpose of a perpetual conservation easement. Accordingly, the regulations provide that, if a subsequent unexpected change in conditions makes continued use of the subject property for conservation purposes “impossible or impractical,” the conservation purpose of the easement will nonetheless be treated as “protected in perpetuity” if the restrictions are extinguished in a judicial proceeding.<sup>50</sup> The regulations further provide that, if an easement is extinguished, the holder must be entitled to a share of the proceeds from a subsequent sale or exchange of the property and must use those proceeds “in a manner consistent with the conservation purposes of the original contribution.”<sup>51</sup> These provisions help to ensure that, in the unlikely event of extinguishment, the public’s investment in conservation will not be lost.

### *C. Dramatic Growth*

In 1980, the Senate Finance Committee estimated that § 170(h) would reduce federal revenues by only \$5 million annually.<sup>52</sup> The deduction provision has become much more expensive in the ensu-

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<sup>49</sup> Treas. Reg. § 1.170A-14(g)(5).

<sup>50</sup> *Id.* § 1.170A-14(g)(6)(i).

<sup>51</sup> *Id.* § 1.170A-14(g)(6)(ii).

<sup>52</sup> S. Rep. No. 96-1007, at 16 (1980).

ing 35 years. Former legal counsel to the Joint Committee on Taxation explains:

According to [IRS] statistics, on average over \$1.5 billion are claimed in easement contributions each year, and this does not include corporate contributions, which likely are considerable. In terms of lost federal income tax revenue, a rough estimate over the eight-year period from 2003–2010 for individual contributions (again not including corporate contributions) is in the range of \$4.2 billion.<sup>53</sup>

The dramatic increase in the federal expenditure on conservation easement donations has inspired doubts about the proper valuation of the easements, the public benefits being derived from the easements, and whether the easements are being appropriately monitored and enforced over the long term.

#### *D. Washington Post Articles and Their Aftermath*

In 2003 and 2004, the Washington Post published a series of articles alleging abuses in both the conservation and façade easement donation contexts.<sup>54</sup> The articles described allegedly abusive trans-

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<sup>53</sup> Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 2013 UTAH L. REV. 755, 756, available at <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1106&context=scholar>.

<sup>54</sup> See David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at A1; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, WASH. POST, May 5, 2003, at A1; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1; Joe Stephens, *For Owners of Upscale Homes, Loophole Pays; Pledging to Retain the Façade Affords a Charitable Deductions*, WASH. POST, Dec. 12, 2004, at A1; Joe Stephens, *Local Laws Already Bar Alterations; Intervention by Trusts Is Rare for Preservation*, WASH. POST, Dec. 12, 2004, at A15; Joe Stephens, *Tax Break Turns Into Big Business*, WASH. POST, Dec. 13, 2004, at A1.

actions involving exaggerated conservation easement appraisals, developers who received shocking tax deductions for donating conservation easements encumbering golf course fairways or otherwise undevelopable land, and large deductions for façade easements that merely duplicated restrictions already imposed by state and local laws. The articles also described easement violations, monitoring and enforcement problems that were widespread and growing worse, and alterations made to easement restrictions at the request of landowners, resulting in the public paying for nonexistent benefits.

The Washington Post articles raised the ire of Congress, which launched an investigation that eventually led to Congressional hearings and some modest reforms.<sup>55</sup> The reforms, enacted as part of the Pension Protection Act of 2006 (PPA), primarily tightened the requirements pertaining to appraisers, appraisals, and façade easements.<sup>56</sup> Illustrating Congress's somewhat schizophrenic approach the § 170(h) deduction, however, the PPA also temporarily enhanced the tax benefits offered to conservation easement donors by making the percentage limitations on the resulting charitable

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<sup>55</sup> See *Report of Staff Investigation of The Nature Conservancy (Volume I)*, U.S. Senate Committee on Finance, Executive Summary 10-11 (June 2005), available at <http://finance.senate.gov/>; see also *Options to Improve Tax Compliance and Reform Tax Expenditures*, prepared by the Joint Committee on Taxation, JCS-2-05, 281 (Jan. 27, 2005), available at <http://www.jct.gov/publications.html?func=showdown&id=1524>; Staff of Joint Comm. Taxation, 109th Cong., 1st Sess., *Description of Revenue Provisions Contained in the President's Fiscal Year 2006 Budget Proposal*, 239-41 (Comm. Print 2005), available at <https://www.jct.gov/publications.html?func=startdown&id=1523>.

<sup>56</sup> Pub. L. No. 109-280, 120 Stat. 780, §§ 1213, 1219 (2006).

deductions more favorable.<sup>57</sup> Congress has repeatedly extended the enhanced incentives, most recently through 2014.<sup>58</sup>

The Washington Post articles also caught the attention of the IRS. In 2004 the IRS issued a Notice stating that it was aware of abuses and intended to disallow improper deductions and impose penalties on taxpayers, promoters, and appraisers where appropriate.<sup>59</sup> The agency also began aggressively auditing and litigating conservation easement donation transactions. Since 2005, the courts have collectively issued more than seventy opinions involving challenges to deductions claimed with regard to conservation easement donations. The issues addressed in these cases range from overvaluation of the easements, to failure to comply with the requirements under § 170(h) and the regulations, to the donor's failure to properly substantiate the claimed deduction.

The following two sections briefly describe a sampling of cases in which the IRS challenged deductions claimed with respect to a conservation easement donation on the ground that the donor failed to satisfy either § 170(h)'s "conservation purposes" test or its "perpetuity" requirements. The IRS has informally indicated that there are many additional cases in the litigation pipeline, so further interpretation of the requirements of § 170(h) and the regulations is expected.

### *E. Case Law on Conservation Purposes*

To date, the IRS has had only limited success in challenging satisfaction of the conservation purposes tests of § 170(h). In one of the

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<sup>57</sup> *Id.* § 1206. For an explanation of the Pension Protection Act of 2006 changes, see JCT Explanation of PPA, *supra* note 33, 275-77, 291-96, 308-12.

<sup>58</sup> Pub. L. No. 113-295, § 106 (Dec. 19, 2014).

<sup>59</sup> IRS Notice 2004-41, 2004-1 C.B. 31.

first cases to be handed down following the Washington Post articles, *Turner v. Commissioner*, the Tax Court sustained the IRS's complete disallowance of a \$3.1 million deduction claimed for the donation of a conservation easement encumbering 29.3 acres in Northern Virginia for failure to satisfy the open space or historic preservation conservation purposes tests.<sup>60</sup>

The property subject to the easement at issue in *Turner* is located down the road from Mount Vernon, President George Washington's 500-acre estate; adjacent to President Washington's Grist Mill; and in close proximity to the Woodlawn Plantation, which was built in 1805 on land also owned by President Washington. The easement purported to reduce the number of residences that could be built on the property from 62 to 30, but zoning regulations already limited development to 30 residences because more than half the property was situated in a 100-year floodplain. In addition, nothing in the easement limited the size of the residences, either in square footage (to limit the amount of land each could cover) or in height (to protect the view from nearby historic areas). In holding for the IRS, the Tax Court concluded:

Here there has been no preservation of open space. Nor [has the donor] preserved anything that is historically unique about the property or the surrounding historical areas. [The donor] simply developed the property to its maximum yield within the property's zoning classification.<sup>61</sup>

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<sup>60</sup> *Turner v. Comm'r*, 126 T.C. 299 (2006).

<sup>61</sup> *Id.* at 317; see also Joe Stephens, *IRS Gets 'First Big Win' in Push to Stem Abuse of Conservation Tool*, WASH. POST, June 4, 2006, at A01. In *Herman v. Comm'r*, T.C. Memo. 2009-205, the Tax Court held that a taxpayer who donated a facade easement restricting the exercise of a portion of the unused development rights over an apartment building on Fifth Avenue in New York City was not eligible for a deduction because the easement did not preserve the historic structure or the

The IRS had less success challenging satisfaction of the habitat protection conservation purposes test in a later case, *Glass v Commissioner*.<sup>62</sup> *Glass* involved deductions claimed for the donation of two easements encumbering a small portion (collectively, just over one acre) of a ten-acre parcel located on the shore of Lake Michigan. The IRS argued that the easements failed to satisfy the habitat protection conservation purposes test because (i) threatened species had not been actually sighted living on the property, (ii) the subject properties were too small, (iii) there was no limit on building on neighboring properties, and (iv) the taxpayers reserved too many rights in the easements.

The 6th Circuit rejected each of the IRS's arguments, holding that: (i) protection of property that is merely *potential* habitat for rare, threatened, or endangered species may be sufficient to satisfy the habitat protection conservation purposes test (and one of the taxpayers testified credibly that she had observed bald eagles on the property in any event); (ii) there is no requirement in § 170(h) or the regulations that the property subject to a tax-deductible easement be of a minimum size; (iii) § 170(h) and the regulations do not require consideration of the building rights of neighboring property owners, which reflects the "common sense truth" that donors cannot limit building on property outside their control; and (iv) despite the numerous use rights reserved by the donors in the easements, the easements were carefully drawn to prohibit any use that would undermine their stated conservation purposes. The 6th Circuit thus sustained the Tax Court's holding in favor of the taxpay-

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underlying land and, thus, did not satisfy the historic preservation conservation purposes test.

<sup>62</sup> *Glass v. Comm'r*, 471 F.3d 698 (6th Cir. 2006), *aff'g* *Glass v. Comm'r*, 124 T.C. 258 (2005).



ers, permitting them to claim deductions of just over \$340,000 for the donation of the easements.<sup>63</sup>

### F. Case Law on Perpetuity

The IRS has had more success challenging claimed deductions for failure to satisfy the perpetuity requirements. In *Carpenter v. Commissioner*, the Tax Court sustained the IRS's disallowance of over \$2.7 million of deductions claimed with respect to the donation of several conservation easements encumbering land in Teller County, Colorado.<sup>64</sup> Each of the easements provided that, if the purpose of the easement should later become impossible to accomplish, the easement could be extinguished either by judicial proceedings or by mutual written agreement of the parties. The Tax Court held that conservation easements extinguishable by mutual agreement of the parties, even if subject to a standard such as impossibility, fail as a matter of law to comply with the regulation governing extinguishment, which requires a judicial proceeding.<sup>65</sup>

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<sup>63</sup> In *Butler v. Comm'r*, T.C. Memo. 2012-72, the Internal Revenue Service (IRS) similarly argued that the development and use rights reserved by the taxpayers were inconsistent with the habitat protection conservation purposes of the donated easements. The Tax Court held for the taxpayers, noting that, although the record on the issue was "sparse," the taxpayers presented some credible evidence that the conservation purposes would be protected in perpetuity at full exercise of all reserved rights and the IRS failed to offer any evidence to the contrary.

<sup>64</sup> *Carpenter v. Comm'r*, T.C. Memo. 2013-172, *denying reconsideration of and supplementing Carpenter v. Comm'r*, T.C. Memo. 2012-1.

<sup>65</sup> See *supra* note 50 and accompanying text. In support of its holding, the court quoted one of the principal drafters of the regulations, who explained:

[the] restrictions . . . are supposed to be perpetual in the first place, and the decision to terminate them should not be [made] solely by interested parties. With the decision-making process pushed into a court of law, the legal tension created by such judicial review will generally tend to create a fair result.

In *Wachter v. Commissioner*, the Tax Court sustained the disallowance of deductions claimed with respect to easements encumbering land in North Dakota.<sup>66</sup> The court held that North Dakota law, which limits the duration of any easement in the state to 99 years, prohibits conservation easements in the state from being “granted in perpetuity” as required by § 170(h). The court rejected the argument that the 99-year limitation could be ignored as a remote future event. The court explained that, on the dates of the donations, it was not only possible, it was inevitable that the holder would be divested of its interests in the easements by operation of North Dakota law and, thus, the easements were not restrictions “granted in perpetuity.”<sup>67</sup>

*Wachter* reiterated a fundamental principle of federal tax law: while state law determines the nature of property rights, it is federal law that determines the tax treatment of such rights.<sup>68</sup> *Wachter* is also notable because it confirmed that a state can render all conservation easements in the state nondeductible by passing a law that makes it impossible to satisfy the federal perpetuity requirements.

In *Belk v. Commissioner*, the 4th Circuit affirmed the Tax Court’s holding that a conservation easement that permits the parties to agree to “substitutions” or “swaps” (i.e., to remove land from the easement in exchange for the addition of some other land), even

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*Carpenter*, T.C. Memo. 2012-1, at \*8 (quoting SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS, 16-4 (1986)).

<sup>66</sup> *Wachter v. Comm’r*, 142 T.C. 140 (2014).

<sup>67</sup> *Id.*; see also I.R.C. § 170(h)(2)(C); N.D. CENT. CODE § 47-05-02.1(2).

<sup>68</sup> *Wachter*, 142 T.C. at 146; see also *Carpenter*, T.C. Memo. 2012-1, at \*5 (“To determine whether the conservation easement deeds comply with requirements for the conservation easement deduction under Federal tax law, we must look to State law to determine the effect of the deeds. State law determines the nature of the property rights, and Federal law determines the appropriate tax treatment of those rights.”).

though subject to certain limitations, was not eligible for a deduction because it was not a “restriction (granted in perpetuity) on the use which may be made of the real property” as required by § 170(h).<sup>69</sup> The 4th Circuit explained that the regulations interpreting § 170(h) offer a single, and exceedingly narrow, exception to the requirement that a conservation easement impose a perpetual use restriction—i.e., the regulation’s authorization of extinguishment in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of a share of proceeds to the holder to be used in a manner consistent with the conservation purposes of the original donation. “[A]bsent these ‘unexpected’ and extraordinary circumstances,” explained the 4th Circuit, “real property placed under easement must remain there in perpetuity in order for the donor of the easement to claim a charitable deduction.”<sup>70</sup>

While most state conservation easement enabling statutes contemplate the enforceability of non-perpetual conservation easements, § 170(h), the regulations, and the case law make it clear that federal deductibility is dependent on perpetuity.

### *G. IRS Form 990 Reporting Requirements*

Internal Revenue Code § 501(c)(3) charitable organizations—as most land trusts are—generally must file an IRS Form 990 each year.<sup>71</sup> Schedule D to this form requires a charitable organization

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<sup>69</sup> *Belk v. Comm’r*, 774 F.3d 221 (4th Cir. 2014), *aff’g* *Belk v. Comm’r*, T.C. Memo 2013-154, *denying reconsideration of and supplementing* *Belk v. Comm’r*, 140 T.C. 1 (2013).

<sup>70</sup> *Id.* at 225. In *Balsam Mountain v. Comm’r*, T.C. Memo. 2015-43, the Tax Court, citing to *Belk*, held that a conservation easement that authorized the parties to change up to 5% of the land subject to the easement during a five year period was similarly not eligible for a deduction under § 170(h).

<sup>71</sup> IRS Form 990, Return of Organization Exempt from Income Tax, available at <http://www.irs.gov/pub/irs-pdf/f990.pdf>.

holding a conservation easement to provide detailed information regarding its easement holdings, including the number of easements held at the end of the year; the acreage restricted; the number of easements modified, transferred, released, or extinguished during the year; the number of hours devoted to monitoring and enforcement during the year; and the expenses incurred during the year for monitoring and enforcement.<sup>72</sup> For each easement modified, transferred, released, or extinguished, in whole or in part, the organization must explain the changes in a supplemental statement to Schedule D. These reporting requirements signal that the IRS is interested in ensuring that conservation easements are being appropriately administered over the long term on behalf of the public.

#### *H. Additional Federal Tax Incentives*

The charitable income tax deduction under § 170(h) is only one of several federal tax benefits available to a landowner who donates a conservation easement. A donation also removes the value of the easement from the landowner's estate for estate tax purposes (i.e., only the restricted value of the land will be included in the landowner's estate). In addition, if the requirements of IRC § 2031(c) are met, up to an additional forty percent of the restricted value of the land can be excluded from the landowner's estate for estate tax purposes, subject to a cap of \$500,000 per estate. These estate tax benefits became less compelling for many landowners with the increase in the amount each individual can transfer during life or at death free of gift or estate tax to \$5 million in 2010, and the

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<sup>72</sup> Instructions for Schedule D (Form 990), available at <http://www.irs.gov/pub/irs-pdf/i990sd.pdf>.

annual adjustment of this exclusion amount for inflation beginning in 2012.<sup>73</sup>

## V. State Conservation Easement Enabling Statutes

### A. *Common Law Impediments*

By encumbering a piece of land with a conservation easement, a landowner transfers certain specific rights from the landowner's "bundle of rights" – generally rights to restrict the development and use of the land – to a governmental entity or charitable organization for the purpose of preserving the conservation or historic values of the land. The landowner retains certain rights, including the right to possess and use the property in a manner that does not disrupt the conservation or historic purposes for which the easement was established. The landowner may also agree to certain affirmative obligations. For example, a landowner may agree to employ "best management practices" in agricultural operations on the subject property.<sup>74</sup>

Conservation easements do not fit easily into the common law property interest analysis. First, conservation easements are generally held by governmental entities or charitable conservation organizations "in gross." The benefit of the servitude (protection of the conservation or historic values of the burdened land) runs to the holder (a governmental entity or charitable organization) and the

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<sup>73</sup> See IRS, What's New – Estate and Gift Tax, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Whats-New-Estate-and-Gift-Tax> (last visited March 21, 2015). The exclusion amount in 2015, adjusted for inflation, is \$5,430,000. *Id.*

<sup>74</sup> Façade (or historic preservation) easements are similar to other conservation easements, but they are intended to protect the historic attributes of historic structures. A façade easement may restrict alterations to, and impose affirmative maintenance and repair obligations on the owner of, a historic structure.

general public, and not to the owner of some nearby real property, as would be the case with a more traditional “appurtenant” easement, such as a right-of-way easement agreed to between neighbors.

Second, conservation easements are generally “negative” easements, in that they restrict what the owner of the burdened parcel may do on that parcel. An “affirmative” easement grants the holder of the easement (usually in connection with an appurtenant parcel) the right to do an act on the burdened parcel, such as utilizing a right-of-way. The law traditionally has recognized only a few types of negative easements, such as an easement that prevents the owner of the burdened parcel from erecting a structure that would interfere with the passage of light and air to, or obstruct the view from, the appurtenant (or dominant) parcel.<sup>75</sup> Conservation easements, which are created for a broad range of conservation purposes (e.g., protection of open space, wildlife habitat, watersheds, scenic views, working farm and ranchlands, and historic landscapes), regularly contain prohibitions or limitations that could not be construed as falling within the narrow range of negative easements tolerated under traditional law.

Historically, courts struck down most private land use restrictions held in gross because they were viewed as reducing the marketability of land. State legislatures have come to recognize, however, that restricting the development and other uses of property for conservation or historic preservation purposes can provide significant benefits to the public. Accordingly, to facilitate the use of conservation easements as a land protection tool, all fifty states and the District of Columbia have enacted some form of legislation

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<sup>75</sup> See, e.g., Susan F. French, *Toward a Modern Law of Servitudes: Reweaving Ancient Strands*, 55 S. CAL. L. REV. 1261, 1267-69 (1983) (discussing easements).

that removes the potential common law impediments to the creation and long-term validity of conservation easements. These statutes, as noted above, are generally referred to as conservation easement “enabling” statutes.<sup>76</sup>

Before enactment of a conservation easement enabling statute in a jurisdiction, it was reportedly common practice to have a conservation easement grantor also convey a small “anchor” parcel in fee to the governmental or nonprofit holder to circumvent the common law limitations on the enforceability of land use restrictions held in gross. In such cases, the conservation easement was “appurtenant” to the anchor parcel.<sup>77</sup> Enactment of the conservation easement enabling statutes eliminated the need to engage in this practice to ensure the long-term validity of conservation easements.

Conservation easements held in gross have been found to be valid in the absence of an enabling statute in a few instances. For example, in 1991, the Supreme Judicial Court of Massachusetts declined to apply common law real property rules to invalidate a re-

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<sup>76</sup> As of 2010, there were more than one hundred state statutes authorizing the creation or purchase of a wide variety of conservation easements. See Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. TR. & EST. L. J. 1, 19, Appendices A and B (2011). Roughly half of the statutes, like the UCEA, could be characterized as “general” enabling statutes, in that they authorize the creation of conservation easements for a fairly broad range of conservation purposes and remove the common law impediments to the long-term validity of such instruments. The other statutes are so varied they are difficult to characterize. However, these statutes, for example, (i) authorize the acquisition of easements, often by government entities, for very specific purposes, such as the protection of scenic views from highways, drinking water resources, or river shorelands; (ii) establish easement purchase programs, such as programs authorizing government entities to acquire easements protecting productive agricultural lands; or (iii) establish easement grant programs, whereby state funds are provided to government entities or nonprofits to acquire conservation easements.

<sup>77</sup> See 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 9, at 389.

striction in a conservation easement held by the State that did not conform precisely to the definition of a conservation easement in the enabling statute.<sup>78</sup> The court explained: “Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force.”<sup>79</sup>

Similarly, in 2005, the Supreme Court of Virginia held that an easement in gross conveyed for conservation and historic preservation purposes to a nonprofit organization fifteen years before the enactment of Virginia’s easement-enabling statute was nonetheless valid and enforceable.<sup>80</sup> The court noted, among other things, Virginia’s strong public policy in favor of land conservation and the preservation of historic sites and buildings.<sup>81</sup> Conservation easements generally are creatures of statute, however, and they typically are perceived, at least in part, through the lens of the statutory language that authorizes their creation.

### *B. The Uniform Conservation Easement Act*

As noted above, the UCEA is generally considered the dominant source for state statutory conservation easement law. Understanding its provisions is therefore an excellent place to start in understanding the state enabling statutes more generally.

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<sup>78</sup> See *Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365 (Mass. 1991).

<sup>79</sup> *Id.* at 1367.

<sup>80</sup> See *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005).

<sup>81</sup> *Id.* at 448.



### 1. *Section 1 – Qualified Purposes and Qualified Holders*

Section 1 of the UCEA - although brief - authorizes the creation of an extraordinary real estate interest. Section 1(1) authorizes the creation of a non-possessory interest in real property that imposes limitations or affirmative obligations on the owner of the property for the purpose of “retaining or protecting [the property’s] natural, scenic, or open space values,” “assuring its availability for agricultural, forest, recreational or open-space use,” “protecting natural resources,” “maintaining or enhancing air or water quality,” or “preserving the historical, architectural, archaeological or cultural aspects of [the] property.” Although the foregoing purposes for which conservation easements can be created are extremely broad, unlike most real property interests, conservation easements must be created for one or more of the statutorily sanctioned purposes to be valid.<sup>82</sup> Although conservation easements may serve the public good in many ways, they must serve the public good.

Section 1(2) of the UCEA limits holders of conservation easements to (i) government bodies empowered to hold interests in real property and (ii) charitable entities, the purposes or powers of which include the purposes for which the UCEA allows conservation easements to be created. Again, unlike most real property in-

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<sup>82</sup> In adopting a purpose-based description of conservation easements, the UCEA followed a tradition established in earlier conservation easement enabling statutes. For example, the Massachusetts general enabling statute, enacted in 1969, authorized the creation of “conservation restrictions” for the purpose of “retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use.” MASS. ANN. LAWS ch. 184, § 31 (Michie 1969).

terests, conservation easements must be conveyed to and held by one of the statutorily sanctioned holders to be valid.<sup>83</sup>

Even in states that have not adopted the UCEA, the enabling statutes almost universally require that conservation easements be (i) created for certain conservation or historic purposes intended to benefit the public and (ii) held and enforced by entities organized and operated for the benefit of the public (i.e., government entities or charitable organizations).<sup>84</sup> These requirements are similar to those imposed under federal tax law, which mandates that a tax-deductible conservation easement be conveyed exclusively for one or more of the four conservation purposes enumerated in § 170(h),<sup>85</sup> and to a governmental or charitable entity that has a commitment to protect the conservation purposes of the easement and the resources to enforce the restrictions.<sup>86</sup>

As noted above, the conservation purpose and holder requirements are intended to help ensure that conservation easements will

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<sup>83</sup> The UCEA again builds on statutes that came before. The 1969 Massachusetts statute provided "Such conservation and preservation restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in land, in the same manner as it may acquire other interests in land." MASS. ANN. LAWS ch. 184, § 32 (Michie 1969).

<sup>84</sup> See McLaughlin, *supra* note 76, Appendices A and B (listing the state enabling statutes). Although charitable entities can hold conservation easements in virtually every state, there are some variations in what each state statute requires. Many states require Internal Revenue Code § 501(c)(3) status, and some require that conservation be the primary purpose of the charitable entity. See, e.g., CAL. CIV. CODE § 815.3(a). North Carolina appears to be the only state that allows for-profit holders, although to be eligible their purposes must include conservation or historic preservation. N.C. GEN. STAT. § 121-35(2). The New Mexico enabling statute specifically identifies only nonprofit entities. N.M. STAT. § 47-12-2.A. However, the New Mexico Attorney General has opined that other statutes in the State support the ability of New Mexico government agencies to hold conservation easements. See Op. N.M. Att'y Gen. No. 01-02 (2001).

<sup>85</sup> See *supra* note 35 and accompanying text.

<sup>86</sup> See *supra* note 42 and accompanying text.

serve the public interest. That is, state legislatures were willing to sweep away the common law impediments to the validity of land use restrictions held in gross, and Congress was willing to subsidize the creation of such restrictions, only when there is some assurance that the restrictions will provide benefits to the public.

It is hard to overestimate how the almost universal limitation on holders of conservation easements to government entities and charitable organizations has shaped the legal and political debate about conservation easements. This novel limitation on the entities that can hold this particular type of servitude was intended to provide some guarantee of the public value of easements. By making it difficult if not impossible for for-profit entities or private individuals to hold conservation easements, state legislatures and Congress foreclosed many opportunities for abuse.<sup>87</sup> As the *Washington Post* articles illustrate, however, the limitation on holders did not foreclose all opportunities for abuse.

In addition, enactment of the enabling statutes and the federal tax incentives helped to fuel the dramatic growth in the number of land trusts. This growth has had both positive and negative effects. Land trusts now play an important role in protecting ecological, scenic, historic, and agricultural resources throughout the nation.

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<sup>87</sup> Unlike government entities and charitable organizations, for-profit entities and private individuals are not organized and operated primarily to serve the public. Accordingly, they would reasonably be expected to elevate their private interests over the public interest in their management of conservation easements. In addition, the comments to § 1(2)(ii) of the UCEA provide: "a 'holder' may be a government unit having specified powers . . . or certain types of charitable corporations, associations, and trusts, provided that the purposes of the holder include those same purposes for which the conservation easement could have been created in the first place . . ." UCEA, *supra* note 26, § 1 cmt. The drafters of the UCEA recognized, albeit implicitly, that congruence between the purposes of the holders and the purposes of the conservation easements would limit possibilities for abuse.

There also is concern, however, that they constitute an increasingly powerful special interest group that is responsible for managing land use restrictions on millions of acres nationwide, while generally not being accountable to the electorate in the affected communities.

There also are concerns about the ability of both government entities and land trusts to properly monitor and enforce conservation easements over the long term on behalf of the public. For example, some holders have dissolved or otherwise become defunct, leaving inventories of “orphaned” easements. Monitoring and enforcement can be time-consuming and expensive, and many holders lack the necessary staff and financial resources. In addition, given the partial interest and often perpetual nature of conservation easements, holders have an inherent conflict of interest. The desire to maintain good relations with current landowners and avoid costly and unpleasant enforcement proceedings may cause holders to acquiesce to violations, or agree to inappropriate amendments or terminations of easements, particularly if such acts or omissions occur behind closed doors and with little or no accountability to public. This latter issue raises an important question— who can or should be able to call a government entity or charitable organization to account for failing to properly administer or enforce a conservation easement on behalf of the public? This question is addressed in the discussion of section 3 of the UCEA below.

## *2. Section 2 – Acceptance, Pre-existing Interests, Duration, Creation, Modification, and Termination*

Section 2(b) of the UCEA provides that no right or duty in favor of or against a holder arises under a conservation easement before the holder’s acceptance of the easement and recordation of the acceptance. The drafters of the UCEA did not want holders to be re-

sponsible for the enforcement of easements they never accepted and of which they might not even be aware.<sup>88</sup> Unfortunately, statutory requirements for recording have not resulted in comprehensive, readily available information regarding the location of conservation easements. County real estate records are still not sufficiently easily accessible to provide information to national databases like the NCED.

Section 2(d) of the UCEA provides that an interest in the subject property in existence at the time a conservation easement is recorded is not impaired by the easement unless the owner of the interest is a party to the easement or consents to it. Thus, a conservation easement will “be subject to existing liens, encumbrances and other property rights (such as subsurface mineral rights) which pre-exist the easement, unless the owners of those rights release them or subordinate them to the easement.”<sup>89</sup>

Pre-existing interests could, of course, impair the conservation purpose of a conservation easement. Accordingly, it is not surprising that, to be eligible for a deduction under § 170(h) for the donation of a conservation easement, any outstanding mortgages on the subject property must be subordinated to the rights of the holder under the easement<sup>90</sup> and, if ownership of the surface estate and the mineral estate has long been separated, the donor must demonstrate that the probability of surface mining is “so remote as to be negligible.”<sup>91</sup>

Section 2(c) of the UCEA provides that, except as provided in section 3(b), “a conservation easement is unlimited in duration un-

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<sup>88</sup> See UCEA, *supra* note 26, § 2 cmt.

<sup>89</sup> See *id.*

<sup>90</sup> See *supra* note 47 and accompanying text.

<sup>91</sup> See *supra* note 46 and accompanying text.

less the instrument creating it otherwise provides.” The UCEA thus creates a presumption in favor of perpetuity, but also provides the parties with the flexibility to create easements of various durations—term, terminable, or perpetual.<sup>92</sup> Recognizing that perpetuity is a long time and circumstances can change, the UCEA provides that an easement of unlimited duration is subject, in section 3(b), to the power of a court to modify or terminate the easement in accordance with the principles of law and equity.<sup>93</sup>

Lastly, section 2(a) of the UCEA provides that “a conservation easement may be created, conveyed, recorded, assigned, released, modified, [or] terminated . . . in the same manner as other easements.” Some argue that this provision grants holders and current landowners the freedom to mutually agree to modify and terminate conservation easements as they may see fit from time to time, regardless of the specific terms of an easement or the circumstances of its creation.<sup>94</sup> That interpretation would, however, be inconsistent with the expressed intent of the drafters of the UCEA.

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<sup>92</sup> Many conservation easement statutes predating the UCEA contain presumptions in favor of perpetuity. For example, Colorado’s statute, first enacted in 1976, provides “A conservation easement in gross shall be perpetual unless otherwise stated in the instrument creating it.” COLO. REV. STAT. § 38-30.5-103(3). Three states, California, Florida, and Hawaii, specifically require that conservation easements be perpetual. CAL. CIV. CODE § 815.2(b); FLA. STAT. ANN. § 704.06(2); HAW. REV. STAT. § 198-2(b). Alabama and Kansas have presumptions against perpetuity. Alabama’s statute provides a default duration of “the lesser of 30 years or the life of the grantor, or upon the sale of the property by the grantor.” ALA. CODE § 35-18-2(c). Under the Kansas statute, “unless the instrument creating it otherwise provides, a conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at grantor’s request.” KAN. STAT. ANN. § 58-3811(d). Only North Dakota prohibits the creation of perpetual conservation easements. *See supra* note 67 and accompanying text.

<sup>93</sup> *See* UCEA, *supra* note 26, §§ 2(c) and 3(b).

<sup>94</sup> *See* Lindstrom, *infra* note 133.

The drafters of the UCEA were clear that the act is not intended to affect other laws that might condition or limit a holder's ability to release or agree to modify or terminate a conservation easement, including the laws applicable to entities soliciting and accepting charitable gifts for specific purposes (in some jurisdictions referred to as charitable trusts). In the comments to section 3 of the UCEA, the drafters explain:

The Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts. Thus, while Section 2(a) provides that a conservation easement may be modified or terminated 'in the same manner as other easements,' the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.<sup>95</sup>

Pursuant to the venerable doctrine of *cy pres*, if the purpose to which a charitable asset is perpetually devoted becomes impossible or impractical to accomplish due to changed conditions, a court may authorize the use of the asset for a new charitable purpose that is as near as possible or reasonably similar to the purpose specified in the original grant.<sup>96</sup>

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<sup>95</sup> See UCEA, *supra* note 26, § 3 cmt.

<sup>96</sup> See R. CHESTER, G. G. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431, AT 113 (REV. 3D ED. 2005). See also MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 173 (2004) (the doctrine of *cy pres* was originally formulated in the eleventh century as the legal response to the problem inherent in permitting charitable institutions to have perpetual existence).

The comments to section 3 of the UCEA further provide that, “because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose—i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes—the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.”<sup>97</sup> Application of these principles to conservation easements is also consistent with the approach recommended by the Restatement (Third) Property: Servitudes,<sup>98</sup> the drafters of the Uniform Trust Code,<sup>99</sup> and the drafters of the Model Protection of Charitable Assets Act.<sup>100</sup>

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<sup>97</sup> See UCEA, *supra* note 26, § 3 cmt.

<sup>98</sup> See RESTATEMENT (THIRD) PROPERTY: SERVITUDES § 7.11 (2000) (recommending that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres*, and explaining that “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes.”). The comments to section 3 of the UCEA explain that application of the changed conditions doctrine to easements is problematic in many states.

<sup>99</sup> Section 414(d) of the Uniform Trust Code specifically exempts conservation easements from a provision authorizing the termination of “uneconomic” trusts. The comments explain:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust.

UNIFORM TRUST CODE § 414(d), cmt (2000).

<sup>100</sup> See MODEL PROTECTION OF CHARITABLE ASSETS ACT (2011), § 2(1), cmt. (defining “charitable asset” to mean property given, received, or held for a charitable



The drafters of the UCEA were also clear that the act is intended to allow landowners to draft conservation easements that comply with federal tax law perpetuity requirements. The comments to section 2 explain that allowing parties to create easements to last in perpetuity, subject to the power of a court to modify or terminate the easement in accordance with principles of law and equity, including the doctrine of *cy pres*, “enables [the easements] to fit within federal tax law requirements that the interest be ‘in perpetuity’ if certain tax benefits are to be derived.”<sup>101</sup>

As discussed above, the regulations interpreting § 170(h) authorize donees to transfer tax-deductible conservation easements only to other “eligible donees” that agree to continue to enforce the easements.<sup>102</sup> The regulations further authorize the extinguishment of tax-deductible easements only in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of proceeds to the holder to be used “in a manner consistent with the conservation purposes of the original contribution” (i.e., in accordance with the regulatory version of the doctrine of *cy pres*).<sup>103</sup> The typical donor of a conservation easement who is interested in claiming federal tax benefits will include clauses in the deed providing that the easement can be transferred or extinguished only as provided in the regulations.<sup>104</sup> If section 2(a) of the UCEA

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purpose, and explaining that the term “property” includes all interests in real property, including conservation or preservation easements).

<sup>101</sup> See also UCEA *supra* note 26, Prefatory Note (“The Act enables the structuring of transactions to achieve tax benefits which may be available under the Internal Revenue Code, but parties intending to attain them must be mindful of the specific provisions, of the income, estate and gift tax laws which are applicable.”).

<sup>102</sup> See *supra* notes 42, 43 and accompanying text.

<sup>103</sup> See *supra* notes 50, 51, 69, 70 and accompanying text.

<sup>104</sup> See, e.g., 2005 CONSERVATION EASEMENT HANDBOOK, *supra* note 9, at 313-14 (providing a checklist of provisions relating to federal tax law requirements).

were interpreted to authorize holders and property owners to mutually agree to assign, release, modify, or terminate conservation easements regardless of their terms and the manner of their creation, section 2(a) would preclude the creation of easements eligible for the federal tax incentives, which would be in direct contravention of the expressed intention of the drafters of the act.<sup>105</sup>

The courts also have addressed the interaction of federal and state law in the conservation easement context. As noted in the discussion of *Wachter v. Commissioner* above, while state law determines the nature of the property rights in an easement, it is federal law that determines the tax treatment of those rights.<sup>106</sup> Thus, in determining whether an easement complies with federal tax law requirements, one must look to the terms of the deed and applicable state law to determine how a particular easement may, for example, be transferred or extinguished, and then ask whether the easement, so configured, satisfies federal tax law requirements.

In *Carpenter v. Commissioner*, the Tax Court held that the federally deductible conservation easements at issue were restricted charitable gifts, or “contributions conditioned on the use of the gift in accordance with the donor’s precise directions and limitations.”<sup>107</sup> Restricted gift status means the holder of an easement and the current property owner will be bound by the terms of the deed under state law, including the restriction on transfer, judicial extinguish-

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<sup>105</sup> See UCEA, *supra* note 26, § 2 cmt; see also K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 780-83, available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/1135/827>.

<sup>106</sup> See *supra* 68 and accompanying text.

<sup>107</sup> See *Carpenter v. Comm’r*, T.C. Memo. 2012-1, at \*6, reconsideration denied and opinion supplemented in *Carpenter v. Comm’r*, T.C. Memo. 2013-172 (quoting Schmidt, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31 COLO. LAW. 57, 58 (2002)).

ment, division of proceeds, and other provisions included in the deed to satisfy federal tax law requirements.

The most recent case addressing federal and state law interaction is *Belk v. Commissioner*, also discussed above, which involved a conservation easement that granted the parties the right to agree to substitutions or swaps via “amendment” of the easement.<sup>108</sup> The taxpayers in *Belk* argued that, because North Carolina law permits the parties to an easement to mutually agree to amend the easement, a finding that the easement at issue in *Belk* was not eligible for a deduction would render all conservation easements in North Carolina nondeductible.<sup>109</sup> The 4th Circuit rejected that argument as “unpersuasive,” explaining

whether state property and contract law permits a substitution in an easement is irrelevant to the question of whether federal tax law permits a charitable deduction for the donation of such an easement. . . . [§ 170(h)] requires that the gift of a conservation easement on a specific parcel of land be granted in perpetuity to qualify for a federal charitable deduction, notwithstanding the fact that state law may permit an easement to govern for some shorter period of time. Thus, an easement that, like the one at [issue in *Belk*], grants a restriction for less than a perpetual term, may be a valid conveyance under state law, but is still ineligible for a charitable deduction under federal law.<sup>110</sup>

States are, of course, free to craft whatever modification and extinguishment procedures they deem appropriate for state-funded

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<sup>108</sup> See *supra* notes 69-70 and accompanying text.

<sup>109</sup> See *Belk v. Comm’r*, 774 F.3d 221, 228 (4th Cir. 2014), *aff’g* *Belk v. Comm’r*, T.C. Memo 2013-154, *denying reconsideration of and supplementing* *Belk v. Comm’r*, 140 T.C. 1 (2013).

<sup>110</sup> *Id.*

conservation easements, and some have done so.<sup>111</sup> Government and nonprofit holders are similarly free to raise funds and purchase conservation easements that are modifiable or terminable as they may see fit or upon the satisfaction of conditions of their choice, subject to whatever requirements might be imposed by the applicable state enabling statute and assuming they negotiate with the grantor for this discretion and memorialize such discretion in the easement deed instead of representing that the easement is perpetual. To the extent landowners and holders wish to benefit from the federal tax incentives, however, they must satisfy the requirements set forth in § 170(h) and the regulations.

With the exception of North Dakota, which limits the duration of any easement created in the State to 99 years, it appears that the parties to a conservation easement can include provisions in the deed to comply with the federal tax law perpetuity requirements and those provisions will be enforceable under state law even though they impose conditions on the transfer or extinguishment of the easement that are different or more restrictive than those imposed by state law. As the Tax Court noted in *Wachter*, “[b]oth parties allege that the State law at issue here is unique because [North Dakota] is the only State that has a law that provides for a maximum duration that may not be overcome by agreement.”<sup>112</sup>

### 3. Section 3 – Standing to Bring a Judicial Action

Section 3(a) of the UCEA addresses standing to bring a judicial action “affecting a conservation easement.” It provides that such an action may be brought by (i) the owner of the subject property, (ii)

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<sup>111</sup> See McLaughlin, *supra* note 76, Appendices A and B (listing the state enabling statutes).

<sup>112</sup> *Wachter v. Comm’r*, 142 T.C. 140, 147 (2014).

the holder of the easement, (iii) a person having a third-party right of enforcement, and (iv) a person authorized by other law.<sup>113</sup> This provision, similar provisions in other enabling statutes, and the case law that has developed around them demonstrate the uniquely public nature of this interest in real property.

Section 1(3) of the UCEA provides that a government body or charitable entity eligible to be a holder under the UCEA may be granted a third-party right of enforcement in the easement deed. Thus, a landowner conveying a conservation easement to a small local land trust could grant a state-wide or national land trust a third party right of enforcement, thus helping to ensure that the easement will be properly enforced over the long term despite the possible limited resources and expertise of the local land trust. The comments to section 1 also explain that, while a grant of a third-party right of enforcement to a neighbor or other private person would not be enforceable under the UCEA, such a grant may be enforceable under other applicable law of the adopting state. Accordingly, in some circumstances it may be possible for an easement grantor to grant a right of enforcement to his or her descendants, a neighbor, or other private person.

With regard to the UCEA's grant of standing to "a person authorized by other law," the comments explain

the Act also recognizes that the state's other applicable law may create standing in other persons. For example, independently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.<sup>114</sup>

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<sup>113</sup> See UCEA, *supra* note 26, § 3(a).

<sup>114</sup> *Id.* § 3 cmt.

This is consistent with the drafters intent to “leave[] intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts” and to have such law apply to conservation easements.<sup>115</sup>

At least seven states—Connecticut, Illinois, Maine, Mississippi, Rhode Island, Tennessee, and Virginia—expressly grant the State Attorney General standing to enforce a conservation easement.<sup>116</sup> A few states have unique standing provisions. For example, Arizona grants standing to “a governmental body if the holder is no longer in existence and there is no third party right of enforcement.”<sup>117</sup> The Illinois enabling statute grants a right of enforcement to neighbors (i.e., “the owner of any real property abutting or within 500 feet of the real property subject to the conservation right”) and provides for the payment of punitive damages in the case of willful violations by the owner of the subject property.<sup>118</sup>

There are two different types of enforcement actions in the conservation easement context: (i) an action filed directly against a person violating or threatening to violate a conservation easement and (ii) an action filed against the government or nonprofit holder of a

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<sup>115</sup> See *supra* notes 95 and 97 and accompanying text.

<sup>116</sup> CONN. GEN. STAT. ANN. § 47-42c; 765 ILL. COMP. STAT. 120/4; ME. REV. STAT. ANN. tit. 33, § 478(1)(D); MISS. CODE ANN. § 89-19-7(1); R.I. Gen. Laws § 34-39-3(f)(4); Tenn. Code Ann. § 66-9-307(a)(4); VA. CODE ANN. § 10.1-1013. For attorney general enforcement actions, see, e.g., *Lyme Land Conservation Trust, Inc. v. Planter*, 2013 WL 3625348 (Superior Ct. of Connecticut, May 29, 2013) (unpublished); *Wooster v. Dept. of Fish and Game*, 211 Cal. App. 4th 1020 (Cal. Ct. App. 2012); *New Jersey v. Quaker Valley Farms, LLC*, No. HNT-C-14007-08, 2012 N.J. Super LEXIS 1987 (N.J. Super Ct. Ch. Div., Aug. 8, 2012) (unpublished), available at <http://www.nj.gov/oag/newsreleases12/Quaker-Valley-Farms-Court-Decision.pdf>. (last visited March 31, 2015).

<sup>117</sup> ARIZ. REV. STAT. ANN. § 33-273(5).

<sup>118</sup> 765 ILL. COMP. STAT. ANN. 120/4(c).

conservation easement when the holder fails to enforce the easement, or agrees with the landowner to improperly transfer, modify, or release or otherwise terminate the easement. The first type of action is generally considered to be the responsibility of the government or nonprofit holder of the easement, although, as noted in the preceding paragraph, some states have granted the State Attorney General and other parties the right to file such actions. The second type of action—a suit against the holder of a conservation easement for breach of its fiduciary duties in administering the easement on behalf of the public—will generally be brought by the State Attorney General,<sup>119</sup> although a co-director or co-trustee would also generally have standing to file such a suit and, in some circumstances, a court may be willing to grant standing to the easement donor or a party with a special interest. To date, neighbors and other members of the general public have not had much success in seeking standing to sue holders for alleged failures to properly administer conservation easements.<sup>120</sup>

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<sup>119</sup> For examples of attorney general enforcement actions against holders, see *infra* note 122 and accompanying text (discussing the Myrtle Grove Controversy) and *infra* note 133 and accompanying text (discussing *Salzburg v. Dowd*).

<sup>120</sup> See, e.g., *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) (denying standing to a citizen to sue to object to County's agreement to terminate a perpetual conservation easement, but inviting the Wyoming Attorney General, who had previously declined to file suit because the public interest was already being represented, to "reassess his position" in the case); *Long Green Valley Ass'n v. Bellevale Farms*, 432 Md. 292 (2013) (denying standing to a preservation association and its members to sue to object to a state agency's authorization of the building of a creamery on property subject to an agricultural easement; the Maryland Attorney General served as legal counsel to the state agency and supported the authorization); cf. *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008) (neighbor objecting to amendments to a conservation easement and a partial swap had standing to sue under the Illinois enabling statute's neighbor-standing provision); *Kapiolani Park Pres. Soc'y v. Honolulu*, 751 P.2d 1022 (Haw. 1988) (members of the public who used a public park had standing to sue to enjoin the lease of a portion of the park for use as a restaurant where the attorney

Here we cross from the core of conservation easement law onto other tiles in the conservation law mosaic. Land trusts are generally nonprofit corporations, associations, or trusts committed to charitable conservation missions. They also solicit and accept charitable gifts of land, conservation easements, cash, and other property to be used to further their charitable conservation missions. Like all other charities, they are subject to state laws (statutory and common law) governing charities and the assets they solicit and hold on behalf of the public. Government entities soliciting and accepting charitable gifts are similarly subject to state laws governing the administration of such gifts.<sup>121</sup>

The existence of third-party rights of enforcement and enforcement under other bodies of law has been a subject of concern for some holders and practitioners who would prefer that conservation easements be treated as “private” restrictions that are subject to very limited public supervision. A variety of controversies illustrate the tension between the seemingly private nature of conservation easement transactions (which can appear to involve only the current landowner and the nonprofit or governmental holder) and the need to ensure that the public interest and the public’s investment in conservation easements are protected over the long term.

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general actively joined in supporting the alleged breach of trust). For detailed discussions of *Bjork v. Draper* and *Hicks v. Dowd*, see *infra* notes 126 and 133 and accompanying text. In a number of recent cases, courts have permitted the donor of a charitable gift (or the donor’s personal representative) to file suit against the donee charity for the charity’s failure to administer the gift in accordance with the terms and purposes specified by the donor. See, e.g., *Smithers v. St. Luke’s-Roosevelt Hospital Center*, 723 N.Y.S.2d 426 (2001); *Adler v. Save*, 432 N.J. Super. 101 (2013); *Register v. The Nature Conservancy*. 2014 WL 6909042 (U.S. Dist. Ct. E.D. KY, Dec. 9, 2014).

<sup>121</sup> See generally MARION FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* (2004).



*a. Myrtle Grove Controversy*<sup>122</sup>

The Myrtle Grove controversy involved a perpetual conservation easement that Mrs. Margaret Donoho donated to the National Trust for Historic Preservation (National Trust) in 1975. The easement restricts the development and use of a 160-acre historic tobacco plantation on the Maryland Eastern Shore ("Myrtle Grove"). Donoho's family had owned Myrtle Grove since the 1700s, and Donoho donated the easement for the specific purpose of prohibiting subdivision and development of the land and to preserve its open space and historic character. The National Trust, consistent with the practice of land trusts, represented to Donoho that the easement would protect her land from development "in perpetuity" or "forever."

Following Donoho's death, a prominent Washington D.C. developer purchased the land, subject to the perpetual conservation easement. After restoring the historic manor house and finding himself unable to sell the property as an estate (due to a downturn in the market for large estates), the developer consulted with his real estate agent. On the agent's advice, the developer requested that the National Trust amend the easement to permit a seven-lot upscale development on the property, with a single family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the lots. The National Trust approved the requested amendment. This touched off a storm of protest from conservation groups, Donoho's heirs, and the local and national media. One of Donoho's daughters wrote to the National Trust to

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<sup>122</sup> For a detailed discussion of this controversy and citations to original source materials, see Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006).

express her “sense of outrage and betrayal,” explaining that her mother was not a rich woman and could have kept for herself the right to sell some of the land, but she chose instead to deny herself in order to permanently preserve the land.

The National Trust soon acknowledged that it had made a mistake and withdrew its approval to amend the easement. The developer then sued the National Trust for breach of contract, asking for either specific performance of the agreement to amend or damages of not less than \$250,000.

The Maryland Attorney General then filed suit in defense of the easement, asserting that the easement could not be amended as proposed without receiving court approval in the context of a *cy pres* proceeding, where it would have to be shown that the charitable purpose of the easement had become “impossible or impractical.”

This suit eventually settled, and the easement remains intact. The parties agreed, among other things, that subdivision of the property is prohibited, any action contrary to the express terms and stated purposes of the easement is prohibited, and amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except prior written approval of the Attorney General is not required for actions expressly permitted under the terms of the easement.

*b. Wal-Mart Controversy*<sup>123</sup>

In 1996, a development corporation donated a perpetual conservation easement on an 8-acre parcel of land adjacent to a river to the City of Chattanooga for the purpose of assuring “that the Property will be retained forever in its scenic, recreational and open space condition and to prevent any use of the Property that will significantly impair or interfere with the Conservation Values of the Property.” The development corporation later sold land adjacent to the protected property to Wal-Mart for the construction of a Wal-Mart SuperCenter. A four-lane road was then constructed across the easement-protected parcel to provide access to the Wal-Mart SuperCenter. Two nonprofit organizations and a private citizen sued both the development corporation, as owner of the encumbered land, and the city of Chattanooga, which held the easement and had ignored the violation of its terms.<sup>124</sup>

The suit received media attention because a candidate for the U.S. Senate and former mayor of Chattanooga had, through his private development company, both owned the property encum-

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<sup>123</sup> For a more detailed discussion of this controversy and citations to original source materials, see Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L. Q.* 673, 695-700 (2007).

<sup>124</sup> At the time the suit was filed, the Tennessee enabling statute provided that a conservation easement could be enforced by the holders or beneficiaries of the easement, or their bona fide representatives, heirs, or assigns. TENN. CODE ANN. § 66-9-307 (2005). At the behest of the Tennessee land trust community, which was concerned that any member of the public might be able to file suit to enforce a conservation easement as a “beneficiary of the easement,” the Tennessee enabling statute was revised to provide that an action affecting any conservation easement granted on or after July 1, 2005, may be brought by (1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having third-party right of enforcement; (4) the Attorney General, if the holder is no longer in existence and there is no third-party right of enforcement; or (5) a person authorized by other law. *Id.* § 66-9-307(a).

bered by the easement and sold the adjacent land to Wal-Mart. Media reports alleged that, while serving as mayor, the candidate had allowed top officials in his staff to facilitate the sale of the land to Wal-Mart by permitting construction of the access road across the easement-encumbered property in violation of the easement's terms.

In 2006, a Tennessee trial court approved settlement of the suit. In the settlement, the development corporation agreed to convey a replacement 8-acre parcel of land and \$500,000 to the plaintiffs to be used for similar conservation purposes and to pay the plaintiffs' not insubstantial legal fees. In approving the settlement, the trial court concluded that the suit was an equitable action involving the charitable grant of a conservation easement; the purpose of the charitable grant of the easement had become, in part, impossible or impractical as a result of the construction of the road and its use by the citizens of Tennessee;<sup>125</sup> and the property and funds transferred to the plaintiffs to be used to effect the same purpose as that of the original easement constituted a reasonable and adequate substitute for any portion of the property that may have been affected or taken as a result of the road construction.

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<sup>125</sup> Construction of the road was completed after the court had initially dismissed the action on the ground that the plaintiffs did not have standing and before the Tennessee Court of Appeals reinstated the action. At the time of the reinstated suit, the road was operational and being used by citizens of the city and state. The court determined that, under the circumstances, it would be inequitable, impracticable, and wasteful to impair or alter the road, and it was necessary to provide an alternative remedy.

*c. Bjork v. Draper*<sup>126</sup>

*Bjork v. Draper* involved a conservation easement that had been conveyed to a land trust as a tax-deductible charitable gift for the purpose of retaining the lawn and landscaped grounds of an historic home “forever predominantly in its scenic and open space condition.” The easement donors later sold the land, subject to the easement, to new owners (the Drapers). The land trust then agreed with the Drapers to “amend” the easement to allow the Drapers to make changes to the landscaping, to construct an addition to the residence on the property, and to remove a portion of the protected land from the easement in exchange for the Drapers’ agreement to encumber a similar-sized portion of adjacent land (a swap). The parties executed the swap to allow the Drapers to construct a driveway turnaround on the land removed from the easement, an action that was expressly prohibited by the easement and would have permitted construction of a garage, carport, or other visible structure on the formerly protected land in contravention of the scenic and open space purposes of the easement.

Neighbors of the Drapers, the Bjorks, filed suit objecting to the amendments.<sup>127</sup> The land trust argued that the Illinois enabling statute, which provides that a conservation easement may be released by its holder, gave it the right to release or amend the easement at will, regardless of the status of the easement as a tax-deductible perpetual charitable gift; the purpose of the easement to retain the lawn and landscaped grounds forever predominantly in their scenic and open space condition; the provisions in the ease-

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<sup>126</sup> *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, *Bjork v. Draper*, 897 N.E.2d 249 (Ill. 2008).

<sup>127</sup> See *supra* note 118 and accompanying text (discussing the Illinois enabling statute’s neighbor-standing provision).

ment expressly prohibiting some of the activities sanctioned by the amendments; and the provision in the easement requiring that the easement be extinguished, in whole or in part, only by judicial proceedings.

The Illinois Appellate Court invalidated the amendments, explaining, in part:

Here, the easement set forth in section 1 that its purpose was to assure that the property would be “retained forever predominantly in its scenic and open space condition, as lawn and landscaped grounds.” Section 3 provided that this purpose would be achieved, in part, by “expressly prohibit[ing]” “[t]he placement or construction of any buildings whatsoever, or other structures or improvements of any kind.” Section 15 provided that the easement could “only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction.”

The trial court’s construction of the easement [which validated the amendments] essentially rendered the above provisions meaningless.<sup>128</sup>

The appellate court also acknowledged that the easement contemplated amendments and that amending a conservation easement may be appropriate in some circumstances. The court explained:

Although the easement sets forth that the conservation values of the property are to be protected in perpetuity, it does not logically follow that the language of the easement could never be amended to allow that to occur. Indeed, it is conceivable that the easement

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<sup>128</sup> *Bjork*, 886 N.E.2d at 574.

could be amended to add land to the easement. Such an amendment would most likely enhance the conservation values of the property.<sup>129</sup>

The appellate court remanded the case, directing the trial court “to equitably consider which of the alterations to the property [the new landowners] must remove.”<sup>130</sup> The court cautioned, however, that “if a landowner could avoid complying with the terms of a conservation easement by making alterations and then claiming that it would be too costly (and, thus, inequitable) to return the property to its original condition, . . . the restrictions placed in a conservation easement could be rendered meaningless.”<sup>131</sup>

On remand, the Drapers were ordered to remove the driveway turnaround and certain trees and vegetation they had planted that restricted the public’s view of the property, but were allowed to retain an addition to the residence that they had constructed. The trial court explained, and the appellate court concurred, that the expense associated with the removal of the addition to the residence “would be greatly disproportionate to any minimal enhancement of the easement’s purpose” because the addition was not viewable from the road.<sup>132</sup>

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<sup>129</sup> *Id.* at 572.

<sup>130</sup> *Id.* at 575.

<sup>131</sup> *Id.*

<sup>132</sup> See *Bjork v. Draper*, 936 N.E.2d 763, 773, (Ill. App. Ct. 2008), *appeal denied*, *Bjork v. Draper*, 943 N.E.2d 1099 (Ill. 2011).

*d. Hicks v. Dowd and Salzburg v. Dowd*<sup>133</sup>

In 1993, Paul and Linda Lowham donated a perpetual conservation easement as a tax-deductible charitable gift to the Board of County Commissioners of Johnson County, Wyoming (Board), for the purpose of preserving and protecting in perpetuity the conservation values of a 1,043-acre ranch located in the county. The Board later transferred the easement to the Scenic Preserve Trust, a charitable organization created and governed by the Board. The easement was estimated to have reduced the value of the ranch by over \$1 million, and the Lowhams claimed a federal charitable income tax deduction for the donation.

Consistent with federal tax law requirements, the conservation easement expressly provided that it could be (i) transferred only to another qualified organization that agreed to continue to enforce the easement, and (ii) extinguished, in whole or in part, only in a judicial proceeding, upon a finding of impossibility, and with a payment of a share of proceeds to the holder as provided in the regulations.

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<sup>133</sup> See *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007); *Salzburg v. Dowd*, Stipulated Judgment, Civ. Action No. CV-2008-0079 (Dist. Ct., 4th Dist. Johnson, County, Wyo., Feb. 17, 2010). For a detailed discussion of these cases, see Nancy A. McLaughlin, *Could Coalbed Methane be the Death of Conservation Easements?*, 29 WYO. LAW 18 (Oct. 2006); C. Timothy Lindstrom, Letter to the Editor, *Conservation Easements*, 29 WYO. LAW 23 (Dec. 2006); Nancy A. McLaughlin, Letter to the Editor, *Perpetual Conservation Easements*, 30 WYO. LAW 7 (Feb. 2007); C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008); Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009); C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009); Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010).



In 1999, the Lowhams sold the land, encumbered by the perpetual easement, to the Dowds. The Dowds were aware they were purchasing the land subject to a perpetual conservation easement. The Dowds were also aware that a third party owned the minerals underlying the land and, as is common in the west, the third party had the right to reasonable access to the surface of the land to extract its minerals. When an energy company later prepared to drill for coalbed methane on the encumbered land, the Dowds requested that the Board terminate the conservation easement. The Board passed a resolution in which it agreed to do so, and executed a quitclaim deed transferring the conservation easement to the Dowds for the purpose of terminating the easement. The Board did not obtain judicial approval of the termination, no inquiry was made as to whether continuing to protect the land for conservation purposes had become impossible or impractical, and the Board neither requested nor received any proceeds in exchange for the easement.

In 2002, a resident of Johnson County, Hicks, filed suit alleging, among other things, that the easement was held in trust for the benefit of the public and could not be terminated without obtaining court approval as required under both state law applicable to charitable gifts and the express terms of the easement deed. Hicks also argued that the minimal drilling that had occurred on the property had not rendered continued protection of land's conservation values impossible or impractical. As it turned out, the ranch was not a good place for coalbed methane development and the impact of the limited drilling was modest. The Wyoming Attorney General was notified of the case and given the opportunity to intervene but declined to become involved, explaining that "the interests of the public, as the beneficiaries of the conservation easement," were already being represented by the litigants. In 2007, the Wyoming Su-

preme Court dismissed Hicks's case on the ground that Hicks did not have standing to sue. The court also, however, invited the Wyoming Attorney General to reassess his position with regard to the case.<sup>134</sup>

In 2008, the Wyoming Attorney General filed suit against the Board and the Dowds requesting that the deed transferring the easement to the Dowds be declared null and void. The Attorney General's primary argument was that the original conveyance of the easement constituted a restricted charitable gift or charitable trust and Johnson County had violated its fiduciary duties by agreeing to terminate the easement without obtaining court approval as required under both state law applicable to charitable gifts and the express terms of the easement deed. The Wyoming Attorney General also warned that, if the Wyoming courts determined that tax-deductible perpetual conservation easements could be modified or terminated "in the same manner as other easements" regardless of their terms and the manner of their creation, conservation easement donations in Wyoming could be rendered nondeductible under federal law. In such a case, the provisions included in the deed intended to comply with federal tax law requirements would not be binding on the parties and the conservation purposes of the easements would not be "protected in perpetuity" as required by § 170(h). The Dowds, for their part, argued that there is nothing special about a conservation easement when it comes to termination, and that conservation easements can be modified or terminated by simple agreement of the then owner of the land and the government or nonprofit holder of the easement.

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<sup>134</sup> *Hicks v. Dowd*, 157 P.3d 914, 921 (Wyo. 2007).

In February of 2010, the parties agreed to settle the case. Consistent with the relief sought by the Wyoming Attorney General, the Board's transfer of the conservation easement to the Dowds was declared null and void and the original deed of easement, with minor court-approved amendments, remains in full force and effect on the ranch.<sup>135</sup>

*e. Protecting the Public Interest*

The controversies discussed above highlight an important issue: who gets to decide when a perpetual conservation easement is no longer serving its intended public purpose? Some advocate that conservation easements should be treated as "private" transactions, primarily of concern only to the current owner of the burdened land and the holder of the easement. They assert that holders "know best" and should be permitted to swap, trade, amend, release, and otherwise terminate easements as they see fit in accomplishing their conservation missions.<sup>136</sup> Others point out that conservation easements exist for the public good. They argue that holders are legally bound to honor the intent of easement grantors, funders, and the public as expressed in the deeds and authorizing statutes. They maintain that perpetual conservation easements should be extinguished only through condemnation or in a court proceeding upon a finding that continuing to protect the land's conservation values has become impossible or impractical due to changed conditions.<sup>137</sup>

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<sup>135</sup> See *Salzburg v. Dowd*, Stipulated Judgment, Civ. Action No. CV-2008-0079 (Dist. Ct., 4th Dist. Johnson, County, Wyo., Feb. 17, 2010).

<sup>136</sup> See generally, e.g., Lindstrom, *supra* note 133.

<sup>137</sup> See generally, e.g., Burnett, *supra* note 105; McLaughlin & Weeks, *supra* note 133; Knowles, *infra* note 196.

The recent decisions in *Carpenter*, *Wachter*, and *Belk* confirm that, at least with regard to federally deductible conservation easements and easements acquired pursuant to state tax incentive programs that require compliance with § 170(h), judicial approval and a finding of impossibility or impracticality are necessary to swap or otherwise terminate the easements.<sup>138</sup> The termination of conservation easements acquired in other contexts, and the amendment (as opposed to termination) of easements, continue to be the subject of some controversy.

Given the public's facilitation of the creation of and the public's considerable investment in conservation easements, it is clear to the authors that the public's interest in conservation easements must be protected when conservation easements are modified or terminated. The frequent references to the public value of conservation easements and the structures designed to protect the public's interest would ring hollow if landowners and holders could modify or terminate conservation easements without reference to the public good. Independent oversight of substantial modifications and terminations is also necessary. That conservation easement holders must be government entities or non-profit corporations does not ensure that their interests will always align with the interests of the public.<sup>139</sup>

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<sup>138</sup> See *supra* Part IV.F (discussing case law addressing the federal tax law perpetuity requirements); *infra* note 165 and accompanying text (discussing state tax incentive programs).

<sup>139</sup> See *supra* Part V.B.1 (explaining that holders of conservation easements have an inherent conflict of interest in their administration of these partial interests in real property).

#### 4. *Section 4 – Validity*

Section 4 of the UCEA accomplishes “[o]ne of the Act’s basic goals” – “to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends.”<sup>140</sup> Section 4 specifically provides that a conservation easement is valid even though “it is not appurtenant to an interest in real property,” “it can or has been assigned to another holder,” “it is not of a character that has been recognized traditionally at common law,” “it imposes a negative burden,” it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder,” “the benefit does not touch or concern real property,” or “there is no privity of estate or of contract.” Many conservation easement enabling statutes contain similar provisions.

#### 5. *Section 5 – Applicability*

Section 5 of the UCEA provides that the act applies to any interest created after adoption of the act, regardless of how it is denominated (as a conservation easement or as a covenant, equitable servitude, restriction, easement, or otherwise), provided the interest complies with the terms of the act.<sup>141</sup> Labels are irrelevant, but compliance with the terms of the act, including the conservation purpose, qualified holder, and acceptance and recordation requirements, is necessary.

Recognizing that conservation easements were created before the enactment of enabling statutes, the UCEA also applies to any interest created before adoption of the act if the interest would have been enforceable had it been created after the act’s adoption, unless

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<sup>140</sup> UCEA, *supra* note 26, § 4 cmt.

<sup>141</sup> *Id.* § 5(a).

retroactive application would contravene the constitution or laws of the adopting state or the United States.<sup>142</sup> The drafters of the UCEA recognized that constitutional difficulties could arise if the UCEA sought to validate interests that would have been invalid under pre-act statutory or case law of the adopting state. Owners of land burdened by formerly invalid interests could argue that their property was “taken” without just compensation.<sup>143</sup>

Finally, the UCEA does not invalidate any interest that is enforceable under other laws of the adopting state.<sup>144</sup> State statutes other than conservation easement enabling legislation can authorize the creation of negative easements.

#### 6. *Section 6 – Uniformity of Application and Construction*

The final section of the UCEA, section 6, provides that the act “shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.” This provision is consistent with the purpose of a “uniform” act—to promote uniformity among the adopting states with regard to the interpretation of the act. Courts generally rely on the comments to a uniform act as a guide in interpreting its provisions. As the Connecticut Supreme Court explained:

A court can “properly consider the official comments as well as the published comments of the drafters as a source for determining the meaning of an ambiguous provision [of a uniform act].” . . . Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a

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<sup>142</sup> *Id.* § 5(b).

<sup>143</sup> *See id.* § 5 cmt.

<sup>144</sup> *Id.* § 5(c).

uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.<sup>145</sup>

### 7. Issues the UCEA Specifically Does Not Address

The UCEA does not address a number of issues that, although important, the drafters considered to be extraneous to the act's primary objective of sweeping away the common law impediments that might otherwise undermine the validity of conservation easements.<sup>146</sup> The issues not addressed are (i) the formalities and effects of recordation of a conservation easement in the local land use records, (ii) the potential impact of a state's marketable title laws upon the duration of conservation easements, (iii) the relationship between the UCEA and local real property assessment and taxation practices, and (iv) the scope of the power of eminent domain and the entitlement of property owners to compensation upon its exercise.<sup>147</sup>

Some states have specifically exempted conservation easements from the state's marketable title act, either in the enabling statute or in the state's marketable title act statute.<sup>148</sup> Some states have directly addressed the local real property tax assessment issue, with

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<sup>145</sup> *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (citations omitted) (interpreting the Uniform Management of Institutional Funds Act and quoting 2B J. SUTHERLAND, STATUTORY CONSTRUCTION (5TH ED. 1992)). For the published comments of a member of the UCEA's drafting committee, see Burnett, *supra* note 105.

<sup>146</sup> UCEA, *supra* note 26, Prefatory Note.

<sup>147</sup> *Id.* Marketable title acts require the rerecording of property interests after the passage of a period of time ranging from twenty to fifty years depending on the jurisdiction. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.16 (2000).

<sup>148</sup> See, e.g., CAL. CIV. CODE § 880.240(d); 765 ILL. COMP. STAT. 120/1(b); MASS. GEN. LAWS ANN. ch. 184, § 26; WIS. STAT. § 893.33(6m); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.16(5) (2000) (recommending exemption of conservation servitudes from the application of marketable title acts).

some providing that the assessor must take the easement restrictions into account when valuing the subject land,<sup>149</sup> while Idaho provides that the land shall be assessed as if the easement did not exist.<sup>150</sup> Numerous states confirm that conservation easements, like other interests in real property, are subject to being taken by eminent domain,<sup>151</sup> and a few specify that the holder of the easement must be compensated for the value of the easement.<sup>152</sup>

The drafters of the UCEA considered requiring public agency approval of conservation easements at the time of their creation, but ultimately declined to do so.<sup>153</sup> The drafters were concerned that requiring such approval would add a layer of complexity that might discourage easement conveyances because organizations and property owners might be reluctant to become involved in the bureaucratic and sometimes political process that public agency approval entails. The drafters also worried that a public agency approval requirement might dissuade states from enacting the UCEA because of the administrative and fiscal burdens associated with an approval program.<sup>154</sup>

In all but five states, conservation easements can be created without public involvement of any kind. The owner of the land and a qualified holder of the conservation easement may agree on the

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<sup>149</sup> See, e.g., CAL. CIV. CODE § 815.10; N.J. STAT. ANN. § 13:8B-7; see also ME. REV. STAT. tit. 36, § 1106-A (providing for a formulaic discount).

<sup>150</sup> See IDAHO CODE ANN. § 55-2109.

<sup>151</sup> See, e.g., ARIZ. REV. STAT. ANN. § 33-272.A; VA. CODE ANN. § 10.1-1010(F). For a discussion of recent changes to California law to provide some limited protection from eminent domain for conservation easements, see Jeff Pidot & Nancy A. McLaughlin, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 2013 UTAH L. REV. 811, 842-46, available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/1137/825>.

<sup>152</sup> See, e.g., CAL. CIV. CODE § 1240.055(g)(1); 32 PA. CONS. STAT. § 5055(d)(2), (e).

<sup>153</sup> UCEA, *supra* note 26, Prefatory Note.

<sup>154</sup> *Id.*



easement's terms, execute the easement, and record it, subject to the requirements of the applicable enabling statute and any other relevant laws (such as federal tax laws if a deduction is desired). Once this is done, the conservation easement is enforceable and its terms are binding on the current and all subsequent owners of the land.

Only five states – Massachusetts, Montana, Nebraska, Oregon, and Virginia – mandate some degree of public involvement in the creation of a conservation easement. Montana requires a nonbinding advisory review of conservation easements by local planning authorities.<sup>155</sup> Virginia requires that conservation easements conform to local comprehensive land-use plans.<sup>156</sup> Oregon requires notice and a public hearing before a government entity can acquire a conservation easement.<sup>157</sup> Only Nebraska (in some cases) and Massachusetts require actual approval of conservation easements. In Nebraska, the “appropriate governing body” must approve a conservation easement unless the holder is the state, a state agency, or political subdivision other than a city, village, or county.<sup>158</sup> In Massachusetts, various state and local authorities must approve conservation easements and the approving authorities depend on the purposes of the easements and the identity of the holders.<sup>159</sup>

The “private” nature of conservation easements is often touted as the key to their popularity. However, conservation easement conveyances do not appear to have suffered in the five states that mandate some level of public involvement. In fact, three of the

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<sup>155</sup> MONT. CODE ANN. § 76-6-206.

<sup>156</sup> VA. CODE ANN. § 10.1-1010.E.

<sup>157</sup> OR. REV. STAT. § 271.735.

<sup>158</sup> NEB. REV. STAT. § 76-2,112(3), (4).

<sup>159</sup> MASS. GEN. LAWS ANN. ch. 184, § 32.

states—Massachusetts Montana, and Virginia—have very active conservation easement programs.<sup>160</sup>

In recent years, some state governments have begun to recognize the advantages of knowing where conservation easements are. Tracking conservation easements helps states and localities optimize their conservation planning, avoid unexpected collisions with land use planning and other forms of regulation, and provide for more effective state oversight of the administration and enforcement of the easements on behalf of the public. In 2007, both Montana and Maine amended their statutes to create formal easement registries. In Montana, holders must send a copy of each recorded easement to the Montana Department of Revenue, which is required to transfer all information collected to the state library to be posted on the library's website for planning purposes.<sup>161</sup> In Maine, all easement holders are required to file an annual statement with the Department of Agriculture, Conservation and Forestry indicating the number of easements held, their location, and the amount of acreage protected.<sup>162</sup> The Department is required to report to the State Attorney General any failure of a holder disclosed by the filing or otherwise known to the Department.

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<sup>160</sup> See National Conservation Easement Database, NCED State Reports, available at <http://www.conservationeasement.us/reports/easements>; 2010 Census, *supra* note 31, at 17.

<sup>161</sup> MONT. CODE ANN. § 76-6-212.

<sup>162</sup> ME. REV. STAT. ANN. tit. 33, § 479-C.

## VI. State Tax Incentives

A significant number of states have enacted state tax incentives to further encourage easement donations within their borders.<sup>163</sup> Most notable are Colorado and Virginia's transferable state income tax credit programs, through which the two states have invested considerable public funds in conservation easements.<sup>164</sup> Many of the states that have established state tax incentive programs, including Colorado and Virginia, require satisfaction of the federal requirements under § 170(h) to be eligible for participation in the program.<sup>165</sup>

Champions of transferable tax credit programs point out that more conventional tax *deductions*, like those authorized under § 170(h), provide an "upside-down" incentive in that they provide high-income taxpayers with disproportionately greater tax savings than middle and low-income taxpayers. The upside-down nature of the incentive is a result of the progressive rate structure of our income tax system<sup>166</sup> and the limitations placed on a donor's ability to

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<sup>163</sup> See Jeffrey O. Sundberg & Chao Yang, *Do Additional Conservation Easement Credits Create Additional Value?*, STATE TAX NOTES 723, 728 (Dec. 3, 2012) ("As of 2011, 15 states offered tax credits as an incentive for easement donations.").

<sup>164</sup> *Calendar Year 2013 Land Preservation Tax Credit Conservation Value Summary*, Executive Summary (Va. Dept. of Conservation and Recreation, Dec. 2014), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD72015/\\$file/RD7.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD72015/$file/RD7.pdf) (as of Oct. 31, 2014, landowners had received \$1.4 billion in tax credits through Virginia's tax credit program); *Conservation Easement Tax Credit*, Dept. of Revenue and Divis. of Real Estate, Performance Audit (Office of the State Auditor, Sept. 2012) available at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/\\$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf) (from 2000-2009, taxpayers claimed approximately \$639 million in tax credits through Colorado's tax credit program).

<sup>165</sup> See Sundberg & Yang, *supra* note 163, at 729-38 (summarizing the programs).

<sup>166</sup> The tax savings generated by a deduction depend upon the taxpayer's marginal income tax rate and, under our progressive rate structure, marginal income tax rates increase as one moves up the income scale. For example, if a high-

claim the deduction, which are keyed to the donor's adjusted gross income.<sup>167</sup> Many owners of land with high conservation value are "land rich, cash poor" farmers and ranchers who have modest incomes, pay modest income taxes, and would not receive significant tax savings from a deduction for an easement donation, despite the fact that the donation may significantly reduce the value of their land.<sup>168</sup> Transferable state income tax credits, on the other hand, allow them to receive a significant financial benefit from the donation of a conservation easement because they can use a portion of the credits to offset their own modest state income tax liability, dollar-for-dollar, for a period of years, and sell the excess credits to other individuals with income tax liability in the state.

The generous state tax incentives offered to landowners who donate conservation easements, like their federal counterparts,

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income taxpayer subject to a marginal income tax rate of 35 percent and a low-income taxpayer subject to a marginal income tax rate of 15 percent each make a deductible charitable contribution of \$100, the \$100 deduction would generate an income tax savings of \$35 for the high-income taxpayer but only \$15 for the low-income taxpayer.

<sup>167</sup> A landowner who donates a conservation easement can generally claim the resulting deduction only to the extent of 30% of the landowner's adjusted gross income in any year, and only in the year of the donation and the following five years. If the full deduction cannot be claimed within the six-year period, the unclaimed portion is simply lost. For a discussion of temporary provisions that made these limitations considerably more favorable from 2006-2014, see *supra* note 33.

<sup>168</sup> For example, assume a land rich, cash poor farmer donates a conservation easement that reduces the value of his land by \$10 million. Assume the farmer has annual adjusted gross income (AGI) of \$35,000, is subject to a tax rate of 15%, and can claim the deduction only to the extent of 30% of his AGI for the year of the donation and the following five years. The farmer would be able to claim only \$63,000 of the \$10 million deduction over the 6 year period, generating a tax savings of only \$9,450. For a more detailed discussion of the upside-down nature of the § 170(h) deduction as an incentive, see Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOL. L. Q. 1, 29-33 (2004).

raise a host of complex issues. Most famously in Colorado, the state tax incentives have engendered high-profile abuses.<sup>169</sup> On the other hand, the credits also appear to have encouraged donations of easements protecting lands with important conservation values.

## VII. Private Allocation of Public Funds

The federal and state tax incentives offered to conservation easement donors allow private individuals to effectively allocate public funds for conservation purposes. For example, if landowners donate conservation easements valued at \$1 billion in a calendar year and collectively receive federal and state tax savings of \$700 million as a result of the donations, the landowners will have directly contributed \$300 million, and the federal and state governments will have indirectly contributed \$700 million (in the form of foregone revenues) to the cause of conservation. If the governments had instead collected the \$700 million of foregone revenue, they may have been able to use those funds to acquire land or conservation easements in programs that more effectively target lands with high conservation value and provide for greater oversight of the drafting of the conveyance documents and the appraisals. On the other hand, there is no guarantee that the federal or state governments would choose to spend the \$700 million of revenue saved on conservation, or that the direct spending programs would be well-structured or administered, or that the landowners would volun-

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<sup>169</sup> See, e.g., Jennie Lay, *Conservation Easement Conundrums, Colorado and Other Western States Crack Down on Abusers*, HIGH COUNTRY NEWS, Mar. 31, 2008, at 4; David Migoya, *Colorado Auditor Says Conservation Easement Program Riddled with Problems*, THE DENVER POST, Oct. 17, 2012, at 14A; David Migoya, *Easement Program Failures Penalize Taxpayers, Landowners*, THE DENVER POST, Dec. 21, 2014, at 10K.

tarily contribute the additional \$300 million absent the leverage provided by the tax incentives.

## VIII. Direct Government Funding

Tax incentives are not the only form of government financial support for conservation easement transactions. Federal, state, and local governments expend significant funds to purchase conservation easements as “holders” and to support land trust purchases of conservation easements.

### *A. Federal Funding*

The federal government funds conservation transactions through four primary mechanisms: the Land and Water Conservation Fund, the Forest Legacy Program, the North American Wetlands Conservation Act, and the “Farm Bill.”

Congress established the Land and Water Conservation Fund (LWCF) in 1965 to take a portion of the revenues from offshore oil and gas leasing and use them for conservation.<sup>170</sup> Although the LWCF regularly shows a generous balance on paper, funds must be appropriated by Congress to become available for conservation. LWCF theoretically receives roughly \$900 million a year from energy royalties, but much of that funding has gone unappropriated. LWCF funding has been cut by more than a quarter from its recent high of \$432 million in Fiscal Year 2010.<sup>171</sup>

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<sup>170</sup> CAROL HARDY VINCENT, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES, CONGRESSIONAL RESEARCH SERVICE (Oct. 21, 2014), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL33531.pdf>.

<sup>171</sup> *Id.* at 8.

The LWCF program is divided into two distinct funding processes: state grants and federal acquisition funds. The "stateside" of LWCF is distributed to all 50 states, the District of Columbia, and the territories by a formula based on population and other factors. State grant funds can be used by states and local governments for park development and acquisition of land and easements.<sup>172</sup>

The Federal side of LWCF provides for national park, national forest, national wildlife refuge, and Bureau of Land Management area fee and conservation easement acquisitions. Each year, based on priority recommendations from the federal land management agencies, the President can forward recommendations to Congress requesting funding for LWCF projects. Once received by Congress, the recommendations go through an appropriations committee review process with input from Representatives and Senators representing the areas in which recommended projects are located. In recent decades, LWCF monies have been used by federal agencies to purchase both land and conservation easements.

The Forest Legacy Program is a U.S. Department of Agriculture (USDA) Forest Service program that provides grants to states for the purchase of conservation easements and fee interests on ecologically sensitive privately-owned forest lands.<sup>173</sup> Pursuant to the Forest Legacy Program, the federal government may fund up to 75% of project costs.<sup>174</sup> Since it was created in the 1990 Farm Bill, the Forest Legacy Program has resulted in the conservation of more

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<sup>172</sup> *Id.* at 2-6.

<sup>173</sup> U.S. Forest Service, Forest Legacy Program, <http://www.fs.fed.us/cooperativeforestry/programs/loa/aboutflp.shtml> (last visited March 26, 2015).

<sup>174</sup> *Id.*

than 2.4 million acres, a significant portion of which are protected by conservation easements.<sup>175</sup>

The North American Wetlands Conservation Act (NAWCA) provides grants to organizations and individuals for the acquisition, restoration, and enhancement of wetlands for the benefit of associated migratory birds and wetland wildlife. Administered by the U.S. Fish and Wildlife Service and the North American Wetlands Conservation Council, funding is available in the form of small grants up to \$75,000 and standard grants up to \$1 million.

The 2014 Farm Bill, signed into law by President Obama on February 7, 2014, provides more than \$58 billion for conservation, exceeding all other federal sources of conservation funding.<sup>176</sup> The 2014 Farm Bill established the Agricultural Conservation Easement Program (ACEP), which consolidates three former programs: the Wetlands Reserve Program (WRP), the Grassland Reserve Program (GRP), and the Farm and Ranch Land Protection Program (FRPP).<sup>177</sup>

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<sup>175</sup> See United States Department of Agriculture, The Forest Legacy Program: 25 Years of Keeping Working Forests Working, <http://blogs.usda.gov/2015/04/17/the-forest-legacy-program-25-years-of-keeping-working-forests-working/> (last visited April 18, 2015).

<sup>176</sup> Pub. L. 113-79 (Feb. 7, 2014); RALPH M. CHITE, COORDINATOR, THE 2014 FARM BILL (P.L. 113-79): SUMMARY AND SIDE-BY-SIDE, CONGRESSIONAL RESEARCH SERVICE 4 (Feb 12, 2014), available at [http://www.farmland.org/programs/federal/documents/2014\\_0213\\_CRS\\_FarmBillSummary.pdf](http://www.farmland.org/programs/federal/documents/2014_0213_CRS_FarmBillSummary.pdf).

<sup>177</sup> CHITE, *supra* note 176, at 9; see also TITLE 440—CONSERVATION PROGRAMS MANUAL, PART 528 – AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP), available at <http://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=37029.wba>; USDA Natural Resources Conservation Service, Agricultural Conservation Easement Program, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited March 26, 2015).



ACEP, which is administered by the USDA's Natural Resources Conservation Service (NRCS),<sup>178</sup> has two components. Through the Agricultural Land Easements component, which combines the purposes and functions of FRPP and GRP, NRCS provides financial assistance to eligible entities to help them purchase Agricultural Land Easements. Through the Wetland Reserve Easements component, which operates like WRP, NRCS purchases Wetland Reserve Easements directly from private and Tribal landowners.

### *B. State and Local Funding*

Many states have created a range of funding mechanisms for conservation, and many of these mechanisms involve direct or indirect funding of conservation easement transactions. For example, numerous states have established agricultural conservation easement purchase programs, such as the program administered by the Pennsylvania Department of Agriculture through which participating counties receive state funds for the purchase of agricultural conservation easements.<sup>179</sup> As of early 2015, the Pennsylvania Department of Agriculture reported that more than 442,000 acres had been permanently protected through this program.<sup>180</sup>

Another example is Great Outdoors Colorado (GOCO). By constitutional amendment in 1992, the citizens of Colorado directed that a significant portion of the proceeds from the Colorado lottery

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<sup>178</sup> See USDA Natural Resources Conservation Service, Agricultural Conservation Easement Program, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited March 26, 2015).

<sup>179</sup> Pennsylvania Department of Agriculture, Easement Purchase, [http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_2\\_24476\\_10297\\_0\\_43/AgWebsite/ProgramDetail.aspx%3Fname%3DEasement-Purchase-%26navid%3D12%26parentnavid%3D0%26palid%3D11%26](http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_0_2_24476_10297_0_43/AgWebsite/ProgramDetail.aspx%3Fname%3DEasement-Purchase-%26navid%3D12%26parentnavid%3D0%26palid%3D11%26) (last visited March 21, 2015).

<sup>180</sup> *Id.*

be used to preserve and enhance parks, trails, wildlife, rivers, and open spaces in the State.<sup>181</sup> While only a portion of this money is available to fund the acquisition of conservation easements, GOCO has played a significant role in such acquisitions.

Local governments, competing to improve quality of life for their residents, have also invested significantly in conservation easements. One example is Albemarle County, Virginia's, Acquisition of Conservation Easements Program.<sup>182</sup> Established in 2000, the County has acquired easements on 44 properties encumbering more than 8,500 acres through the program.<sup>183</sup>

Conservation easements are popular with landowners because they are voluntary and the restrictions can be tailored to the particular land. To state and local authorities, conservation easements also often appear to be the most cost-effective way of preserving open space because purchasing a conservation easement will generally cost less than purchasing the possessory estate. However, a perpetual conservation easement entails a permanent partnership with a changing set of landowners, and the costs associated with monitoring and enforcement over the easement's perpetual life may exceed those associated with land with respect to which a state or locality acquires fee title.

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<sup>181</sup> CO. CONST. art. XXVII; *see also* Great Outdoors Colorado, History, <http://www.goco.org/about-us/history> (last visited March 26, 2015).

<sup>182</sup> Albemarle County, Virginia, Community Development, Acquisition of Conservation Easements Program, <http://www.albemarle.org/departments.asp?department=cdd&relpage=4227> (last visited March 21, 2015).

<sup>183</sup> Annual Update on the Acquisition of Conservation Easements (ACE) Program, [http://www.albemarle.org/albemarle/upload/images/forms\\_center/departments/community\\_development/forms/Rural\\_Area/ACE\\_2015\\_Annual\\_Update.pdf](http://www.albemarle.org/albemarle/upload/images/forms_center/departments/community_development/forms/Rural_Area/ACE_2015_Annual_Update.pdf) (last visited March 21, 2015).

## IX. Paying for Nature

Among scholars with faith in government structures for regulating private lands, both tax incentive and easement purchase programs are a cause for concern. Conservation easements allow landowners to be compensated for restrictions they might otherwise be subject to, without compensation, through government-imposed regulation. Professor John Echeverria has written about the potential conflict between paying and regulating landowners to protect environmental values:

The most difficult and potentially controversial question is how the different approaches to land protection may interact with each other and whether the use of one approach has the potential to undermine the availability of the other. If each tool operated independently, the choice between tools could be made in straightforward fashion based on the pros and cons of each approach in given circumstances. Unfortunately, that is not the case. Instead, the widespread use of voluntary easements appears to threaten the viability of the regulatory tool as a matter of policy, and perhaps ultimately the legal availability of this tool....

At the practical policy level, it seems clear that widespread use of voluntary, publicly-financed easements is making it more difficult to develop and implement regulatory programs. For example, the public policy menu effectively offers farmers the options of selling development rights or having their property subjected to zoning restrictions. Not surprisingly, even moderately self-interested farmers have a strong preference for being paid rather than not. Whatever political response to the regulatory option one might otherwise expect, the possibility that the government can be induced to pay to establish land

use restrictions creates a powerful incentive for farmers to support the payment option instead of regulation. Indeed, farm groups appear to sometimes oppose regulatory initiatives politically in order to increase the chances that they will be paid for the same restrictions that might be imposed through zoning.<sup>184</sup>

Jeff Pidot, former Chief of the Natural Resources Division of the Maine Attorney General's Office, has questioned whether limited resources available for state financing of land conservation ought to be used to acquire conservation easements where there is no direct public oversight as to the lands protected or the terms of the protection.<sup>185</sup> "Public money devoted to such unsupervised private land conservation efforts," he argues, "can displace that which would otherwise be available to purchase parks and other public lands that have higher public values for conservation and recreation."<sup>186</sup> There also is the concern that the channeling of billions of public dollars into and increasing reliance on conservation easements to accomplish conservation goals is unwise given that the instrument has not yet proven itself to be an effective long-term land protection tool.

## X. Perpetuity

The perpetual nature of conservation easements has been criticized. Some have questioned the wisdom of allowing private land-

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<sup>184</sup> John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 J. LAND RESOURCES & ENVTL. L. 1, 38-39 (2005); see also John Echeverria & Jeff Pidot, *Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect Land*, 39 ENVTL. L. REP. 10868 (2009); FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780-2004* (2005).

<sup>185</sup> See McLaughlin & Pidot, *supra* note 151, at 846.

<sup>186</sup> *Id.*

owners and charitable organizations to create perpetual restrictions on the use of land because the restrictions could end up frustrating other public policy goals.<sup>187</sup> Others have decried the arrogance of current generations in permanently conserving land given our limited understanding of the preferences of future generations.<sup>188</sup> Still others have argued that perpetual conservation easements create rigid property structures, lock in a single landowner's preferences, and are ill-suited to the adaptive management needed to respond to environmental changes.<sup>189</sup>

The authors have countered that development is far more permanent and leaves far fewer options for future generations than perpetual easements.<sup>190</sup> In addition, perpetual conservation easements can be modified and terminated to respond to changing conditions. As discussed above, federal law provides for the extinguishment of tax-deductible perpetual conservation easements in a court proceeding if changed conditions have made continued use of the property for conservation purposes impossible or impractical.<sup>191</sup> The UCEA explains that the state law doctrine of *cy pres* operates in a similar fashion.<sup>192</sup> Conservation easements are also generally subject to condemnation.<sup>193</sup> In addition, flexibility to modify conservation easements can be and often is built into con-

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<sup>187</sup> See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).

<sup>188</sup> See Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

<sup>189</sup> See Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 122-23 (2011).

<sup>190</sup> See Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (And Care) About Land Trusts And Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223, 10231 (2004).

<sup>191</sup> See *supra* note 50 and accompanying text.

<sup>192</sup> UCEA, *supra* note 26, §§ 2 and 3 cmts.

<sup>193</sup> See *supra* note 151 and accompanying text.

servation easement instruments in the form of an “amendment provision” that typically grants the holder the express power to agree with the owner of the encumbered land to amendments that are consistent with the conservation purposes of the easement.<sup>194</sup> Even in the absence of such an amendment provision, the holder may be deemed to have the power to agree to amendments that are consistent with the purpose of a conservation easement. Although there continues to be some controversy and debate about the amendment and termination of perpetual conservation easements, this paragraph illustrates that these instruments can adapt to change.

A few states have recently addressed the issues of amendment and termination. In 2007, at the behest of the Maine Attorney General’s Office and the Maine land trust community, the Maine legislature revised the state’s enabling statute to, among other things, require that (i) termination of a conservation easement, or any amendment that materially detracts from the conservation values intended for protection, be approved by a court in an action in which the Attorney General is made a party to represent the public interest, and (ii) any increase in the value of the landowner’s estate

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<sup>194</sup> The typical amendment clause generally provides as follows:

*Amendment.* If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of \_\_\_\_\_ County, [state].

CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 164 (Janet Diehl & Thomas S. Barrett eds., 1988); see also Jones et al., *supra* note 9, at 12-13 (describing termination via the doctrine of *cy pres* and amendment provisions).

caused by an amendment or termination be paid to the easement holder or to such nonprofit or governmental entity as the court may designate, “to be used for the protection of conservation lands consistent, as nearly as possible, with the stated publicly beneficial conservation purposes of the easement.”<sup>195</sup> In 2010, the New Hampshire Attorney General’s Office co-authored, in collaboration with the New Hampshire land trust community, a guide to amending and terminating conservation easements based on charitable principles.<sup>196</sup> In 2011, Rhode Island revised its state enabling statute to adopt Maine’s amendment and termination provisions, with some minor modifications.<sup>197</sup>

## XI. Stewardship – The Coming Storm

One issue that is likely to become increasingly vexing as time passes is the monitoring and enforcement of conservation easements on behalf of the public. Although the grantor of a conservation easement voluntary creates the restrictions imposed by the easement, subsequent owners bound by those restrictions may perceive them as “delegated regulation” – enforceable by the holder and potentially others.<sup>198</sup>

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<sup>195</sup> ME. REV. STAT. ANN. tit. 33, § 477-A.2.

<sup>196</sup> Doscher et al., *Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements, Guidelines for New Hampshire Easement Holders* (Ctr. for Land Conservation Assistance), available at <http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>; see also Terry M. Knowles, *Amending or Terminating Conservation Easements: The New Hampshire Experience*, 2013 UTAH L. REV. 871, available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/1139/823>.

<sup>197</sup> See R.I. GEN. LAWS §§ 34-39-5(c).

<sup>198</sup> Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1092 (1996).

In addition, a variety of studies suggest that some land trusts and government entities lack the resources to enforce the terms of the conservation easements they hold against uncooperative landowners.<sup>199</sup> Land trust groups have initiated a variety of measures to make that less likely.<sup>200</sup> State Attorneys General have also been willing to assist land trusts in enforcing easements on behalf of the public in some circumstances.<sup>201</sup> Under the best of circumstances, however, enforcing conservation restrictions on tens of millions of acres that land trusts and government entities have promised to preserve unspoiled “in perpetuity” will be an enormous challenge in decades to come.

## XII. Conclusion

The mosaic of law surrounding conservation easements has emerged during only the past few decades. The number of acres subject to its structures has exploded to a degree unanticipated by many of the movement’s original visionaries. Without a doubt, the laws shaping conservation easements will continue to evolve in decades to come.

Although the mosaic of conservation easement law is complex, it is not difficult to identify a public interest in conservation easement transactions. From the text of state conservation easement

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<sup>199</sup> See, e.g., Darla Guenzler, *Creating Collective Easement Defense Resources: Options and Recommendations* v (Bay Area Open Space Council, May 2002).

<sup>200</sup> See, e.g., Land Trust Accreditation Commission, <http://www.landtrustaccreditation.org>; TerraFirma, <http://www.terrafirma.org> (“The Land Trust Alliance formed TerraFirma in 2011 to help land trusts defend their conserved lands from legal challenge.”).

<sup>201</sup> See, e.g., *Lyme Land Conservation Trust, Inc. v. Planter*, 2013 WL 3625348 (Superior Ct. of Connecticut, May 29, 2013) (unpublished); Kimberly Drelich, *After Lengthy Dispute, Court Finds in Favor of Lyme Land Conservation Trust*, THE DAY, Mar. 14, 2015, at A1.



laws, to the funding of conservation easements through tax incentives or direct purchase programs, to judicial and administrative enforcement, the public has shaped and invested in this new conservation network. Accordingly, it is not surprising that the public's agents - be they attorneys general, tax officials, judges, or citizens groups - will have a role to play in its evolution.