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The California Forest Legacy Program Act of 2000: A Long-Term Conservation Easement Program for Private Land

Stacy E. Gillespie

Code Sections Affected

Public Resources Code §§ 12200, 12210, 12211, 12220, 12230, 12231, 12240, 12241, 12242, 12243, 12244, 12245, 12246, 12247, 12248, 12249, 12249.5, 12249.6, 12250, 12251, 12252, 12260, 12261, 12270, 12271, 12272, 12273, 12274, 12280, 12281, 12282, 12283, 12284, 12285, 12286, 12287, 12288, 12289, 12290, 12291 (new).
SB 1832 (Chesbro); 2000 STAT. Ch. 790

*“Tree-sitting is a last resort. When you see someone in a tree trying to protect it, you know that every level of our society has failed.”*¹

I. INTRODUCTION

This is not merely Julia Butterfly Hill’s opinion, but a tested conviction: she engaged in a widely publicized two-year tree-sit to prevent “Luna” and other surrounding trees, from being cut down by its private landowners, Pacific Lumber Company.² The contentious battle between those who seek to preserve forests and those who have title in fee simple prompts the question—Whose tree is it, anyway?³

1. JULIA BUTTERFLY HILL, *THE LEGACY OF LUNA* 23 (2000).

2. *See id.* (chronicling her heroic two-year tree sit in a thousand-year-old redwood, named “Luna”, in which she succeeded in preventing Pacific Lumber Company from clear-cutting it and several surrounding trees in Humboldt County, California).

3. *See generally* Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (arguing for a paradigm shift that would grant legal status to natural objects). Professor Stone attests that historically, the granting of rights to a rightless entity is typically thought to be laughable, because we presuppose that if the entity is without rights, it is “a decree of Nature, not a legal convention acting in support of some status quo.” *Id.* at 453. He harkens to cases in our not-too-long-ago past, where granting enslaved Blacks civil rights or legal capacity was thought to be a legal solecism because of their legal status as chattel. *Id.* at 453 n.19. Professor Stone posits that legal status should be granted to “natural objects” such as forests, oceans, and rivers but this does not mean, for instance, that a tree could never be cut down. *Id.* at 456-57. It means that, because natural objects can not speak for themselves (not unlike corporations), attorneys or environmental “friends” could provide legal redress on behalf of the natural objects such that environmental interests may be considered in the equation with other rights holders. *Id.* at 464, 482-83.

Forty-four percent of California's 32.6 million acres of forest land is privately owned,⁴ as well as other valued resources such as watersheds, timberlands,⁵ recreation, and fish and wildlife habitats.⁶ As the State's population soars,⁷ there is a demand to develop untapped land resources for housing and commercial purposes, which could irreversibly threaten our most finite natural resources.⁸

Chapter 790 aims to maintain our threatened forest and aquatic resources by fusing the public outcry for greater environmental protection with the rights of private landowners.⁹ Chapter 790 enacts the California Forest Legacy Program of 2000,¹⁰ developed in accordance with the national Forest Legacy Program,¹¹ to create a State conservation easement program for privately owned forest land. This Program enables private landowners to sell or donate qualified¹² easements to the State¹³ in return for financial benefits, thereby circumventing a landowner's economic need to develop or subdivide her land while conserving California's rich forest resources.¹⁴ Chapter 790 empowers the State to access federal grants available

4. CAL. DEP'T OF FORESTRY AND FIRE PROTECTION, CALIFORNIA FOREST LEGACY PROGRAM ASSESSMENT OF NEED 2 (1995) [hereinafter, CFLP ASSESSMENT] (This includes thirty-three percent of all conifer forests and seventy-one percent of all hardwood forests or 14.2 million acres). *Id.*

5. Timberlands is defined as "being able to grow 20 cubic feet of industrial or wood per acre per year, and can be managed for continuous timber crops." *Id.* at 20.

6. CAL. PUB. RES. CODE § 12210(a) (enacted by Chapter 790).

7. See CFLP ASSESSMENT, *supra* note 4, at 2 (noting that California's population will increase by thirty-percent from 1990 to 2005, thus creating development pressures that will reduce forested lands); see, e.g., A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management and Western Water Law From Urban Oases to Archipelagos*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 163, 164-66 (1999) (listing California as one of the fastest growing states in the next twenty-five years and noting environmental concerns of poorly managed "urban sprawl").

8. See John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW 319, 325-33 (reviewing the historical development of modern conservation easements).

9. See Hastings West-Northwest Staff & Kevin Bundy, *The Headwaters Agreements: A History, Summary and Critique*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 361, 361-62 [hereinafter STAFF & BUNDY] (explaining that the genesis of the Headwaters Agreement, which culminated in state and federal ownership of 7,500 acres of old-growth trees from Pacific Lumber Company, was precipitated by a decade of public protest, litigation, and grassroots organizing); see also Hill, *supra* note 1 (exemplifying a protest and recounting Hill's two-year tree-sit in protest of Pacific Lumber Company's clear-cutting practices of a redwood grove in Humboldt County, California).

10. CAL. PUB. RES. CODE § 12240 (enacted by Chapter 790).

11. See 16 U.S.C.A. § 2103c(a) (West Supp. 2000) (establishing that the federal Forest Legacy Program shall be utilized "in cooperation with the State . . . to establish and protect environmentally important forest areas"); CAL. PUB. RES. CODE § 12240 (enacted by Chapter 790) (establishing that the California program "shall be coordinated with the Federal program to the maximum amount possible"); *infra* Part III (discussing the federal Forest Legacy Program).

12. See *infra* Part IV.A (listing the criteria the proposed easement must satisfy in order to be eligible for selection).

13. Specifically, the CDF is the recipient of the landowner's easement application, who will then look to any amenable qualified agency or land trust organization for easement establishment and oversight. CAL. PUB. RES. CODE § 12240(e) (enacted by Chapter 790).

14. CAL. PUB. RES. CODE § 12210(g) (enacted by Chapter 790); see Hollingshead, *supra* note 8, at 321-22 (providing a historical foundation for the modern use of conservation easements); see also Brenda J. Brown, Comment, *Land Preservation Provides Estate Tax Benefits: Section 2031(c)*, 17 UCLA J. ENVTL. L. & POL'Y 117,

for forest conservation through the federal-state cost sharing program.¹⁵ Chapter 790 is effective until January 1, 2007, unless extended by amendment before that date.¹⁶

II. BACKGROUND

Of California's 14.2 million acres of privately owned forest lands, about 3.4 million acres are owned as industrial private forest (IPF)¹⁷ lands and 10.8 million acres are owned as non-industrial private forest (NIPF) lands.¹⁸ NIPF land owners typically use their land for recreation, grazing, residences, or for investment purposes.¹⁹

However, due to our State's population growth demands, development of these NIPF lands has proven to be a principal threat to California's forest lands, as more people look to escape urban life for more serene and affordable living.²⁰ Although some of the decline of forest cover in NIPF lands can be attributed to purchases made by IPFs, the decline is largely due to residential development.²¹ Also, often times an heir to a forest land owner is confronted with exorbitant estate taxes, which are assessed by the land's "highest and best use" and not with the aims of environmental conservation.²² As a result, forest land heirs may be hard-pressed to cut and sell their trees or to subdivide the parcel to satisfy the burden of estate taxes.²³

Significant conversions to non-forest uses are a threat because they can have a negative impact on wildlife habitat and biodiversity due to the increase of road construction, changes in vegetation, increased influences from people and domestic animals, and fragmentation of habitat areas and migration corridors.²⁴ In addition, there exists a trend of increased timber cutting for lands owned as IPFs.²⁵ Certain

123-26 (1998-99) (offering step-by-step computations for charitable income tax deductions and estate tax reductions for donating and inheriting, respectively, a conservation easement).

15. 16 U.S.C.A. § 2103(c)(1)(1)-(2) (West 2000); CAL. PUB. RES. CODE § 12210(j) (enacted by Chapter 790).

16. CAL. PUB. RES. CODE § 12291 (enacted by Chapter 790). *See infra* Part IV.E (explaining that the reason for the statute's initial seven-year life is due to budget constraints).

17. IPF lands are defined "as those owned by individuals or companies which own 5,000 or more acres of forest land nationwide, and either own a wood processing plant, or employ a permanent forestry staff and a system of regular timber harvests." CFLP ASSESSMENT, *supra* note 4, at 20.

18. *Id.* Although the amount of acreage is disproportionate, acreage parity exists amongst IPF and NIPF land that is commercially viable. *Id.*

19. *Id.*

20. *Id.*; CAL. PUB. RES. CODE § 12210(c) (enacted by Chapter 790). *See, e.g.*, Tarlock and Van de Wetering, *supra* note 7, at 163-64 (discussing the impact population growth has on water law and distribution).

21. CFLP ASSESSMENT, *supra* note 4, at 2, 25.

22. *Id.* at 25.

23. CAL. PUB. RES. CODE § 12210(d) (enacted by Chapter 790); CFLP ASSESSMENT, *supra* note 4, at 25.

24. CFLP ASSESSMENT, *supra* note 4, at 32.

25. *Id.* at 20; *see also* Hill, *supra* note 1, at 25-26 (noting that Charles Hurwitz, President of the Maxxam Corporation, intensified Pacific Lumber Company's rate of cutting trees to satisfy the debt incurred from buying Pacific Lumber Company using junk bonds); STAFF & BUNDY, *supra* note 9, at 361-62 (noting that prior to being taken over by Charles Hurwitz, Pacific Lumber Company logged redwood trees using a progressive conservation

harvest practices, such as clear-cutting,²⁶ and forest conversions can create intense erosion and landslides because, in the absence of a natural forested condition, there remains no root system to absorb water and maintain slope stability.²⁷ As a result, the combined factors of increased timber production and the significant occurrence of NIPF conversions create serious ramifications for the health of timber production, forest resources, and fish and wildlife habitat.²⁸

A. Conservation Easements

Conservation easements are a deeded conveyance of private land whereby the landowner sells or donates specific land use rights to a government entity to preserve natural, scenic, historical, agricultural, forested, or open space land traits.²⁹ Conservation easements are flexible because they may be designed to meet the particular needs of the landowner, so long as those needs comport with the goal of the conservation efforts.³⁰ The restrictions placed on conservation easements are intended to be perpetual in duration.³¹

Modern conservation easements evolved from common law land use instruments which allowed the easement benefactor to influence the use of property owned by another.³² Use of conservation easements developed to circumvent the shortcomings of common law land use devices,³³ namely poor enforcement and the difficulties of maintaining an easement in perpetuity.³⁴

management plan).

26. Clear-cutting is "an even-aged cutting method in which the entire standing crop of trees from an area is removed at one time" CFLP ASSESSMENT, *supra* note 4, at F8.

27. *Id.* at 30-31.

28. CAL. PUB. RES. CODE § 12210(c) (enacted by Chapter 790); CFLP ASSESSMENT, *supra* note 4, at 21.

29. CAL. CIV. CODE § 815.1 (West 1982); CFLP ASSESSMENT, *supra* note 4, at B1. The land use limitation may be executed on behalf of the landowner via a deed, will or other device in the form of an easement, restriction, covenant, or condition. *Id.* See generally, Hollingshead, *supra* note 8, at 326-33 (reviewing the drawbacks of the common law land preservation methods of easements, real covenants and equitable servitudes).

30. Hollingshead, *supra* note 8, at 322.

31. CAL. CIV. CODE § 815.2(b) (West 1982).

32. See Hollingshead, *supra* note 8, at 325-32 (asserting that conservation easements developed from three common law land use instruments: easements, real covenants, and equitable servitudes).

33. Common law land use devices include easements, equitable servitudes, and real covenants. *Id.* at 319.

34. See *id.* at 335-36 (discussing that state statutes and the Uniform Conservation Easement Act aimed to overcome the limitations that common law easements, real covenants, and equitable servitudes have with respect to perpetual preservation); see also 16 U.S.C.A. § 2103c(k)(2) (West Supp. 2000) (establishing that "no conservation easement held by the United States or its successors or assigns under this section shall be limited in duration or scope or be defeasible by—(A) the conservation easement being in gross or appurtenant; (B) the management of the conservation easement having been delegated or assigned to a non-Federal entity; (C) any requirement under State law for re-recording or renewal of the easement; or (D) any future disestablishment of a Forest Legacy Program area or other Federal project for which the conservation easement was originally acquired."); CAL. CIV. CODE § 815.7(a) (West 1982) (declaring that "[n]o conservation easement shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed in the instrument creating it as running with the land").

An example of a limiting characteristic of a common law land use device can be seen by comparing a conservation easement with a common law easement: a government owned or trust held conservation easement can be characterized, in terms of common law easement terminology, as a negative easement in gross.³⁵ It is a “negative” easement because the easement owner is able to control the servient estate owner’s use of the easement, as opposed to an affirmative right of the easement holder, like a right-of-way.³⁶ It is “in gross” because the easement’s ownership does not benefit a dominant estate, but rather, it is a personal right of its owner.³⁷ As such, a negative easement in gross could not traditionally be assigned in perpetuity because it terminated upon the death of the easement benefactor.³⁸ To further protect against common law shortcomings, California law specifies that “[a] conservation easement shall be perpetual in duration . . . shall not be deemed personal in nature and shall constitute an interest in real property notwithstanding the fact that it may be negative in character.”³⁹

In addition, conservation easements can be advantageous over traditional government land preservation methods for a number of reasons:

[c]onservation easements: (1) involve no government regulation; (2) are immune from the politics of open space legislation; (3) do not constitute a taking under the Fifth Amendment; (4) do not require fee simple purchase; (5) do not require maintenance or administration (e.g. parks); (6) are voluntary; (7) meet the needs of the private landowner; and (8) allow the landowner to retain ownership and control of the property.⁴⁰

1. Easement Holders and Enforcement

California law provides that a non-profit organization may acquire or hold conservation easements, under section 501(c)(3) of the Internal Revenue Code if “its primary purpose [is] the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.”⁴¹ Further, State and local government entities may acquire and hold a conservation easement as long as the entity is authorized to do so and the conveyance is voluntary.⁴²

35. Hollingshead, *supra* note 8, at 328.
36. *Id.* at 326.
37. *Id.* at 327.
38. *Id.*
39. CAL. CIV. CODE § 815.2(b)-(c) (West 1982).
40. Brown, *supra* note 14, at 118.
41. CAL. CIV. CODE § 815.3(a) (West 1982).
42. *Id.* § 815.3(b) (West 1982).

Injunctive relief is available to both the owner of the parcel and the holder of the easement where the aims of the conservation easement are violated or threatened.⁴³ Monetary damages are also available to the easement benefactor where there has been injury to the environmental interest.⁴⁴ In that case, the assessment of damages may include not only restoration costs but also the loss of scenic, aesthetic, or environmental value of the conservation easement.⁴⁵

2. Financial Benefits

A landowner may donate or sell, or make a combined donation and sale, of a conservation easement to the State.⁴⁶ If a landowner sells the easement, or a portion thereof, she is compensated by a fair market value purchase.⁴⁷ If the easement is donated, the landowner may receive tax benefits.⁴⁸ For example, if the conservation easement is donated, a landowner may receive charitable income tax deductions, estate tax reduction, or State real property tax benefits.⁴⁹ Regarding income tax deductions, for example, if the value of a donated easement is assessed at \$20,000, the parcel owner can claim a charitable tax deduction in that amount against her state and federal income taxes.⁵⁰ Also, State property taxes are generally based on the "highest and best" use of the property.⁵¹ When there exists a land-use restriction against development, the "highest and best" use of the property is hindered.⁵² Thus, because a conservation easement places perpetual land-use restrictions on the property, the property tax calculated against the parcel is reduced.⁵³ Finally, since the perpetual land restrictions reduce the property value,⁵⁴ estate taxes are significantly reduced, as well.⁵⁵ Lower estate taxes can mean the heirs of the forest

43. *Id.* § 815.7(b) (West 1982). The prevailing party in this instance may recover costs and reasonable attorney fees. *Id.* § 815.7(d) (West 1982).

44. CAL. CIV. CODE § 815.7(c) (West 1982).

45. *Id.*

46. CAL. PUB. RES. CODE § 12210(g) (enacted by Chapter 790); CFLP ASSESSMENT, *supra* note 4, at 38.

47. *See* CAL. PUB. RES. CODE § 12262(g) (enacted by Chapter 790) (stating that the owner shall get the property appraised, and the value of the conservation easement will be the difference between the land before and after the conservation encumbrance).

48. *See, e.g.,* Brown, *supra* note 14, at 119 (summarizing available tax benefits for a 'qualified' conservation easement); Hollingshead, *supra* note 8, at 337-60 (same).

49. *Id.*, at 337-60.

50. REDWOOD COMMUNITY ACTION AGENCY, NATURAL RESOURCES SERVICES, *Financial Incentives for Stewardship of Nonindustrial Private Forest land in Humboldt County* 21 (1998) [hereinafter, RCAA] (summarizing current financial incentives, and proposing new ones, for stewardship of nonindustrial private forest land in Humboldt County); I.R.C. § 170(f)(3)(B)(iii) (West 1998); *see* Hollingshead, *supra* note 8, at 337-39 (tracing the historical federal income tax deductions for conservation easements through changes in various tax laws).

51. Hollingshead, *supra* note 8, at 359-60.

52. *Id.*

53. *Id.*

54. *Id.*

55. RCAA, *supra* note 50, at 21; *see also* I.R.C. § 2055(a) (West 1989).

landowner will not be forced to sell, cut, or convert their forest land to pay for the estate tax.⁵⁶

In sum, a conservation easement can create a “win-win” situation for the fee owner and our publicly valued environmental resources: the fee holder receives financial benefits for voluntarily restricting her land use, the easement may be enforced in perpetuity, and valued forest land can be conserved at a lower price than if the government purchased fee title to the easement or obtained it via taking proceedings.⁵⁷

III. EXISTING LAW

The State and Federal Legislatures have declared forest resources to be a highly valued natural resource, for both environmental and economical reasons.⁵⁸ Accordingly, these resources require prioritized use, restoration and preservation.⁵⁹ The California Legislature has mandated prudent forest resource management to balance the public’s competing need for timber products with long-term protection for watersheds, fisheries and wildlife, as well as recreational opportunities.⁶⁰

The Cooperative Forestry Assistance Act of 1990 created the national Forest Legacy Program to protect forested land threatened by conversion to non-forest uses.⁶¹ Under the Act, federal funds are provided for the acquisition of conservation easements and other interests in land.⁶² The federal program allows states that wish to work for the protection of their forest resources to develop state Forest Legacy Programs.⁶³ The State must document threats to its forest resources, identify forest lands that merit State program protection, and prioritize the environmental qualities

56. RCAA, *supra* note 50, at 21.

57. Hollingshead, *supra* note 8, at 322-23.

58. 16 U.S.C.A. § 2103c(a) (West Supp. 2000); *see* CAL. PUB. RES. CODE § 4512(a) (West 2000) (stating a declaration of the Z’berg-Nejedly Forest Practice Act of 1973); CAL. PUB. RES. CODE § 12210(b) (enacted by Chapter 790); GOV’T CODE §§ 51100-51155 (West 1983 & Supp. 2000) (codifying the California Timberland Productivity Act of 1982); CAL. PUB. RES. CODE §§ 21000-21176 (West 1996 & Supp. 2000) (codifying the California Environmental Quality Act); CAL. FISH & GAME CODE §§ 2050-2116 (West 1998 & Supp. 2000) (codifying the California Endangered Species Act).

59. CAL. PUB. RES. CODE § 12210(a)-(b) (enacted by Chapter 790).

60. CAL. PUB. RES. CODE § 4512(b) (West 1984). *But see* Frank Clifford, *Headwaters: A Case Study in Forest Policy Failure Environment: The Apparent Collapse of a Deal to Protect Redwoods Caps Years of Ineffective State Efforts to Save Trees*, L.A. TIMES, Feb. 28, 1999, at A1, available in 1999 WL 2135379 (reporting that the aims of the Z’berg-Nejedly Forest Practice Act of 1973 have failed).

61. The Cooperative Forestry Assistance Act of 1990 Pub. L. No. 101-624 (codified at 16 U.S.C.A. § 2103c).

62. 16 U.S.C.A. § 2103c(j)(1) (West 2000). Subject to available funding, the federal program gives priority to a prospective easement that has “important scenic or recreational values; riparian areas; fish and wildlife values, including threatened and endangered species; or other ecological values.” 16 U.S.C.A. § 2103c(e) (West Supp. 2000); *cf.* CAL. PUB. RES. CODE § 12211(a)-(g) (enacted by Chapter 790) (reiterating similar environmental priorities but omitting scenic or recreational characteristics).

63. 16 U.S.C.A. § 2103c(a) (West 2000).

that merit protection by the conservation easement program.⁶⁴ Significantly, the federal program may provide up to seventy-five percent of the necessary expenses.⁶⁵

IV. CHAPTER 790

Chapter 790 enacts the California Forest Legacy Program Act of 2000,⁶⁶ setting into motion a state and federal cooperative to enhance the State's biodiversity conservation efforts. Chapter 790 permits landowners to sell or donate qualified⁶⁷ easements to the Department of Forestry and Fire Protection⁶⁸ (CDF) in order to conserve threatened forest resources. Although a landowner retains use and ownership of the parcel, she must limit the use of a conservation easement to traditional forest uses.⁶⁹ As required by the federal program, the State has documented and analyzed forest resource priorities relative to their impending threats in order to determine which forest landowners may participate in the Program.⁷⁰

A. Conservation Easement Eligibility Criteria

To be eligible, a landowner⁷¹ must be willing to sell or donate a prospective conservation easement, and the parcel must satisfy six conditions. First and foremost, the parcel must be subject to potential conversion; the threat of irreversible development of forest lands into non-forest uses.⁷² The parcel must also

64. CFLP ASSESSMENT, *supra* note 4, at 1.

65. 16 U.S.C.A. § 2103c(j)(2) (West 2000); *cf.* CAL. PUB. RES. CODE § 12240 (enacted by Chapter 790) (establishing that the California program "shall be coordinated with the federal program to the maximum amount possible").

66. CAL. PUB. RES. CODE § 12240 (enacted by Chapter 790).

67. *Id.* § 12251 (enacted by Chapter 790).

68. *Id.* § 12240 (enacted by Chapter 790).

69. Traditional forest uses are defined as "those multiple use activities which provide various public benefits including: forest products, forage, clean water, fish and wildlife habitat, rare and native plants, public recreation access, cultural resources and/or scenic enjoyment." CFLP ASSESSMENT, *supra* note 4, at 3.

70. California completed an Assessment of Need (AON) in 1995 which was submitted to and subsequently approved by the Department of Agriculture. CAL. PUB. RES. CODE § 12210(k) (enacted by Chapter 790). Since then, the California Department of Forestry and Fire Protection has published an amendment to the 1995 AON, adding twenty-eight counties to the designated Forest Legacy Areas (FLAs) to utilize the benefits of the Program. CAL. DEP'T OF FORESTRY AND FIRE PROTECTION, PUBLIC REVIEW DRAFT, CALIFORNIA FOREST LEGACY PROGRAM ASSESSMENT OF NEED AMENDMENT, 2 (2000) [hereinafter, CFLP ASSESSMENT AMENDMENT].

71. Landowner is defined as "an individual, partnership, private, public, or municipal corporation, Indian tribe, state agency, county, or local government entity, educational institution, or association of individuals of whatever nature that own private forest lands or woodlands." CAL. PUB. RES. CODE § 12220(h) (enacted by Chapter 790).

72. CAL. PUB. RES. CODE § 12220(e) (enacted by Chapter 790). Forest conversions can be further broken down into three categories: (1) "development conversions": primarily for residential development, (2) "parcelization": smaller subdivisions which typically result through the course of ownership transfers, fragmenting contiguous forest stands even without impending development goals, and (3) "cover type conversions": forest management practices which have had negative repercussions on forest ecosystems, such as overgrazing by

be forested with at least ten percent forest canopy cover, and must possess at least one valued environmental condition that a conservation easement could protect at a reasonable cost.⁷³ Applicable environmental conditions that merit Program protection include fish and wildlife habitat, areas that maintain habitat connectivity, rare plants, biodiversity, riparian habitats, oak woodlands, old growth forests, other forest types inadequately represented, and watershed values.⁷⁴ Finally, to be eligible for the Program, an easement must contain provisions for continued use of traditional forest uses, such as commodities production or habitat maintenance.⁷⁵ Chapter 790 stipulates that a public agency may not make the sale or donation of a conservation easement a condition to granting a landowner a lease, permit, license, certificate, or other entitlement.⁷⁶

B. Selection Criteria

The CDF uses various eligibility criteria to select among prospective easements.⁷⁷ First, the applicant's land must be located within a designated Forest Legacy Area (FLA).⁷⁸ FLAs were designated by evaluating the significance of the forest resources, the degree of impending conversion threats or catastrophic fires, and the level of landowner interest and public support in each area.⁷⁹ Another consideration for Program selection is the degree that key environmental values of the prospective easement and the landowner's management goals for the surrounding parcel of land coincide.⁸⁰ The CDF will also compare the benefits of any stewardship plan that may already govern management on the parcel, and will

livestock, the introduction of non-native plants and insects, fire suppression, clear-cutting practices and roadbuilding. CAL. DEP'T OF FORESTRY AND FIRE PROTECTION, CALIFORNIA FOREST LEGACY PROGRAM DRAFT ASSESSMENT OF NEED 22-29 (1994). See Tony Arjo, *Watershed and Water Quality Protection in National Forest Management*, 41 HASTINGS L.J. 1113-25 (1990) (recounting the origin and development of the United States Forest Services and its concomitant management practices).

73. CAL. PUB. RES. CODE § 12251(c)-(d) (enacted by Chapter 790); *id.* § 12251(f) (enacted by Chapter 790).

74. *Id.* § 12251(d)(1)-(9) (enacted by Chapter 790).

75. *Id.* § 12251(e) (enacted by Chapter 790).

76. *Id.* § 12252 (enacted by Chapter 790); CAL. CIV. CODE § 815.3(b) (West 1982). The stipulation in Chapter 790 retains the appealing nature of a conservation easement; a landowner's relinquishment of her coveted property rights is voluntary. *Hollingshead, supra*, note 8, at 322; CAL. PUB. RES. CODE § 12210(g) (enacted by Chapter 790).

77. CAL. PUB. RES. CODE § 12260 (enacted by Chapter 790).

78. See CFLP ASSESSMENT, *supra* note 4, at 5 (designating sixteen FLAs in six counties for initial inclusion in the Program). FLAs were selected in Mendocino, Riverside, San Diego, San Mateo, Santa Cruz, and Sonoma Counties. *Id.* at 51; see CFLP ASSESSMENT AMENDMENT, *supra* note 70, at 2 (expanding the initial designated FLAs to include twenty-eight additional counties for Program protection: Amador, Butte, Calaveras, El Dorado, Fresno, Humboldt, Lake, Lassen, Los Angeles, Madera, Mariposa, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Bernardino, San Luis Obispo, Santa Barbara, Shasta, Sierra, Siskiyou, Tehama, Trinity, Tulare, Tuolumne, and Yuba Counties).

79. CFLP ASSESSMENT, *supra* note 4, at 49-51.

80. CAL. PUB. RES. CODE § 12260(c) (enacted by Chapter 790).

yield to the environmentally superior plan.⁸¹ Other factors include the existence of a qualified agency to hold and monitor the easement and the availability of funding for the easement acquisition or donation.⁸²

The CDF may disapprove the acquisition of a conservation easement if the eligibility and selection criteria are not satisfied, if clear title to the conservation can not be conveyed, if there exists insufficient funds for the acquisition, or if other acquisitions have a higher priority.⁸³ Finally, the CDF will not disburse any funds for easement acquisition unless the landowner intends to maintain the conservation easement in perpetuity.⁸⁴

C. California Forest Legacy Funding

Chapter 790 enables California to access federal and state funds allocated to the protection of private forest land and aquatic resources.⁸⁵ Both federal and state funds will be used to secure the sale of conservation easements, or for associated costs of donated easements.⁸⁶ The federal program creates a cost-sharing strategy in which federal and state matching funds are used to acquire easements from willing landowners.⁸⁷ The federal contribution can account for up to seventy-five percent of the requisite costs in acquiring the conservation easement.⁸⁸

The remaining costs will be shouldered by the State and are to be obtained from various sources.⁸⁹ California voters have approved a bond measure that will disburse

81. *Id.* § 12260(d) (enacted by Chapter 790).

82. *Id.* § 12260(e)-(f) (enacted by Chapter 790); *see infra* Part II.A (discussing who may hold a conservation easement); *infra* Part IV.C (detailing the funding sources and the costs associated with Program administration).

83. CAL. PUB. RES. CODE § 12264(a)-(d) (enacted by Chapter 790).

84. CAL. PUB. RES. CODE § 12248 (enacted by Chapter 790). Prior to subsequent amendments, Chapter 790 allowed for termination of the conservation easement, after the lapse of fifty years, so long as the landowner's proposed use coincided with the goals of the forest legacy program and met with CDF approval. SB 1832 (2000) (as amended April 6, 2000, but not enacted). The codified version of SB 1832 allows for easement amendments, subject to consent of all the necessary parties to the easement and CDF determination that the amendment is consistent with the Program, but does not provide for the possibility of an out-right easement termination. CAL. PUB. RES. CODE § 12247 (enacted by Chapter 790).

85. 16 U.S.C.A. § 2103c (1)(1) (West Supp. 2000); CAL. PUB. RES. CODE § 12240 (enacted by Chapter 790). While CDF manages the program, the Wildlife Conservation Board administers the easement acquisition. CAL. PUB. RES. CODE §§ 12240 (enacted by Chapter 790).

For fiscal year 2000, \$18.6 million was allocated to the federal Forest Legacy Program for the nineteen states that were then competing for grants to protect private forest land and wildlife habitat. *See White House Fact Sheet on Forest Legacy Funding*, U.S. NEWSWIRE, Feb. 14, 2000, available in 2000 WL 4141344 (reporting that \$1.3 million was earmarked to provide habitat connectivity between Santa Cruz and San Mateo Counties, in and around Butano Creek, and \$88 thousand was earmarked to facilitate the donation of three perpetual easements, totaling about three-thousand acres, in Sonoma, Mendocino, and Santa Cruz Counties).

86. 16 U.S.C.A. § 2103c(j)(2) (West 2000). *See* CAL. PUB. RES. CODE § 12242 (enacted by Chapter 790) (stating that costs associated with program implementation include purchasing or facilitating the donation of conservation easements, technical assistance and technology transfers provided by CDF, and administrative costs).

87. 16 U.S.C.A. § 2103c(j)(2).

88. *Id.*

89. CAL. PUB. RES. CODE § 12241 (enacted by Chapter 790).

five million dollars toward the preservation of private forest lands that are threatened with development.⁹⁰ In addition, gifts and donations will contribute to the State funds.⁹¹ The Wildlife Conservation Board⁹² will hold the State funds in trust to be available for the administration of the program, the acquisition of conservation easements, and for other related expenditures, such as surveys, title work, and easement drafting.⁹³

D. The Mechanics of Conservation Easement Acquisition

A landowner is obligated to retain a real estate appraiser to determine the value of a conservation easement.⁹⁴ The value of a conservation easement is the difference between fair market value of the property and the tentative encumbered value of the permanent restriction.⁹⁵ Once the CDF approves an application, funds will be disbursed to the landowner, and the conservation easement will be held by a government entity or by a specified non-profit land trust organization.⁹⁶

E. Miscellaneous Provisions

Beginning January 1, 2002, the CDF is required to report annually to the Governor and the Legislature on the preceding year's operation of the California Forest Legacy Program.⁹⁷ The report will include the number of applications, the

90. CAL. PUB. RES. CODE § 12241 (enacted by Chapter 790); see Proposition 12, the Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection Bond Act of 2000 (The Villaraigosa-Keeley Act) (providing \$2.1 billion to a wide array of compelling needs: the protection of the coastline, open space in the suburbs, forests, fish and wildlife habitats, watersheds, to improve air and drinking water quality, and to provide safety improvements at neighborhood parks); CAL. PUB. RES. CODE § 5096.310 (West Supp. 2000) (promulgating the Villaraigosa-Keeley Act).

91. CAL. PUB. RES. CODE § 12241 (enacted by Chapter 790).

92. Telephone Interview with Stephen M. Jones, Deputy Chief of Forestry Assistance, Cal. Dep't of Forestry and Fire Protection (Sept. 12, 2000) (notes on file with *McGeorge Law Review*). According to Mr. Jones, the original designation of State money to be allocated to a trust fund for the Forest Legacy Program was dropped from the SB 1832 (2000) since there already existed a trust fund within the Wildlife Conservation Board. *Id.* See SB 1832 (2000) (as amended April 6, 2000, but not enacted) (establishing the Forest Legacy Trust Fund).

93. CAL. PUB. RES. CODE § 12242 (enacted by Chapter 790); *White House Fact Sheet on Forest Legacy Funding*, *supra* note 85.

94. CAL. PUB. RES. CODE § 12262 (enacted by Chapter 790).

95. *Id.*

96. *Id.* § 12244 (enacted by Chapter 790). The government entities may be federal, state, or local. *Id.* A qualified non-profit organization is one that meets the criteria of Section 107(h)(3) of Title 26 of the United States Code whose objective is the conservation of forest lands. *Id.* § 12220(j) (enacted by Chapter 790); cf. CAL. CIV. CODE § 815.3(a) (West 1982) (defining qualified non-profit organizations as "[t]ax- exempt . . . qualified under Section 501(c)(3) of the Internal Revenue Code and qualified to do business in this state which has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use").

97. CAL. PUB. RES. CODE § 12290 (enacted by Chapter 790).

amount of conservation easements donated or sold, a current description of the conservation easements, the participating landowners, and the easement holders.⁹⁸

Based on the initial projected funding sources available to administer the Program, Chapter 790 has a six-year life.⁹⁹ Hence, Chapter 790 will be automatically repealed, unless later extended by amendment, on January 1, 2007.¹⁰⁰ However, notwithstanding a repeal of Chapter 790, the CDF will provide for the continued monitoring of the easements acquired under the Program to ensure that the terms of a given easement are being met, and to assess the condition of the resources being protected.¹⁰¹

V. ANALYSIS

Notably, Chapter 790 was predicated on the Z'berg-Nejedly Forest Practice Act of 1973¹⁰² and the California Timber Productivity Act of 1982,¹⁰³ which protects forests resources to furnish high-quality timber¹⁰⁴ while providing watershed protection and maintaining fisheries and wildlife.¹⁰⁵ The intent of Chapter 790 is consistent with the aims of these Acts.¹⁰⁶ For example, the purposes behind Chapter 790 included the encouragement of long-term conservation of productive forest lands¹⁰⁷ and long-term sustainable forest uses.¹⁰⁸ Thus, although environmental ideals are the predominant emphasis of Chapter 790,¹⁰⁹ one of the goals of the Program is to protect forest land from the threat of development so that trees may continue to be harvested for private economic gain.

98. *Id.*

99. CAL. PUB. RES. CODE § 12291 (enacted by Chapter 790).

100. *Id.*

101. *Id.* § 12291(2)-(2)(a) (enacted by Chapter 790).

102. *Id.* § 12210(b) (enacted by Chapter 790).

103. *Id.* One legislative finding of the Timberland Productivity Act states "increasing population threatens to erode the timberland base and diminish forest resource productivity through pressures to divert timberland to urban and other uses and through pressures to restrict or prohibit timber operations when viewed as being in conflict with nontimberland uses." CAL. GOV'T CODE § 51101(b) (West 1983).

104. One definition of timber is "trees of any species maintained for eventual harvest for forest products purposes, whether planted or of natural growth, standing or down . . ." CAL. REV. & TAX. CODE § 38103 (West 1994).

105. CAL. PUB. RES. CODE § 4512(b) (West 2000).

106. *Id.* § 12210(b) (enacted by Chapter 790).

107. *Id.* § 12211(a) (enacted by Chapter 790).

108. *Id.* § 12211(g) (enacted by Chapter 790).

109. *See id.* § 12211(b)-(f) (enacted by Chapter 790) (listing five main goals to promote wildlife, aquatic, or environmental ideals); *id.* § 12210(a) (enacted by Chapter 790) (noting fish, wildlife habitat and watersheds as a few of the State's most important forest resources); *id.* § 12210(c) (enacted by Chapter 790) (finding that population growth and changes in land-use patterns are threatening California's private forest lands and woodlands); *id.* § 12251(d)(1)-(9) (enacted by Chapter 790) (highlighting nine environmental values of great concern to the public and the state worthy of Program protection); *id.* § 12260(a)-(b) (enacted by Chapter 790) (prioritizing two environmental criteria for conservation easement selection).

The ability to cut down trees on land designated as a conservation easement is not expressly provided for in Chapter 790.¹¹⁰ However, a breakdown of the terminology is elucidating. To begin with, as is consistent with the flexibility of a conservation easement, the landowner is able to designate the goals of her land management, so long as it comports with the goals of the Program.¹¹¹ The language of Chapter 790 provides that the fee owner of the property must use her land consistent with “traditional forest uses, such as commodities production or habitat maintenance.”¹¹² The State Forest Stewardship Coordinating Committee defines traditional forest uses as “multiple use activities that provide various public benefits including forest products. . . .”¹¹³ Further, CDF’s approved conservation easement stipulations allow the landowner to harvest trees on a sustainable yield basis and even clear-cut¹¹⁴ up to forty acres.¹¹⁵ Thus, although not expressed in Chapter 790, traditional forest uses include the logging of trees. This means that a private landowner may simultaneously benefit from the financial incentives of creating a conservation easement while cutting down, for financial gain, the purported coveted trees, subject to CDF approval. In this light, clearly the overall purpose of Chapter 790 is to restrict development, which is seen as an irreversible threat to California’s long-term economic timber production compatible with environmental protection, and not to per se guard against the cutting of trees on private land.

VI. CONCLUSION

The purpose of Chapter 790 is to create incentives for the voluntary placement of private property into a conservation easement to conserve privately owned forest habitat.¹¹⁶ The importance and priority for such conservation measures are extensively documented.¹¹⁷ Government sanctioned conservation easements are a flexible cooperative of public and private interests—offering incentives to the forest landowner to forego unwanted development or parcel subdivisions while protecting our State’s valued wildlife and environmental resources for future generations.¹¹⁸ On the other hand, Chapter 790 also allows for the logging of trees standing in the conservation easement.¹¹⁹ Thus, the legislative intention to provide for “forestlands

110. *See id.* § 12220-12291 (enacted by Chapter 790) (lacking an express provision for cutting down trees on land designated as a conservation easement).

111. Hollingshead, *supra* note 8, at 322.

112. CAL. PUB. RES. CODE § 12251(e) (enacted by Chapter 790).

113. CFLP ASSESSMENT, *supra* note 4, at B2.

114. *See supra* note 26 (providing a definition of “clear-cut”).

115. *Id.* at F1, F8.

116. *See supra* Part I (explaining the goals of Chapter 790).

117. *See supra* text accompanying note 58 (listing Acts whose purpose and intent is to protect highly valued environmental resources).

118. *See supra* Part II.A (explaining that conservation easements were developed to overcome the shortcomings of common law land use devices).

119. *See supra* Part V (shedding light on the overall aims of Chapter 790).

and aquatic resource protection”¹²⁰ may be euphemistic in this respect. Nevertheless, Chapter 790 has the capacity to provide redress for our State’s mounting forest resource depletion as it creates a notch with which to build upon for more significant future forest conservation efforts. Until then, however, it is doubtful that Chapter 790 will hearten the brazen Julia Butterfly Hill to stay on the ground.

120. CAL. PUB. RES. CODE § 12211 (enacted by Chapter 790).

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