



Conservation Easements and Private Land Stewardship

by Steven J. Eagle

INTRODUCTION

Many landowners pride themselves on their careful stewardship of their lands. They often want to ensure that their love for the environment is respected by succeeding family generations and others who eventually might own their lands. Since they want their progeny to continue using the land, an outright gift or sale to a land trust or similar conservancy group would not achieve their purposes. They also realize that family ownership coupled with heavy-handed governmental regulation is not the answer. Even if regulators understand and respect their environmental concerns, they are apt to effectuate them in an undifferentiated and clumsy manner. They certainly cannot be expected to respect the careful balance between conservation of the environment and the continuation of family heritage and traditional uses that the original landowner wants to achieve.

The conservation easement is partly a creature of common law and partly of recent statutes.

One answer is for landowners to inculcate a conservation ethic in their children and grandchildren. Yet, even if owners were confident that this could be done successfully, there would still be the problem of maintaining stewardship traditions through uncertain times and future generations. In any event, confiscatory death and inheritance taxes often force even conscientious heirs to sell or over-develop lands in order to raise cash.

The conservation easement is a device that attempts to deal with all of these problems. Partly a creature of common law and partly a creation of recent statutes, the conservation easement does not operate through regulations. It does not modify or increase existing regulatory schemes or apply them to parcels not previously subject to them. Rather, the conservation easement works through private ownership. It divides a fee simple (*i.e.*, ownership of all of the rights in a parcel of land) into two distinct interests. The first is the easement itself, which imposes conditions upon land use. The second is the original fee ownership, now subject to the easement. The owner of this interest has full ownership of the land for all purposes except those conflicting with the easement to which it is subject. Thus the owner of a ranch might give to a land trust an easement precluding residential or commercial development. The donor still owns the land and can use it for ranching, but no longer owns the right to use the land for residential or commercial purposes.

The tax benefits resulting from the grant of qualified conservation easements provide some landowners with funds for their retirement years, or allow them to fund or endow conservation management projects on the land at no additional net cost. Also, on the donor's death, the lower appraised value may mean that family members will be able to keep the land instead of very possibly having to sell large parts of it to pay large estate and inheritance taxes.¹



Since a conservation easement is established through a private agreement between a donor and an easement holder, there is considerable flexibility in tailoring their relationship. On one hand, the land trust or other holder might assume the complete day-to-day management of the donor's undeveloped land and have the responsibility of nurturing a particular endangered species or other purpose of the easement. Alternatively, the role of the holder could be limited to ensuring that the donor and his successors do not violate the terms of the easement through impermissible development. Or, the parties could structure the easement to provide the holder with an intermediate level of responsibility and authority. Thus, to the extent the law permits and the holder is willing, the donor could structure the easement to provide what in his view is an optimal mix of economic and family utilization of land and stewardship of resources.

However, conservation easements do present potential problems. It is possible that the land trust holding the easement might insist on more Draconian controls on the land than the donor had agreed to. On the other hand, the easement holder might be lax, and the land might not be properly cared for or the donor's heirs might be permitted to undermine the intended land stewardship. Conditions might change so that, for instance, an endangered species sought to be protected becomes plentiful or extinguished. The Internal Revenue Service might unfairly interpret the highly technical rules for favorable tax treatment. Powerful land trusts might serve as conduits by which land intended for private stewardship comes under the control of government. In all of this, it is important that statutes permit donors to retain as much ability to deal with future changes in scientific knowledge, social and economic conditions, and family needs as is consistent with the purposes of the easement. And it is important that donors structure conservation easements to permit them to exercise that freedom.

An easement is “an interest in land in the possession of another.”

Thus, a carefully drafted conservation easement might provide owners with a good method of maintaining private ownership, reducing tax burdens, and ensuring sensitive stewardship. The challenge for the legislator or citizen advocate is to examine each aspect of the state's conservation easement law or Federal tax requirement to ensure that easements live up to their promise while minimizing potential burdens to families and to the community.

EASEMENTS FOR CONSERVATION UNDER THE COMMON LAW

While common law easements, real covenants, and equitable servitudes have been important aspects of property law, they do not provide an adequate foundation for the modern conservation easement. This is because the common law was resistant to the imposition of burdens upon land that were not directly related to the coordination of their use with the uses of neighboring lands. In explaining this situation, it is useful to begin with a general review of these common law methods by which owners coordinated the use of their lands.

The Common Law of Easements

An easement is “an interest in land in the possession of another” that entitles the owner of the easement to “limited use enjoyment” of that land and “is capable of creation by conveyance.”² As one recent case put it, an easement is “the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner.”³ Easements have been traced back to Roman



days. By the early 19th century, their increasing importance resulted in their characterization in England as a separate category of property rights.⁴ Since the owner of an easement often makes substantial investments in the expectation that the land subject to it (*i.e.*, the *servient* land) would be used as agreed, it is important that the restrictions survive the death of the servient owner or the sale or his parcel. Likewise, the value of the benefit of an easement is maximized when the holder is free to transfer his interest to another.

The extent to which the burdens and benefits of easements survive beyond their original owners depends on how the easements are categorized in an elaborate common law classification scheme. For our purposes, the most important classification is whether easements are *appurtenant* or *in gross*. An easement appurtenant is intended to coordinate the uses of adjoining parcels of land. It is created for the benefit of the then-owner of the *dominant* land and his successors. On the other hand, the easement in gross is not attached (*i.e.*, appurtenant) to a dominant parcel, but rather provides a benefit that is “personal” to the holder and independent of his ownership of land.

The common law singled out for special treatment the *easement with a profit*, which permits the holder to remove substance from the servient land. Common examples involve mining, timber cutting and hunting.

Easements may also be categorized as *negative* or *affirmative*. Negative easements provide the holder with a veto power over uses of the servient land that otherwise could be engaged in by the owner. An affirmative easement permits the owner to enter the servient land or to engage in activities that otherwise could be blocked by the servient owner, such as engaging in a nuisance.⁵

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The easement came into being and flourished because it filled a practical need. Neighbors wanted to coordinate agricultural uses and, later, commercial and residential activities. Easements allowed separate parcels to be developed as if they had a single owner who would want to maximize total returns. So long as the agreement made the combined value of the parcels greater, it did not matter that not every party to an easement benefited equally. Even if some parcels lost value, the dominant owners could purchase the consent of the servient owners and still have a net gain. To illustrate, an agreement among *A*, *B*, and *C* that would increase the value of *A*'s land and *B*'s land each by \$150,000 and would reduce the value of *C*'s land by \$150,000 would be entirely feasible. If *A* and *B* each paid *C* \$100,000, every one of the parties would wind up \$50,000 better off. The community would be better off, too, since the total value of its land would increase by \$150,000.

If *C* had made an ordinary contractual promise to restrict the use of his land, a subsequent purchaser of it would not be bound, and *C* subsequently might not be found or might not be able to pay a court's award of money damages against him.⁶ The result would be that *A* and *B* each would have paid \$100,000 and obtained no lasting benefit. Landowners thus would be discouraged from entering into such agreements in the future. To prevent this result, the common law provided that easements appurtenant automatically would inhere in the estate in land acquired by the successor to an original party without the need for any mention of the easement in the deed or will.⁷ This means that the use of the burdened land would be restricted in the hands of *C*'s purchaser just as it would had *C* continued to own it.



Likewise, the value of easements with a profit also could be maximized by free alienability. This type of easement in gross had not been permitted in medieval times, but later became widely accepted in England and America. As the common law evolved, the benefit of commercial easements in gross and most non-commercial easements in gross established for severance purposes were made freely transferable.⁸

However, with a few exceptions,⁹ the common law has treated most easements in gross that were not associated with profits very differently. In England, such easements are regarded not as interests in land, but rather as rights that are granted in favor of an individual and that die with that individual.¹⁰ In America, easements in gross have been the subject of great controversy. Some authorities have argued that, consistent with the general common law rule pertaining to interests in land, easements in gross should be freely alienable.¹¹ Others have countered that novel burdens on land are apt to be detrimental to value, to create traps for the unwary over the generations, and to increase the difficulty and expense in land transfers generally (referred to in the common law as creating “clogs on title”).¹²

Conservation easements are “negative” and “in gross” under the traditional classification scheme. They are negative easements because the owner of the servient land has the obligation *not* to do something (i.e., not to engage in uses inconsistent with the conservation purposes for which the easement is established). The holder of the easement has a veto power over such inconsistent uses. Conservation easements are in gross because their object is not to benefit the owners of adjoining parcels. Rather, the owner of the easement need own no land in the area, and the easements are intended to benefit a broader community. At common law, the benefit of such an easement did not run with the land. The reason for this largely is a remnant of feudal and medieval times. Most people were illiterate and record keeping was primitive, thus introducing justifiable fears that complicated rights would make land ownership difficult to keep track of. It also was the result of undeveloped economic and social relationships, which made promises regarding land use for the benefit of those beyond the tiny village or manor difficult to comprehend. And, of course, our modern notion of “conservation” hardly was discernable.

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The Common Law of Real Covenants

Just as easements permitted private regulation of land uses through real property law, real covenants subsequently evolved to permit regulation through contract law. The crucial issue is whether the promise (*i.e.*, the covenant) is enforceable only against its maker, or whether it “runs with the land” so as to bind successors as well. In order for a real covenant to run, the common law propounded three tests: whether the covenant “touched and concerned” the land; whether the parties intended that successors be bound; and whether the parties had an otherwise close relationship, termed “privity of estate.” Whether a given covenant had a close enough tie to the land (as opposed to the owners) so as to “touch and concern” has always been a vexing problem. Privity of estate in England was limited to those in a landlord-tenant relationship. In America, a buyer-seller relationship sufficed.

The influential *Restatement of Property* has taken the view, as do the laws of many states, that the burden of a real covenant is not imposed on successors to the owner of the servient estate if the benefit does not run with the land to be benefited.¹³ Furthermore, real covenants, like most contract



rights, were enforceable only through money damages. This would be an entirely unsatisfactory remedy in the case of conservation easements, which must bind the burdened land, even though the benefit does not pertain to adjoining parcels, and where money damages are an insufficient remedy for violations.

The Common Law of Equitable Servitudes

If there had been time for it to incorporate modern conceptions of private land stewardship, the common law would have been ideal.

The privity requirement for real covenants proved to be unduly technical and difficult to comply with. Also, money damages were viewed as less effective than the ability to enjoin violations of a covenant. For these reasons, courts of equity developed yet a third layer of controls, the equitable servitude. In the case of restrictions that were appurtenant, it was easy. If the parties intended that their successors be bound, if the subject matter of the agreement touched and concerned the land, and if the successor to ownership of the servient tenement had reason to know of the restriction, he was bound to it. Again, however, things were not so simple when a servitude in gross was concerned. If the benefit did not run with the land authorities differed as to whether the burden ran with the land so as to bind a succeeding owner.¹⁴ Once again, resistance to new types of restrictive arrangements prevailed.

Common Law Reform Doesn't Address the Conservation Easement Problem

During the past few decades, American courts and legal scholars have concluded that the common law system of three overlapping but subtly different bodies of law for the private coordination of land use makes no sense. The new version of the *Restatement of Property* now being developed by the American Law Institute has adopted as a guiding principle that the law of servitudes is “an integrated body of doctrine encompassing the rules applicable to profits, easements, and covenants.” Generally, all servitudes “are functionally similar, and ... for the most part they are, or should be, governed by the same rules.”¹⁵ When we look at how interests are “governed by the same rules” under this new *Restatement*, the crucial distinction becomes apparent: “appurtenant ... burdens pass automatically,”¹⁶ but a “burden in gross is simply a contract obligation.”¹⁷ Since conservation easements are not intended to benefit land trusts as owners of adjoining property, these developing reforms in common law land use coordination devices do not solve the problem.

The Need for an Approach Based on Common Law

The common law approach is one of maintaining order based not on overarching doctrine, but through observance of the dealings among individuals in a civil society. It is marked by slow change as the wants of society adjust with respect to cultural, economic, and scientific evolution. If there had been sufficient time for it to have incorporated modern conceptions of private land stewardship, the common law would have been an ideal vehicle for the nurturing of divergent methods of conservation. Over the years, the most effective methods would tend to supplant others, but there still would have been room for much individual initiative.

As will be described shortly, however, the massive purchase of conservation rights by the federal government in the 1930s and '40s, and by the states using federal monies in the 1960's, quite overwhelmed the common law process. Since almost all states now have conservation easements, it

is difficult to contemplate a complete return to a common law regime. Nevertheless, a laudable goal for legislators and citizens' groups is to attempt to restructure statutory conservation easements so as to bring them as close to the common law model of individual responsibility, flexibility, and freedom of contract as is possible.

THE CONSERVATION EASEMENT

The conservation easement is usually held in gross, *i.e.*, there is no dominant estate which is benefited by the easement. It is nonetheless assignable and the burden runs with the servient estate to bind the landowner's successors and assigns. A conservation easement is a creature of statute since, at common law, a restriction in gross was not assignable and would not run with the land.¹⁸

Origins

Modern conservation easements were first employed to protect lands adjacent to parkways near Boston in the 1880s. They came into more widespread use in the 1930s, when the U.S. Fish and Wildlife Service (USFWS) and the National Park Service (NPS) used them to protect wildlife refuges in Minnesota and the Dakotas and scenic views along the Blue Ridge Parkway in Virginia.¹⁹ The term "conservation easement" first was popularized in the late 1950s by William H. White.

Almost every state has enacted a conservation easement statute.

What we're really after is conservation of things we value, and thus I have been trying the term "conservation easement."

Another term may well prove better, but "conservation easement" has a certain unifying value: It does not rest the case on one single benefit – as does "scenic easement," but on the whole constellation of benefits – drainage, air pollution, soil conservation, historic significance, control of sprawl, and the like....²⁰

While the concept of the conservation easement has flourished, the inadequacy of the common law conservation easement was demonstrated early on. Many owners who dedicated easements to the FWS and NPS in the 1930s and '40s did not notify subsequent purchasers, who alleged in subsequent litigation that they thought they were purchasing unrestricted lands. In some of these cases, the buyers were ordered to comply. As a result of these problems, the NPS adopted a practice of purchasing land outright instead of obtaining easements.²¹

State Conservation Easement Statutes

Since the 1940s, almost every state has enacted a conservation easement statute. These laws result in part from the imperfections of common law easements previously discussed. Probably a more significant spur to their passage, however, was the availability of funds under the Federal Highway Beautification Act of 1965. That law provided that three percent of the funds appropriated during any fiscal year for highway aid to a given state had to be used for landscaping and scenic enhancement, or else the funds would lapse.²² The states used this money to acquire easements for landscaping and scenic views along highway rights-of-way. According to the Land Trust Alliance, land trusts have blossomed under these statutes. They now hold conservation easements over more than 740,000 acres. The Nature Conservancy estimates that it owns, through purchase or donation, conservation



easements over an additional 628,000 acres. These figures do not include easements held by federal, state, or local agencies.²³

Basic Provisions

While these laws vary in significant respects, they have many similarities. The model Uniform Conservation Easement Act (UCEA), which was promulgated in 1981,²⁴ is the basis for statutes in at least 17 states and the District of Columbia. This discussion will stress UCEA, but is generally applicable otherwise. According to the UCEA:

Land trusts now hold conservation easements over more than 740,000 acres.

“Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.²⁵

By referring to the conservation easement simply as a “nonpossessory interest,” the UCEA anticipates the Restatement’s obliteration of the distinction among easements, real covenants, and equitable servitudes. Nevertheless, the UCEA continues to employ the term “easement,” as a basis provision demonstrates:

[A] conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as *other easements*.²⁶

Permissible Holders

The model Act also prescribes that a permissible “holder” of a conservation easement must be either (1) a governmental unit, or (2) a charitable corporation, association, or trust, the purposes or powers of which:

include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.²⁷

The benefit of a given conservation easement consists of the right to veto land uses incompatible with the purposes of the easement. In practice, the only power acquired by the holder is one of enforcement. Indeed, in order for the donee to obtain federal tax benefits for his contribution, the holder must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.”²⁸

The range of permissible easement holders always includes governmental bodies, and beyond that varies widely among the states. Some states permit no private holders, others more typically include private non-profit organizations (sometimes limited to those tax exempt under the Internal



Revenue Code), and one state, South Carolina, limits the field of non-profits to one, the Nature Conservancy. Only New York requires that the non-governmental holder be a corporation.²⁹ Three states, Maryland, Montana, and Utah, do not require that the holder be a non-profit organization.³⁰

Obviously, the goals that conservation easements are to be consensual in nature and custom-tailored to individual circumstances and desires largely are vitiated in those states in which government (or government and one land trust) has a monopoly on holder status. In such a jurisdiction one could expect the full panoply of bureaucratic regulations and a “one-size-fits all” approach, resulting in fewer landowners entering into conservation easements than otherwise would be the case. The more freely non-profit (and for-profit) organizations are allowed to act as easement holders, the more likely landowners would be able to make mutually beneficial arrangements. In restrictive states, legislators and concerned citizens might want to press for such liberalization.

Third - Party Enforcement

Since enforcement is the entire basis of the conservation easement, the landowner establishing it might find it desirable to appoint an independent party to ensure that enforcement will take place. This resembles, so to speak, the converse of the designation of a surety or co-signer on a loan. The Uniform Act anticipates this need by providing that an independent right of enforcement might be given to a governmental entity or charitable organization that would be qualified to be a holder. This device adds to the landowner’s flexibility. He could select a small local land trust that is familiar with his philosophy to manage the conservation land and a national land trust to monitor its results. Conversely, the owner could appoint a national organization with technical expertise to manage the easement and a local organization to make sure that the national land trust has complied with the spirit and the letter of his wishes.

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Tax Advantages

Gifts of conservation easements to the United States were permitted as a charitable deduction under the federal income tax by a 1964 Internal Revenue Service ruling.³¹ A more general deduction for the value of donated conservation easements was added by the Tax Reform Act of 1976, and the present structure was established in 1980.³² The Internal Revenue Code permits the deduction of charitable contributions made “exclusively for conservation purposes.” Normally a charitable deduction is allowed only if the donor’s entire interest in the property is donated,³³ but there is an exception for a “qualified conservation contribution.”³⁴ As specified in I.R.C. § 170(h), a qualified contribution must be “(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes.”³⁵ There is no commercial market for conservation easements (although, as will be discussed, holders may sell or exchange easements with governmental or other qualified holders). In the absence of an open market, the value of the easement and the amount of the deduction is generally determined through a “before and after” approach. The value of the landowner’s parcel is appraised first as unencumbered and then as subject to the conservation easement. The difference is deemed to be the value of the easement.³⁶

Most germane for our purposes is that the qualified interest of the donor must consist of “a restriction (granted in perpetuity) on the use which may be made of the real property.”³⁷ The form of the restriction (*i.e.*, easement or covenant) is not material, but the limitation must be binding under state law.³⁸



The donee must be a governmental or charitable organization qualified to be the holder of the conservation easement. It also must have both the commitment to protect the conservation purposes for which the easement was granted and the resources to do so.³⁹

The “conservation purposes” established in the I.R.C. are:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is—

- (I) for the scenic enjoyment of the general public, or

- (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,

and will yield a significant public benefit, or

- (iv) the preservation of an historically important land area or a certified historic structure.⁴⁰

As recently amended by the Taxpayer Relief Act of 1997, the federal estate tax excludes part of the value of property with respect to which a qualified conservation easement is granted by the decedent or a family member.⁴¹ However, “the requirements for obtaining the estate tax exclusion are exceedingly complicated and the benefits are relatively limited.”⁴²

Enforcement “in Perpetuity”

To utilize the federal income tax deduction the conservation easement must be granted “in perpetuity.”

The Uniform Act provides in general that “a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.”⁴³ Some states, such as California, explicitly provide that the easement “shall be perpetual.”⁴⁴ Other states may require a specified minimum term.⁴⁵ However, if the landowner wishes to utilize the federal income tax deduction for his donation, the conservation easement must be granted “in perpetuity.”⁴⁶ The Internal Revenue Code and its interpretive Treasury Regulations take this requirement very seriously. If there is a mortgage on the parcel, it must be subordinated to the conservation easement in order for the donation to be a “qualified conservation contribution.”⁴⁷ If a court later determines that a change in conditions requires the extinguishment of a perpetual conservation restriction, the donee organization must receive a portion of the then-unencumbered value of the parcel at least in proportion to the ratio of the original value of its easement with respect to the value of the unencumbered parcel at the time of the donation.⁴⁸

This demand that restrictions be perpetual is a serious flaw that impedes wider use of conservation easements. Even if landowners are able to convince courts that changes in conditions make conservation easements of no further use, they must bear the costs of litigation. These might be very high should the easement holder or third party with enforcement powers object. The landowner also must run the risk of protracted investigation, negotiation, and even litigation with the Internal Revenue Service, which has the power to challenge his assessment of the value of the land and of the easement.

Beyond these problems, a more fundamental objection to perpetual restrictions flows from the essential nature of the things landowners wish to conserve. As environmental scholar R. J. Smith has noted:

This demand that restrictions be perpetual is a serious flaw.

[I]f you're basing an action on perpetuity, then you're simply foreclosing future societal choices and future societal options. Many environmentalists are increasingly claiming that we can't straight-jacket the future or completely commit to one conservation strategy. They say we can't know what's best even in the near future. With regard to the Endangered Species Act, they're opposed to creating habitat conservation plans for 25 or 50 years into the future. We can't say "No surprises," because the one thing we know that nature brings is surprises. That's the nature of nature: surprise.⁴⁹

The requirement that a conservation easement have some minimum duration is reasonable, given the need to avoid to land being "parked" in a restricted status during routine holding periods pending development. Surely, however, holding requirements of ten, or twenty, or thirty years should suffice, especially given the "give back" provisions of the Internal Revenue Code. Although state legislators and citizens groups may wish to reevaluate the perpetuity requirement in this light, as a practical matter a change in the Internal Revenue Code will be required before the perpetuity requirement stops being a serious discouragement to the donation of conservation easements, or a limitation on their environmental value.

POSSIBILITIES OF ABUSE

From the perspective of a landowner considering a donation, three types of problems regarding conservation easements deserve special attention. They involve potential abuse by the Internal Revenue Service, by holders of the easement, and by subsequent owners of the land. Obviously, a landowner considering the contribution of a conservation easement wants to make sure that his plans would achieve his intended purposes, that his wishes will be honored by the donee and his heirs, and that he will get the tax benefits he anticipates.

Before considering these problems, it should be noted that concerns about self-interest or naive enthusiasm should preclude a given land trust or other charitable donee from being relied upon to examine the circumstances and draft the instrument of gift. A landowner considering the establishment of a conservation easement should check with knowledgeable experts to ensure that the physical aspects of the land and its environment provide a reasonable probability that the ecological or other conservation project that the owner has in mind will succeed. Likewise, the history and background of potential donees should be investigated to make sure that they are willing and able to abide by the donor's wishes. An attorney skilled in land use matters should check all of the documentation to



ensure that the terms of the gift can be effectuated under federal and local land use and other laws, and that the gift will be of a qualified conservation easement for federal tax purposes. Sufficient appraisals and other records must be obtained to support the dollar value of the contribution claimed by the landowner, as well.

Abuse by the Internal Revenue Service

Given the complexity of federal tax administration and the multiple tests for establishing a “qualified conservation easement,” it should come as no surprise to landowners that disputes are apt to arise regarding income and estate tax deductions for the donation of these interests. It is difficult to determine the extent of such problems, since most of them are settled through negotiation between the IRS and taxpayers or their executors. There is perhaps a score of formal Private Letter Rulings issued by the IRS, as well as a handful of cases. Two of the latter should illustrate the nature of potential problems.

In *Richmond v. United States*,⁵⁰ the taxpayers had acquired a 25 percent interest in a building in the French Quarter in New Orleans. They granted a perpetual easement in the façade of the building to the Vieux Carre’ Commission, a governmental agency responsible for historic preservation. The taxpayers sued for a refund, contending that their share of the value of the donated façade easement was \$150,000. However, the burden is upon the taxpayer. At trial, the U. S. District Court determined that they had failed to show that the Internal Revenue Service’s valuation of \$59,000 was incorrect. Part of the discrepancy was a dispute over what part of the acquisition costs of the building and preparatory work should be allocated to the façade. Another aspect was the extent to which the fair

Some conservation organizations have defaulted in their obligation.

market value of the structure was reduced by the unwillingness of potential buyers to take a title subordinated to the easement. The court found the testimony of the plaintiffs’ real estate brokers to be insufficient.

In the recent case of *Great Northern Nekoosa Corp. v. United States*,⁵¹ the taxpayer also sought an income tax refund. The U.S. Court of Federal Claims held that the taxpayer’s retention of the right to extract gravel and sand through surface mining disqualified its contributed conservation easement and that the restrictions on surface mining by affiliates were not granted in perpetuity.

Before making large conservation easement donations, landowners should consider obtaining a private letter ruling from the IRS. In all situations, solid documentation of every aspect of the donation and its value is a must.

Abuse by Easement Holders

One significant problem with conservation easements is that the landowner places a great deal of faith in the willingness and ability of the holder of the easement to carry out their original agreement. Yet some conservation organizations have defaulted in their obligation to exercise proper stewardship. For instance, Randolph Richardson, a businessman with farming and ranching interests, has related how his father had established a 74-acre hardwood grove with nature trails that was intended for educational programs for children. The small land trust selected to carry out his vision completely failed to carry out its promises. The trees were choking on thick vines, and the “land was overgrown and untended, and locked gates barred public access.” While trust officials claimed that they lacked

funds for proper maintenance, one part of the tract was used as a profitable Christmas tree farm the profits of which flowed elsewhere. As Richardson observed, such land management practices also may reflect an ideological bias favoring undisturbed wilderness. This sometimes results in a stringent limitation on public access to the land that thwarts the donor's purpose of conserving resources for enjoyment by the community.⁵² To the extent practicable, the conservation easement should contain objective performance standards by which the land trust's stewardship is to be measured. Provisions should also be made for the termination of the grant to the holder and the appointment of an alternate qualifying organization should the conservancy organization's performance be substantially amiss.

A somewhat related and even more serious form of abuse is the working hand-in-glove of conservancy organizations with the federal and state governments for the purposes of extorting exactions from landowners or "hijacking development."⁵³

A case in point is the experience of Alan Murray, a developer from Yarmouth, Maine.⁵⁴ In 1988 he purchased 60 acres of remote ocean inlet property on Bellier Cove, near the Canadian border. Mr. Murray bought the land for \$215,000, only after receiving initial approval from the Maine Land Use Regulation Commission (LURC) to create 10 residential ocean-front lots of from 2.5 to 6 acres in size. In exchange, he had agreed to restrictive conservation easements on the entire 250-foot-deep shoreline zone, on three undeveloped lots and two stream corridors.

A serious form of abuse is the conservancy that becomes the 'willing seller' (to government).

While the Bangor *Daily News* conceded in an editorial opposing the development, that the agreement was "even more restrictive in some ways than the LURC zoning regulations" required, the manager of a U.S. Fish and Wildlife Service (USFWS) wildlife refuge some miles away had other ideas. He wanted to turn the refuge into a full-blown park with (unauthorized) plans to acquire at least 2,100 to 10,000 more acres. In this he had the cooperation of The Nature Conservancy (TNC). As its Maine Director told reporters, "USFWS let us know quite early that they wanted Bellier Cove."

TNC national President William Weeks was quoted as saying: "We do work closely with USFWS. We buy these properties when they need to be bought, so that at some point we can become the 'willing seller' (to government). This helps the government get around the problem of local opposition." As a result of what are described as "orchestrated protests" by the local environmental groups, Mr. Murray offered to sell them his property at its market value. There were no takers, and at the final hearing on Mr. Murray's petition in 1989, he was confronted the FWS refuge manager, who spoke not only for his own agency, but for TNC and other environmental groups. His opposition to any homes on Bellier Cove led the LURC to rescind its preliminary approval. Mr. Murray was forced to sell his property to TNC for \$235,000, much below its estimated \$400,000 market value. According to reporters' accounts, TNC then confirmed its plans to resell to USFWS when (and if) they have funds. Ironically, the TNC Main Director was quoted as admitting, "We've already seen a quarter of a million go out the door, so we may eventually have to resell this property as two 30-acre residential building lots."

This is part of a more general problem, whereby land trusts are reported to sell lands to the FWS and other governmental agencies at a price equal to that of unencumbered parcels, plus costs. In exchange, the land trusts "facilitate agency empire-building by first providing acquisition money that taxpayers and their representatives have not yet approved, then by lobbying lawmakers to fund the



acquisition.”⁵⁵ Furthermore, gains from sales made under these circumstances seem to be an abuse of the trusts’ tax exempt status. Such trading in the conservation easements created by others also is entirely unnecessary. Groups that want to buy land for conservation efforts by themselves or by government are free to raise funds for that purpose. As the free-market environmentalist Richard Stroup noted a few years ago, “Plenty of land is available for purchase by conservation groups. Most wild areas are not attractive for commercial development.”⁵⁶

Critic Tom Holt maintains: “Some land trusts – usually small, local ones – perform pretty close to the theory.” He sees the larger, national trusts differently:

Land-trust acquisitions also have become an important tool of de facto regional land-use planning. Trusts can acquire strategically located land or development rights and therefore channel roads, housing and industrial development. A California land trust official described, on tape, how this organization stopped a major development: “We had co-opted the local government when we established a conservancy years ago by having the mayor of the local town and the supervisors on our board, and by me personally helping the board of supervisors of the county set up an agricultural land trust to protect irrigated agricultural land. To the point where people in the government said, ‘Come talk with the land conservancy, because, in effect, off the record we’re telling you, you’re not going to work it out without the conservancy.’”⁵⁷

Abuse by Heirs of the Donor or by Purchasers

As noted earlier, the mandate in the Internal Revenue Code and in many state laws that conservation easements be perpetual detracts from the flexibility that landowners should have in establishing conservation easements. However, owners may desire that their conservation easements be perpetual, that they exceed any minimum duration that state law (or an amended Internal Revenue Code) might provide. They may also desire that their powers to terminate easements (as consistent with state law) be restricted. One good reason why donors might willingly bind themselves and their successors is to induce a land trust to expend funds in conserving the parcel that it would be unwilling to do without a long-term commitment from the landowner. Another reason is to ensure the success

Most wild areas are not attractive for commercial development.

over time of conservation efforts with which the donor’s heirs or possible purchasers of the restricted land might not be sympathetic. In short, the landowner should have the flexibility to impose firm restrictions upon his later acts or those of his successors.

In some cases, however, purchasers or heirs will be able to evade restrictions designed to prevent the termination of conservation easements. The resources of land trusts often are limited. This is especially true of smaller, local trusts. They may face difficulty in policing the conservation restrictions over a substantial period of time. The new owners of the land may be using it in a manner inconsistent with the conservation easement. If this adverse use continues beyond the prescriptive period established by state law, the holder may lose the right to enforce the conservation easement in the future.⁵⁸

It is also possible that the new owners might be able to convince a court that the conservation easement ought to be extinguished as incompatible with uses of the surrounding lands. Sometimes this will occur in circumstances in which those who knew the donor might be sure that he would have. Once again, the solution is not the establishment of additional mandatory rules. Rather, legislators and

interested citizens should work for the establishment of a body of law that will achieve the following goals:

- (1) provide landowners with maximum flexibility in the establishment of conservation easements,
- (2) permit a wide variety of land trusts and other entities to serve as easement holders, in order to enhance competition for donations, and
- (3) recognize that a system of incentives to private stewardship, albeit imperfect, is far preferable to a system of statutory codifications buttressed by thick walls of regulations.

CONCLUSION

While abuses occur and must be guarded against, conservation-minded landowners should welcome conservation easements as a potential way to reduce governmental barriers to stewardship while providing a secure framework for private conservation initiative.

Many private landowners will want to select as holders of conservation easements small and locally-oriented land trusts that they know share their values. Small-scale and attentive stewardship combines ecology and ethics in a way celebrated in Aldo Leopold's masterpiece *A Sand County Almanac*.⁵⁹ Just as private property accords individuals an open space to exercise their creative talents free from bureaucracy, private conservation allows for innovative experiments. To this day, the Leopold Memorial Reserve and the Sand County Foundation and similar groups across America take advantage of conservation easements and similar devices to give them "the security to swim against the tide of popular and scientific opinion to preserve natural resources."⁶⁰

While abuses must be guarded against, conservation-minded landowners should welcome conservation easements.

The task for the concerned private landowner is to develop a scheme that will conserve those aspects of the environment that he values most. This includes creation of a properly drafted conservation easement. It also includes the selection of an easement holder with a proven record of effectiveness. The land trust must have goals that match the donor's. Not the least of these is an appreciation that the advantages of private land ownership and private land stewardship together nurture our liberty as well as our environment.

The task for the rest of us, as legislators and concerned citizens, is to fashion conservation easement laws and practices that will most encourage this process.



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ENDNOTES

¹ See I.R.C. § 2031(c) (providing for a deduction from the decedent's gross estate of a sliding-scale "applicable percentage" of the value of land subject to a qualified conservation easement).

² *Restatement of Property* § 450 (1944). For general descriptions of easements, see *7 Thompson on Real Property, Thomas Edition*, David A. Thomas, ed., ch. 60 (Charlottesville, Va.: Michie Co., 1994); *4 Powell on Real Property*, ch. 34 (N.Y.: Matthew Bender, 1997).

³ *Abbott v. Nampa School Dist. No. 131*, 808 P.2d 1289, 1293 (Supreme Court of Idaho 1991).

⁴ See Susan French, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands," 55 *S. Cal. L. Rev.* 1261, 1262 (1982).

⁵ *Powell*, supra note 2, at § 34.02.

⁶ C would not be bound because personal promises bind only the promisor, and not any successor to his interest in land. See *Powell*, note 2, § 60.04[1]. To illustrate, consider a daughter who is deeded a house by her mother, based on the daughter's promise that two of her mother's other children may live in the house as long as they desire. The daughter nevertheless is free to sell the house, since the promise did not bind the land. The purchaser, having no connection to with the promise, would not be bound either. *Schaeffers v. Apel*, 328 So. 2d 274 (Alabama Supreme Court, 1976).

⁷ See *Restatement of Property* § 487 (1944).

⁸ See *Powell*, § 34.16.

⁹ These include railroad, pipeline, and utility rights of way and water ditches. See *Powell*, at §34A.01 n. 8.

¹⁰ For a discussion of English and American cases, see *Hanson v. Fergus Falls Nat'l. Bank*, 65 N.W.2d 857 (Supreme Court of Minnesota 1959).

¹¹ See Lewis M. Simes, "The Assignability of Easements in Gross in American Law," 22 *Michigan L. Rev.* 521 (1924).

¹² See Charles Clark, "The Assignability of Easements, Profits, and Equitable Restrictions," 32 *Yale L. J.* 813 (1928); Uriel Reichman, "Toward a Unified Concept of Servitudes," 55 *S. Cal. L. Rev.* 1177 (1982).

¹³ *Powell*, at §34A.01.

¹⁴ See, e.g., John L. Hollingshead, "Conservation Easements: A Flexible Tool for Land Preservation," 3 *Environmental Lawyer* 319, 332 (1997).

¹⁵ *Restatement (Third) of Property (Servitudes)* Introduction (Tentative Draft No. 1, 1989).

¹⁶ *Restatement (Third) of Property (Servitudes)* § 5.1 (Tentative Draft No. 5, 1995).

¹⁷ *Restatement (Third) of Property (Servitudes)* § 5.8 (comment c) (Tentative Draft No. 5, 1995).

¹⁸ *Powell*, at §34A.01.

¹⁹ For an historical sketch, see Hollingshead.

²⁰ William H. Whyte, Jr., "Securing Open Space for Urban America: Conservation Easements," 8 (*Urban Land Inst. Tech. Bull.* No. 36 (Wash: 1959).

²¹ The details are recounted in an unpublished manuscript by Oakes A. Plimpton, "Conservation Easements: Legal Analysis of 'Conservation Easements' as a Method of Privately Conserving and Preserving Land." It was prepared for

the Nature Conservancy, on file at The Environmental Lawyer, and discussed in Hollingshead, at 333-334.

²² 23 U.S.C. §§ 131, 136, and 319 (containing allocation of funds for landscaping and scenic enhancement).

²³ These figures are reported in Hollingshead, at 324.

²⁴ *Uniform Conservation Easement Act of 1981*, 12 *Uniform Laws Annot.* 170 (1996).

²⁵ *Id.*, § 1(1)

²⁶ *Id.*, § 2(a) (emphasis added).

²⁷ *Id.*, § 1(2).

²⁸ Treas. Reg. § 1.170A-14(c).

²⁹ For classifications and code references, see Powell, at § 34A.03[2].

³⁰ *Id.* at n. 27.

³¹ Rev. Rul. 64-205, 1964-2 C.B. 62.

³² Pub. L. 96-541, 94 Stat. 3206 (adding subsection (h) to I.R.C. § 170).

³³ I.R.C. § 170(f).

³⁴ I.R.C. § 170(f)(3)(B)(iii).

³⁵ I.R.C. § 170(h)(1).

³⁶ See Treas. Reg. § 170A-14(h)(3)(i) and (ii).

³⁷ I.R.C. § 170(h)(2)(C). Other permissible interests are a remainder, (h)(2)(B), or the entire interest of the donor other than a qualified mineral interest, (h)(2)(A).

³⁸ Treas. Reg. 1.170A-14(b)(2).

³⁹ Treas. Reg. 1.170A-14(c)(1).

⁴⁰ I.R.C. § 170(h)(4)(A).

⁴¹ Pub.L. 105-34, § 508(a) adds new I.R.C. § 2031(c).

⁴² Jonathon G. Blattmachr and Howard M. Zaritsky, "Estate Planning After the Taxpayer Relief Act of 1997," 87 *J. Taxation* 133, 142 (1997).

⁴³ *Uniform Conservation Act*, § 2(c).

⁴⁴ *Cal. Civ. Code* § 815.2.

⁴⁵ See, e.g. Montana Code § 76-6-202 (15-year minimum term).

⁴⁶ I.R.C. § 170(h)(2)(C).

⁴⁷ Treas. Reg. 1.170A-14(g)(1).

⁴⁸ Treas. Reg. 1.170A-14 (g)(6)(ii). There is an exception if state law provides that the donor is entitled to the full proceeds from the conversion. *Id.*

⁴⁹ Roundtable, “What Makes for a Good Land Trust?” October 7, 1997, p. 17 (comment of Robert J. Smith) (Center for Private Conservation, 1998).

⁵⁰ 699 F.Supp. 578 (E.D. La. 1988).

⁵¹ 38 Fed.Cl. 645 (1997).

⁵² See R. Randolph Richardson, “Steward Little: Which Land Trusts Can You Trust?” *Policy Review*, Fall 1995, p. 87.

⁵³ See Warren Brookes, “Hijacking Development?,” *The Washington Times*, January 23, 1991, p. G-3.

⁵⁴ This account is based on the Brookes article.

⁵⁵ Kenneth Smith, “Land trusts raking in the profits?,” *The Washington Times*, June 12, 1992, p. F-1.

⁵⁶ Richard L. Stroup, “The Market–Conservation’s Best Friend,” *Wall Street Journal*, April 19, 1990, p. A-14.

⁵⁷ Tom Holt, “Q: Are nonprofit land trusts taking advantage of the public’s trust?; Yes: Sharp Practices Belie Trusts’ Lofty Agenda,” *Insight*, February 5, 1996.

⁵⁸ For an account dwelling on the possibility of such abuses, see Federico Cheever, “Public good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future,” 73 *Denver U. L. Rev.* 1077 (1996).

⁵⁹ Aldo Leopold, *A Sand County Almanac* 1949. Reprinted by Ballantine Books, 1991.

⁶⁰ Terry L. Anderson and Donald R. Leal, *Enviro-Capitalists: Doing Good While Doing Well* 52 (N.Y.: Rowman & Littlefield, 1997).



CONSERVATION EASEMENTS AND PRIVATE LAND STEWARDSHIP

by Steven J. Eagle

EXECUTIVE SUMMARY

“Conservation easements” are property rights created to ensure that lands are used only in a manner consistent with specified conservation purposes. These purposes include the protection of wildlife, forests, scenic views, and historic places. Under common law rules, conservation easements were permitted but ineffective due to demands that the land be “used”. Now most states have enacted conservation easement statutes. These allow landowners to donate “qualified conservation easements” that are enforceable over time. Such easements are potentially of great advantage to donors and their communities, but have serious potential disadvantages as well. This is especially true to the extent that rigidity and coercion are introduced into what should be a device for private stewardship based on individual circumstances and vision. It is important that landowners exercise care before entering into conservation easements. It also is vital that legislators and concerned citizens work to reform governmental rules and practices so as to restore to conservation easements as much of the common law ethic of free and flexible agreements as possible.

By granting a qualified conservation easement, the donor continues to own and use his lands and may pass them to his heirs. The donor also may deduct the value of the easement for federal income tax purposes and enjoy local real estate tax and federal estate tax reductions as well. At the same time the owner is assured that the land will be used in accordance with principles of good stewardship even after its sale or his death. The community benefits as well, since the advantages of conservation extend well beyond the boundaries of the parcel subject to the easement. All the while, the land is kept in productive use and the costs of enforcing the terms of the easement are borne by the holder.

These potential advantages are increasingly well known, but it is important that prospective donors, legislators, and others interested in good stewardship and individual freedom understand the potential disadvantages of conservation easements as well. One important disadvantage is rigidity—some state statutes and federal tax laws require that easements must be “perpetual.” This discourages some donors and, if the restrictions have ceased to fulfill their original purpose, imposes wasteful under-utilization of land on others and their communities. Another disadvantage is that easement holders (which most states require to be governmental bodies or charities such as land trusts) may not be faithful to their obligations. Self-dealing, laxity, and over-zealous enforcement all are real possibilities. The technical requirements of state laws and federal tax codes also create traps for the unwary. Finally, and of profound importance to those who might prize conservation easements as combining stewardship and individual liberty, some land trusts may have worked hand-in-glove with public officials to intensify governmental coercion and to hold conservation easements out as a more palatable alternative. The challenge remains to enhance the benefits of conservation easement statutes and to eliminate these potential problems.