Denver Law Review

Volume 73
Issue 4 *Symposium - The New Private Law*

Article 9

January 2021

Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future

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PUBLIC GOOD AND PRIVATE MAGIC IN THE LAW OF LAND TRUSTS AND CONSERVATION EASEMENTS: A HAPPY PRESENT AND A TROUBLED FUTURE

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I. INTRODUCTION

In October 1995, I joined about a thousand other people—predominately young and professional, in shorts and pile jackets—in an ornate auditorium on the California coast.[1] We listened politely as politicians—aging, in suits and ties, identifying themselves with "the radical middle"—praised the achievements of the "land trust movement." The numbers, enthusiasm, and experience of my companions provided much better evidence of the achievements of that movement than the politicians could. It is, currently, the most active and forward-looking element in the national effort for environmental preservation. The laws that provide the framework for the national environmental regulatory structure remain in a perilous and apparently perpetual reauthorization holding pattern in Congress.[2] State legislatures appear unwilling to undertake environmental protection where the federal government no longer will. But someone establishes a new "private" land trust, committed to scenic, historic, or ecological preservation on an average of once a week.[3]

The land trust movement furthers the public good[4] in ways that other

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1. Land Trust Alliance National Rally '95, Asilomar Conference Center, Pacific Grove California, Oct. 15-18, 1995.

2. 25 ENVTL. L. REP. (Envtl. L. Inst.) 10104 (discussing Congress's attempt to reauthorize the Endangered Species Act); 25 ENVTL. L. REP. (Envtl. L. Inst.) 10089 (discussing Congress's failure to reauthorize the Resource Conservation and Recovery Act); 24 ENVTL. L. REP. (Envtl. L. Inst.) 10262 (discussing Congress's attempt to reauthorize CERCLA); 24 ENVTL. L. REP. (Envtl. L. Inst.) 10489 (discussing Congress's failure to reauthorize the Clean Water Act).

3. LAND TRUST ALLIANCE, 1995 NATIONAL DIRECTORY OF LAND TRUSTS at vi (1995) [hereinafter DIRECTORY] (Land Trust Alliance 1994 Land Trust Survey results).

4. For purposes of this essay, I assume that piecemeal preservation of open space by private transaction is in the public interest. Some reviewers of this essay questioned the public value of land trusts because the land trust preservation model does not require comprehensive planning. In

more "public" aspects of the environmental protection movement cannot because it possesses a "private magic." I use the word "magic" for its two meanings: "the art of producing illusions . . . by the use of sleight of hand" and "the art of producing a desired effect or result through . . . techniques that presumably assure human control over supernatural agencies."[5] I leave to the reader whether the "private magic" of land trusts and conservation easements is simply legal sleight of hand or the "operation of some occult controlling principle of nature."[6]

The magic of the land trust movement has something to do with its apparent contradictions. The movement is "radical" because it regularly endeavors to do what traditional environmental protection rarely dares to do—"lock-up" private land. Through donation and purchase, land trusts transform the property rights associated with the land they protect, prohibiting or severely limiting, in perpetuity, the possibility of environmentally damaging development. Many of my companions in California had experience in more traditional and "public" elements of the environmental movement. In land trusts and conservation easements, they have found powerful tools to pursue goals they have pursued before in other ways. At the same time, the movement achieves its goals primarily through private, voluntary land transactions, among the most ancient and settled of all means of legal interaction and among the least "public" or controversial. This draws to its ranks activists distrustful of government,[7] and politicians fond of words like "middle."

At present, the land trust movement seems a successful combination of public and private. Its apparent success provides a useful model for achieving legislated goals in a privatized world. However, some dark omens cloud the future of the movement and, absent some changes in the legal structures that support it, time may erode the happy congruity between public and private at the cost of the environment and the public good. The legal community associated with the land trust movement should address these potential problems. However, in doing so, we must be careful to avoid destroying the private magic that gives the movement its special power.

Land trusts do many things: they purchase land outright; they purchase land for sale to government agencies; they participate in the development and application of every conceivable manner of land use restriction, public or private. I will focus my attention on one specific type of transaction which, I believe, embodies more than any other the movement's happy present and potentially troubled future: acquisition and maintenance of conservation easements by private land trusts. First, I will describe some general legal aspects

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fact, land trust land purchases can compliment comprehensive land use planning. The Internal Revenue Code governing the income tax deductibility of donations to land trusts require that "the preservation of open space be pursuant to a clearly delineated Federal, state or local governmental conservation policy." I.R.C. § 170(h)(4)(A)(iii) (1994). The regulations interpreting that provision explicitly govern designations of scenic areas. Treas. Reg. § 1.170A-14(d) (1994).

5. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1155 (2d ed. 1983).

6. 6 OXFORD ENGLISH DICTIONARY 24 (1933).

7. Telephone Interview with Reeves Brown, Colorado Cattleman's Land Trust (May 24, 1996).

of both conservation easements and the land trusts which employ them.[8] I will then use a single hypothetical conservation easement transaction to demonstrate the complex and productive interrelationship between public goals and private.[9] I will use the same hypothetical transaction to identify some of the dangers the future may hold.[10] Finally, I will ponder briefly possible responses to these dangers and how they might affect the private magic of the land trust movement.[11]

I should say, at the outset, that I do not believe that the legal problems the future holds for land trusts are insurmountable. My companions in California are not wasting their time. However, the positive politics of the movement serve to obscure problems, which, if left unaddressed, may lead to dire results. Those who have ruminated about the legal ramifications of the land trust movement in the past have been concerned about the movement's place in the law of property,[12] the tax benefits it can provide,[13] and its potential positive effects on American farmers.[14] I am an environmental lawyer concerned about biological diversity. I *want* land trusts and conservation easements to function and to preserve environmental values for "biologically significant"[15] periods of time. Perversely, this may make my characterizations of the problems they face more alarming than others have been.

II. THE LAND TRUST/CONSERVATION EASEMENT BOOM

A. *What Is a Conservation Easement?*

The land trusts represented at the California conference sometimes preserve land by buying it or receiving it as a donation, transforming property relations only by transferring the "bundle of rights" we understand as land ownership[16] into the hands of an organization committed to biological or aesthetic preservation.[17] However, their favored tool is not acquisition of the fee, but instead, the "conservation easement."

By granting a conservation easement, the owner of land splits that bundle of rights, reserving the rights to engage in certain activities (for example:

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See, e.g.*, Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).
13. *See, e.g.*, Mathew J. Keifer, *Creating Additional Tax Benefits from Qualified Conservation Easements*, 15 REAL EST. L.J. 136 (1986).
14. *See, e.g.*, Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 ANN. SURV. AM. L. 235 (1994).
15. *See generally* KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993).
16. For an excellent and recent treatment of this concept, see J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994).
17. *See infra* notes 47-61 and accompanying text.

hunting, farming, building a cabin) to the grantor—holder of the underlying possessory interest—and ceding the right to prevent the grantor or anyone else from engaging in another range of activities (for example: building casinos, housing developments, clearcutting timber, or filling swamps) to another party, the grantee. A conservation easement may prohibit all ground disturbing activity on a piece of wild land or prohibit only activities that will interfere with particular things (e.g., elk calving). Conservation easements may preserve land as farmland or preserve a "working forest" by allowing only certain types and a certain frequency of logging. The terms of the restrictions are usually set out in detail in the conservation easement itself.[18]

1. Not an Easement at All

Conservation easements are statutory creations. They do not fit easily into any common law category for real property interests. They are creatures of legislation and recent legislation at that. The Colorado Conservation Easement Statute was adopted in 1976,[19] five years before the National Conference of Commissioners on Uniform State Laws approved the current Uniform Conservation Easement Act. Although almost all states now have some form of conservation easement or restriction legislation, the oldest identifiable "conservation easement" statutes were adopted in Massachusetts in 1956[20] and California in 1959.[21] Significantly, both statutes originally only authorized *government* entities to hold the created interests.[22] Modern conservation easement statutes allow private land trusts and other organizations to hold the easements.[23]

A conservation easement is not an "easement" in the traditional sense.[24] Before the statutory coming of conservation easements, the common law system of servitudes tolerated both negative easements and easements in gross, but under limited circumstances.[25] These circumstances did not include what

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18. The Land Trust Alliance Model Conservation Easement uses a tripartite structure identifying overarching "conservation values" the easement should protect, specific reserved rights identifying what activities the holder of the underlying fee interest may engage in, and specific "prohibited uses" identifying activities that the fee holder may not engage in. JANET DIEHL & THOMAS BARRETT, THE CONSERVATION EASEMENT HANDBOOK 147-65 (1988). Iowa requires that the conservation easement "clearly state its extent and purpose." IOWA CODE § 457A.4 (1993).

19. Act approved May 13, 1976, 1976 Colo. Sess. Laws 750-752 (codified as amended at COLO. REV. STAT. §§ 38-30.5-101 to -111 (1994)); *see* Comment, *Open Space Procurement Under Colorado's Scenic Easement Law*, 60 U. COLO. L. REV. 383 (1989).

20. 1956 Mass. Acts, ch. 631; *see* Comment, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 642 (1960) [hereinafter *Preservation*].

21. The Scenic Easement Deed Act of 1959, CAL. GOV'T CODE §§ 6950-6954 (1959). Some argue that California passed the first open space easement legislation in the United States. THOMAS S. BARRETT & PUTNAM LIVERMORE, THE CONSERVATION EASEMENT IN CALIFORNIA 34 (1983).

22. *See Preservation*, *supra* note 20, at 638.

23. *See infra* notes 47-61 and accompanying text.

24. Korngold, *supra* note 12, at 477-78.

25. The common law preferred neither easements in gross nor negative easements. *See* Weil v. Hill, 69 So. 438, 440 (Ala. 1915) ("[T]he court will not presume that [the easement] was intended to be in gross, or personal to the grantor, if it can fairly be construed as appurtenant to his land . . . ."); Wing v. Forest Lawn Cemetery Ass'n, 101 P.2d 1099, 1103 (Cal. 1940) ("[A]ny provisions of an instrument creating or claimed to create [a negative easement] will be strictly con-

we now call conservation easements. Traditionally, negative easements in the United States were limited to easements for light, air, support, or the flow of artificial streams.[26] A negative easement protected the interests of one property owner by restricting the owner of nearby property from exercising an otherwise valid property right.[27] On the other hand, by definition, an easement in gross creates a personal right in an individual, a right unassociated with ownership of land.[28] Easements in gross were generally restricted to commercial affirmative functions like the right to erect billboards or to maintain sewer lines and railway corridors.[29] Negative easements were by their nature appurtenant.[30] Easements in gross were by their nature affirmative. Negative easements in gross were beyond the contemplation of the traditional easement categories.[31]

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strued, any doubt being resolved in favor of the free use of the land."); Atlantic Mills v. New York Cent. R. Co., 223 N.Y.S. 206, 211 (App. Div. 1927) ("It is a well-established principle of law that an easement in gross will not be presumed, where it can fairly be construed to be appurtenant to land."); McWhorter v. City of Jacksonville, 694 S.W.2d 182, 184 (Tex. Ct. App. 1985) ("It is the rule that an easement in gross is not favored, and an easement is never presumed to be in gross, or a personal right, when it can be fairly construed to be appurtenant or attached to some other estate."); Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 173 P. 508, 511 (Wash. 1918) ("It is well settled in law that easements in gross are not favored; and a very strong presumption exists in favor of construing easements as appurtenant.").

26. JESSE DUKEMINIER & JAMES KRIER, PROPERTY 851 (3d ed. 1993).

27. Clements v. Taylor, 184 S.W.2d 485, 487-88 (Tex. Ct. App. 1944). *Accord* Uihlein v. Matthews, 64 N.E. 792, 793 (N.Y. 1902).

28. *See* Ratino v. Hart, 424 S.E.2d 753, 756 (W.Va. 1992) ("An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal . . . ."); *see also* Stiefel v. Lindermann, 638 A.2d 642, 647 n.4 (Conn. App. Ct. 1994) ("An easement in gross belongs to the owner of it apart from his ownership or possession of any specific land and, in contrast to an easement appurtenant, its ownership is personal to its owners.").

29. Alan D. Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109 (1986); Korngold, *supra* note 12.

30. *See* Miller v. Babb, 263 S.W. 253, 254 (Tex. Ct. App. 1924).

31. The comments accompanying the Uniform Conservation Easement Act contain a justification for the use of the term "conservation easement":

> The interests protected by the Act are termed "easements." The terminology reflects a rejection of two alternatives suggested in existing state acts dealing with non-possessory conservation and preservation interests. The first removes the common law disabilities associated with covenants, real and equitable servitudes in addition to those associated with easements. . . . The second approach seeks to create a novel additional interest which, although unknown to the common law, is, in some ill-defined sense, a statutorily modified amalgam of the three traditional common law interests.
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> The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine.

UNIF. CONSERV. EASEMENT ACT § 1 cmt. (1981). While defensible in practical terms, this justification does not make much doctrinal sense. In an era in which the majority of newly constructed housing is subject to restrictive covenants, it is hard to assert that "an easement is the basic [one size fits all] less-than-fee interest." A conservation easement is in fact the "novel additional interest" which the drafters of the Uniform law fear will create "severe confusion." *See* Korngold, *supra* note 12, at 439.

2. Use Restrictions on a Land Use Restriction

State conservation easement statutes generally limit the purposes for which such novel interests may be created. The Uniform Conservation Easement Act, approved in 1981 and adopted in sixteen states[32] and the District of Columbia,[33] provides an example in its definition of "conservation easement":

> 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.[34]

The "purposes of which include" phrasing in the Uniform Act is a relatively modest restriction on the intent of the parties at the time of the transaction. California law provides that a "'conservation easement' means any limitation in a deed, will or other instrument in the form of an easement . . . binding upon successive owners . . . *the purpose of which is* to retain land predominantly in its natural, scenic, historic, agricultural, forested, or open space condition."[35] The laws of Delaware, Hawaii, and New York contain similar unqualified "purpose" requirements.[36] On the other hand, the laws of Colorado, Massachusetts, and New Jersey require only that the restriction be "appropriate" for maintaining a legislative purpose.[37]

In addition to purpose restrictions, some states list specific acts that the grantor may prohibit.[38] Delaware not only enumerates what may be prohibited, it specifically provides what may not be prohibited: the easement cannot prohibit the fee holder from allowing hunting, fishing, or other recreational activities on the land.[39] The Kentucky statute includes language forbidding certain restrictions affecting mining operations.[40]

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32. ALASKA STAT. §§ 34.17.010-.060 (1989); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (1985); GA. CODE ANN. §§ 44-10-1 to -8 (Michie 1992); IDAHO CODE §§ 55-2101 to -2109 (1988); IND. CODE ANN. §§ 32-5-2.6-1 to -7 (West 1984); KAN. STAT. ANN. §§ 58-3810 to -3817 (1992); KY. REV. STAT. ANN. §§ 382.800-.860 (Baldwin 1988); ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-B (West 1985); MINN. STAT. ANN. §§ 84C.01-.05 (West 1985); MISS. CODE ANN. §§ 89-19-1 to -15 (1986); NEV. REV. STAT. §§ 111.390-.400 (1983); N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1991); S.C. CODE ANN. §§ 27-8-10 to -80 (Law. Co-op. 1991); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (West 1983); VA. CODE ANN. 1950, §§ 10.1-1009 to -1016 (Michie 1988); WIS. STAT. ANN. § 700.40 (West 1981).

33. D.C. CODE ANN. §§ 45-2601 to -2605 (1986).

34. UNIF. CONSERV. EASEMENT ACT § 1(1) (1981) (emphasis added).

35. CAL. CIV. CODE § 815.1 (1988) (emphasis added).

36. DEL. CODE ANN. tit. 7, § 6901(a) (1991); HAW. REV. STAT. § 198-1 (1989); N.Y. ENVTL. CONSERV. LAW § 49-0303(1) (McKinney 1989).

37. COLO. REV. STAT. § 38-30.5-102 (West 1990); MASS. GEN. L. ch. 184, § 31 (1995); N.J. REV. STAT. ANN. § 13:8B-2(b) (West 1991).

38. DEL. CODE ANN. tit. 7, § 6901(a) (1991) (providing a non-exclusive list). *Accord* FLA. STAT. ch. 704.06 (1988) (providing an exclusive list); MONT. CODE ANN. § 76-6-203 (1995) (providing an exclusive list).

39. DEL. CODE ANN. tit. 7, § 6901(c).

40. Specifically, the Kentucky statute prohibits the transfer of a conservation easement on property in which there are outstanding subsurface rights, unless written consent is acquired from

To take advantage of federal legislation allowing a charitable income tax deduction for "qualified conservation contributions,"[41] discussed below,[42] most conservation easements are created "in perpetuity." Some states require perpetual conservation easements.[43] Most state conservation easement statutes provide that conservation easements are to be unlimited in duration unless otherwise stated in the instrument itself.[44] Kansas, on the other hand, requires that a conservation easement be limited to the lifetime of the grantor unless otherwise stated in the conservation easement.[45] Many statutes specifically provide that conservation easements can be released or modified like any other easement.[46]

B. *What Is a Land Trust?*

A land trust is either a governmental entity or a private non-profit corporation, association, or trust committed to biological, historical, or aesthetic preservation. Not all private land trusts hold conservation easements, but most

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the owners of the subsurface rights first. KY. REV. STAT. ANN. § 382.850(1) (Baldwin 1988). Furthermore, the easement cannot interfere with coal mining operations on adjacent or surrounding properties. KY. REV. STAT. ANN. § 382.850(2).

41. 26 U.S.C. § 170(h) (1994).

42. *See infra* notes 68-86 and accompanying text.

43. California and Hawaii both require that conservation easements be perpetual. CAL. CIV. CODE § 815.2(b) (West 1992); HAW. REV. STAT. § 198-2(b).

44. *See, e.g.*, ALASKA STAT. § 34.17.010(c); ARIZ. REV. STAT. ANN. § 33-272(C); ARK. CODE ANN. § 15-20-406 (Michie 1994); COLO. REV. STAT. § 38-30.5-103(3); IDAHO CODE § 55-2102(3); TEX. NAT. RES. CODE ANN. § 183.002(c).

45. KAN. STAT. ANN. § 58-3811(d). Apparently, the only way Kansans could get a conservation easement bill passed was to include this concession supported by various interests groups. However, Kansas Land Trust, the lone listed land trust operating in Kansas, will only accept conservation easements if they are perpetual. Telephone Interview with Joyce A. Wolf, Executive Director, Kansas Land Trust (Apr. 19, 1996).

46. *See, e.g.*, ARK. CODE ANN. § 15-20-404; GA. CODE ANN. § 44-10-3(a); IDAHO CODE § 55-2102(1); IND. CODE ANN. § 32-5-5.6-2(a); KAN. STAT. ANN. § 58-3811(b); ME. REV. STAT. ANN. tit. 33, § 477(1); MINN. STAT. § 84C.02(a); NEV. REV. STAT. § 111.420(1); N.M. STAT. ANN. § 47-12-3; S.C. CODE ANN. § 27-8-30; S.D. CODIFIED LAWS ANN. § 1-19B-57; TEX. NAT. RES. CODE ANN. § 183.002(a); VA. CODE ANN. § 10.1-1014; W. VA. CODE § 20-12-4(a) (1995); WIS. STAT. ANN. § 700.40(2). In addition to release, Colorado allows a conservation easement to be terminated, extinguished, or abandoned by merger with the fee interest. COLO. REV. STAT. § 38-30.5-107. In Iowa, a conservation easement may be released by the holder or changed circumstances can render an easement no longer beneficial to the public. IOWA CODE § 457A.2(1) (1996). In Kansas, the grantor is permitted to have the easement revoked at her request. KAN. STAT. ANN. § 58-3811(d). In Maine, a change in circumstances may justify a termination of the conservation easement. ME. REV. STAT. ANN. tit. 33, § 477(3)(B). Montana allows open-space land to be converted under certain circumstances, but requires that it be replaced with other property. MONT. CODE ANN. § 76-6-107 (1995). Nebraska allows release of a conservation easement with the approval of the governing body that originally approved the conservation easement. NEB. REV. STAT. § 76-2,113 (1990). In New Jersey, the holder may release a conservation easement, if allowed by the terms of the easement, only after a public hearing. N.J. REV. STAT. § 13:8B-5. New York allows conservation easements to be released if allowed by the instrument creating the easement and extinguished if a court finds it to be of no actual benefit to the person seeking enforcement. N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 1989); N.Y. REAL PROP. ACTS. LAW § 1951. In Rhode Island, a holder may release a conservation easement subject to the terms of the easement itself. R.I. GEN. LAWS § 34-39-5 (1995). Utah also allows for termination by release, abandonment, merger, nonrenewal, specific conditions set out in the easement, or any other lawful manner. UTAH CODE ANN. § 57-18-5 (1994). Mississippi, on the other hand, specifies that merger does not occur if the fee holder is also the easement holder. MISS. CODE ANN. § 89-19-5.

do.[47] Accordingly, most private land trusts must conform to the requirements for easement holders imposed by the conservation easement statutes in the states in which they operate. Two sets of legal rules, one state and one federal, define the characteristics to which private land trusts conform.

First, state conservation easement statutes, discussed above, generally allow only two types of entities to hold development rights for someone else's land for purposes of preservation. Again, the Uniform Conservation Easement Act provides an example:

> (2) "Holder" [of a Conservation Easement] means:
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> (i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or
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> (ii) *a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property . . . .*[48]

The states that have adopted versions of this uniform law all contain some similar limitation on potential private "holders" of conservation easements. Alaska and Virginia explicitly require that private "holders" be non-profit entities for purposes of federal taxation.[49]

California, although not a Uniform Act state, places similar limitations on potential easement holders.[50] Colorado, also not a Uniform Act state, requires "a charitable organization" exempt under section 501(c)(3) of the "Internal Revenue Code of 1954."[51] Massachusetts is more restrictive still, requiring the purposes of the "charitable corporation or trust" to conform with the specific purposes of the type of restriction: conservation, agricultural preservation, watershed preservation, or affordable housing.[52]

Federal regulations provide the remaining characteristics of private land trusts. Because much of the grantors' impetus for land trust preservation comes from the charitable federal income tax deductions allowed for "qualified conservation contributions" to "qualified organizations,"[53] private land trusts must generally be "qualified organizations." Internal Revenue Service Code § 170(h)(3) defines qualified organizations to include most § 501(c)(3) charitable organizations that receive substantial public support and almost any governmental entity.[54] Private land trusts must satisfy the requirements for private "qualified" organizations. Establishing necessary tax-exempt status requires some specific structure, filing, and reporting.[55] To maintain tax-exempt

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47. DIRECTORY, *supra* note 3, at vii (1995) (Land Trust Alliance 1994 survey indicated that 54% of land trusts use donated conservation easements and 13% purchase easements).

48. UNIF. CONSERV. EASEMENT ACT § 1(2) (1981) (emphasis added).

49. ARK. CODE ANN. § 34.17.060(2)(3); VA. CODE ANN. § 10.1-1009.

50. CAL. CIV. CODE § 815.3(a),

51. COLO. REV. STAT. § 38-30.5-104(2).

52. MASS. GEN. L. ch. 184 § 31-32.

53. I.R.C. § 170(h) (1995).

54. I.R.C. § 170(h)(3) (1995). The regulations interpreting this provision also require that a "qualified organization" have "a commitment to protect the conservation purposes of the donation and have the resources to enforce the restriction." Treas. Reg. § 1.170A-14(c)(1) (1994).

55. LAND TRUST ALLIANCE, THE STANDARDS AND PRACTICES GUIDEBOOK, AN OPERATING MANUAL FOR LAND TRUSTS, Standard 4.

status, private land trusts must avoid any action which inures to the benefit of any private shareholder or individual, avoid political campaign activity, not engage in "substantial" lobbying, and meet the "public support test" (which requires that a substantial part of the organization's support comes from the general public).[56]

While significant, these two sets of rules do not dictate the specific character of individual private land trusts. Land trusts range in size from the relatively vast Nature Conservancy[57] and Trust for Public Lands,[58] to extremely small organizations with minimal budgets and no paid staff. Land trusts may operate on a national scale or be entirely local. They may endeavor to protect a range of land types and uses, or they may be interest-specific, like the Colorado Cattlemen's Agricultural Land Trust.

Private land trusts are older than conservation easements, but not much older. Founded in 1891, Massachusetts' Trustees of Reservations is probably the oldest private land trust in the United States.[59] Before 1950 there were less than forty land trusts in the United States.[60] There are now 1,095 private land trusts in the country.[61]

C. *The Boom*

1. Advantages of Land Trust/Conservation Easement Preservation

The enthusiasm for the land trust movement extends beyond the politicians at the California conference. With the exception of a few dissenting voices,[62] it is almost universal. Environmental preservation by land trust offers significant advantages over environmental protection through direct public regulation.

First, environmental preservation by land trusts encourages the creation of a more site-specific environmental protection regime. While regulation lends itself to categorical protection of all wetlands (however defined) from all

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56. *Id.* at 4-8, 4-9.

57. The Nature Conservancy has offices in every state and some foreign countries. For a map of locations, see http://www:tnc.org/infield/map.html.

58. Twenty-two offices at last count; *see* http://www.igc.apc.org/tpl.

59. Randee G. Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039, 1042 (1980).

60. Dana & Ramsey, *supra* note 12, at 5.

61. DIRECTORY, *supra* note 3, at vi.

62. Some critics charge that larger land trusts, such as The Nature Conservancy, "exist to remove land or land rights from the ordinary marketplace." Tom Holt, *Q: Are Nonprofit Land Trusts Taking Advantage of the Public's Trust?*, WASH. TIMES, Feb. 5, 1996, at 22. Taking land from the marketplace "removes the land from local tax roles and limits job growth." Malcolm Howard, *U.S.-Environment: Land Trusts Protect, Threaten Country Lifestyles*, Inter Press Service, Feb. 8, 1996, *available in* LEXIS, News library, Current file. Groups such as The Nature Conservancy are also able to stop larger housing and industrial development by acquiring development rights in strategic areas. Holt, *supra*, at 22. Property rights advocates also criticize The Nature Conservancy for buying land or land rights and immediately selling them to government agencies for a profit. Aside from being labeled as "profit-motivated," The Nature Conservancy is also chastised for avoiding accountability. *Id.* The stated purpose for this practice is that the government cannot operate as freely as a land trust can, so the government uses the land trust as a "middleman." *Id.*

significant disturbance (however defined), conservation easements and land trust acquisition lend themselves to protection of particular wetlands with particular boundaries in particular places. Because every wetland—like every other piece of land—is different, a more site-specific regulatory regime can, in theory, do a better job of protection.

Second, and more intriguing, for a law professor at least, is the capacity of conservation easements to alter the nature of land tenure itself. During the 1970s and 1980s, protection of the environment affected the nature of land tenure through public regulation. The rights associated with uses of land remained conceptually unchanged, but were increasingly subject to "burdens" imposed by local, state, and federal regulation for environmental protection. A land owner remained sole owner of her land, but could not fill wetlands upon the land, destroy endangered species' nesting habitat, emit large quantities of noxious air pollutants, or build more than a certain number of houses per acre. The various elements of this process of land regulation have been discussed at length elsewhere.

The conceptual structure of burdensome regulation upon property rights has contributed to the current backlash against environmental protection because it fosters a sense of injury among landowners. Accustomed to our conceptual structure of legal rights, they perceive that they have "rights" that they cannot exercise.

Conservation easements avoid this by creating property rights in conservation. The holders of conservation easements possess, to a greater or lesser degree, the right to prevent development on the land subject to the easement. They may prevent, just as a regulator might, such environmentally harmful activities as: the filling of wetlands, destruction of species' nesting habitat, construction of factories that might emit noxious air pollutants, and construction of additional structures. Legally, however, we do not perceive this protection as an imposition but rather an exercise of rights. The fee holder does not have rights she cannot exercise; those rights have been granted away with the conservation easement.

> Property . . . includes a normative "deep structure" that may be of use in an environmental ethic. The norms that lurk in property go beyond the wonderous power of exclusion that so awed Blackstone in the case of individual property. They include as well the qualities of restraint and responsibility that characterize common or shared property.[63]

The express mutual interests in the same land created by severing the rights associated with a conservation easement from the rights associated with the underlying possessory interest crystalize these often hidden norms of responsibility and restraint in our property system.

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63. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 28 (1994).

2. Growth in Land Trust/Conservation Easement Preservation

According to a 1994 survey conducted by the Land Trust Alliance (LTA), there are now more than 1,095 private land trusts in the United States, an increase of 23% over four years.[64] These trusts have protected roughly 4,029,000 acres of land. Of that acreage, 990,000 acres were acquired and then transferred to a third party (generally a government agency), 535,000 acres are owned outright by land trusts, and 740,000 acres are protected by conservation easements held by land trusts. The rest of the four million acres are protected in ways unidentified by the LTA survey.[65]

These numbers may seem small compared to, say, the 187 million acres of the National Forest System,[66] until one realizes that this is all land someone felt was worth protecting from development and made the effort to protect. Therefore, unlike the National Forests, National Parks, and National Wildlife Refuges, it includes little or no land above 9,000 feet, north of the 60th parallel, under glaciers or rock slides, or with slopes that cannot be negotiated without ropes. Private land trusts also tend to be concentrated in the more populous parts of the country: New England (36%), the Mid-Atlantic region (18%), and the West Coast (16%).[67] Most significantly, the rapid growth of land trusts suggests that the acreage of protected land will multiply in years to come.

III. A "PRIVATE" TRANSACTION

The mixture of public and private in a land trust conservation easement transaction stands out more clearly when presented in a factual context. While I could make the points below using a variety of specific transactions which have taken place in Colorado in recent years, it is simpler to use a hypothetical transaction that draws together the elements of many transactions in a simplified form.

A. *The First Generation*

Laura Deadlock wakes up one morning and realizes that she is not as young as she used to be. Seventy years of raising cattle on the Deadlock ranch and fighting with the federal government about public land grazing have taken their toll. She loves her family and hopes they will stay in the ranching business. She loves her Colorado mountain ranch and the idea of seeing it carpeted with condominiums fills her with dismay. She owns a thousand acres, worth $1 million[68] in a real estate market inflated by developers and perhaps half

64. DIRECTORY, *supra* note 3, at vi.

65. *Id.*

66. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (1996).

67. *Id.*

68. This figure is probably unrealistically *low*. Telephone Interview with William Silberstein, Isaacson, Rosenbaum & Levy, P.C. (June 27, 1996).

that much ($500,000) as a going concern. On a clear night, and there are many, she can see the lights of the nearby ski area.

Laura has an honest son, Martin, who works at a university a few hours drive away. She would be happy to leave him the ranch and he would be happy to have it. However, Laura is aware of the federal estate tax and knows that if she leaves Martin the ranch in her will there may be more estate tax to pay than he can afford on his university salary. Federal estate tax applies to estates valued at $600,000 or more.[69] Effective rates start at 37% and escalate quickly.[70] Assuming Laura had no other property, her estate would incur roughly $153,000 in tax payable within nine months of her death.[71] Martin's only option would be to sell at least a part of the ranch in a market dominated by ski condominium developers.[72]

In a recent issue of *High Country News*,[73] Laura read an article about ranchers in another part of the state "preserving" their ranch land by granting conservation easements to public interest land trusts.[74] She understood from the article that granting such an "easement" might technically reduce the value of the land, thereby limiting or eliminating the estate tax burden. Laura calls someone she knows in town who puts her in touch with the president of the Local Area Land Trust. A few days later the land trust president drives out and gives Laura the good news.

First, if she grants the land trust an easement the land will be preserved as in the easement document. Any restrictions created in the easement document will "run with the land"—bind future owners. Although not a traditional easement, the conservation easement does share the single most important characteristic of all common law servitudes—it burdens future holders of the "servient estate." If Laura wishes, the easement can be "perpetual," protecting the land forever.

Second, by donating the easement to the land trust Laura loses nothing she values (just development rights) and gains a potentially large charitable tax deduction. Section 170(h), mentioned above, permits an income tax deduction for a "qualified conservation contribution" to a "qualified organization." The qualified contribution can include a "qualified real property interest" if the contribution is made for "conservation purposes."[75] A qualified real property

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69. I.R.C. §§ 2001(c), 2010 (1994).

70. I.R.C. § 2001(e) (1994).

71. *Id.* Although there is Colorado estate tax due also, *see* COLO. REV. STAT. § 39-23.5102 (1990), it would not increase the total estate tax burden because the Colorado payment would be credited against the federal estate tax. I.R.C. § 2011 (1995).

72. I.R.C. § 2032 may permit "a special use valuation" of land like Laura's at its current use value under some circumstances. The maximum permitted reduction is $750,000. It might arguably apply in this case, but would not significantly affect other similar cases involving higher, but still realistic, values.

73. *Saving the Ranch*, HIGH COUNTRY NEWS, Nov. 27, 1995.

74. Hal Clifford, *Can Private Conservation Stave Off Ski-Town Sprawl*, HIGH COUNTRY NEWS, Nov. 27, 1995, at 1, 10.

75. Conservation purposes include: (1) "the preservation of land areas for outdoor recreation by, or the education of, the general public"; (2) "the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem"; (3) "the preservation of certain open space (including farmland and forest land)"; and (4) "the preservation of an historically important land area or

interest can contain "a restriction (granted in perpetuity) on the use which may be made of the real property."[76] Such restrictions include conservation easements. The value of the charitable deduction will be the "value" of the restriction. The value of the restriction is generally the difference between the value of the land unburdened by the restriction and its value subject to the restriction.[77]

In Laura's case, her land is worth $500,000 as a cattle ranch and $1 million for development. If she grants away all development rights not associated with maintaining her ranching operation, she can assert that she has reduced the value of her land by one-half ($500,000). Under the federal tax code, she may deduct the lesser of the value of the easement or 30% of her adjusted gross income each year for a total of six years until the value of the gift is depleted.[78] Unless Laura has lots of income from other sources, she is unlikely to be able to deduct the entire value of the donated easement, even over six years. Nonetheless, if she meets all the requirements, the deduction is likely to save her a great deal of money.

If Laura needs cash, the land trust may be able to find some and enter into a "bargain sale" whereby Laura sells the easement to the trust at a price below its "fair market value." She gets a charitable income tax deduction for the difference between fair market value and the sale price, and some money. The availability of money to purchase Laura's easement may not be a function of the wealth of the land trust's backers but rather a function of the fact that a government agency (federal, state, or local) may be a potential future purchaser. Many land trusts engage in what they call "preacquisition" —purchasing development rights from private parties and then turning them over to the government for money.[79] This enhances their financial prospects and decreases the amount of time and money they must expend monitoring and enforcing easements.

Laura's feelings about government may prevent her from entering into any transaction through which a government entity will eventually get an interest in her land.[80] Even so, she may still be the beneficiary of another form of government market participation. State funding organizations—the State Board of the Great Outdoors Colorado Trust Fund in Colorado—may directly provide the Local Area Land Trust with funds to purchase an easement on the Dead-

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a certified historic structure." Treas. Reg. § 1.170A-14(d) (as amended in 1994). Each of these four purposes is discussed at greater length in § 1.170A-14(d).

76. The Internal Revenue Service regulations define "perpetual conservation restriction" as "a restriction granted *in perpetuity* on the use which may be made of real property—including, an easement or other interest in real property . . . ." Treas. Reg. § 1.170A-14(b)(2) (emphasis added).

77. Keifer, *supra* note 13, at 136.

78. I.R.C. § 170(b)(1)(B), (D) (1995) and I.R.C. § 58 (1994) (if Laura dies before the end of the six years, the deduction dies with her, but most of us are optimists about such things).

79. EVE ENDICOTT, LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS 17-27 (1993).

80. *Id.* at 39-40 ("It should be said, however, that some landowners will never accept government ownership of their land.").

lock Ranch. As of 1993, at least thirteen states had such direct funding mechanisms in place.[81]

Third, by donating the easement, Laura effectively reduces the value of her land, thereby sheltering her estate from federal estate tax and, perhaps, local property tax. Colorado's conservation easement statute specifically provides:

> Conservation easements in gross shall be subject to assessment, taxation, or exemption from taxation in accordance with general laws applicable to the assessment and taxation of interests in real property. . . . Conservation easements in gross shall be assessed, however, with due regard to the restricted uses to which the property may be devoted.[82]

Fourth, the arrangement will be a private transaction between Laura and the Local Area Land Trust: no "red tape" or government approval required.[83] While the absence of the potential delay and expense often associated with government participation is relatively obvious and objective, there are other more subtle and subjective benefits associated with a private transaction. Laura, as a rancher, familiar and unhappy with federal range control, may place a premium on the absence of government from her preservation deal. Having lived most of her life in the area, she may also place an additional premium on the local nature of the transaction. Chances are good that the Local Area Land Trust is a small organization concerned only with a small area of the state and that its president is a volunteer. The 1994 Land Trust Alliance survey reveals that approximately one-half of the 1,000 odd land trusts in the United States have a budget of $10,000 a year or less, that 54% of the nation's land trusts have no paid staff, and that 21% have a part-time staff only.[84]

There is other news too. But it is probably not going to be bad news to Laura. As discussed above, the easement must be created for specific purposes

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81. *Id.* at 258-313.

82. COLO. REV. STAT. § 38-30.5-109 (1990). In Village of Ridgewood v. The Bolger Found., 517 A.2d 135 (N.J. 1986), the New Jersey Supreme Court recognized the principle that a taxpayer may reduce the value of her land and her property tax assessment by granting a conservation easement to a conservation organization.

83. A few states do require approval of conservation easements by local governments or government officials. Both Massachusetts and Nebraska require prior approval for any conservation easement. MASS. GEN. L. ch. 184, § 32 (1996); NEB. REV. STAT. § 76-2,112(3) (1995). The Nebraska approval requirement ensures the sanction of local planning commissions. The Lower Platte South Natural Resources District (NRD), which has undergone the Nebraska approval process on three occasions, has not encountered any problems with the approval process. Telephone Conversation with Dan Schulz, Lower Platte South Natural Resources Director (Apr. 24, 1996). This may be due to the fact that the properties on which the NRD holds conservation easements are not near any developed land. In Montana, the intended holder must present the proposed conveyance to the local planning authority for review, but their comments are not binding, merely advisory. MONT. CODE ANN. § 76-6-206 (1995). For land to be placed in the Save Illinois Topsoil Program, the land must have a management plan approved by the soil and water conservation district of the county in which the land is located. ILL. REV. STAT. ch. 505, para. 35/1-3(f), 35/2-1 (1996). Oregon requires any *public* entity considering obtaining a conservation easement to hold a public hearing. OR. REV. STAT. § 271.735 (1987).

84. DIRECTORY, *supra* note 3, at vii.

or uses.[85] Technically, Laura cannot create the easement just to preserve the ranch for her son, Martin, or save herself taxes. However, because the side effects of preserving the ranch for natural or agricultural purposes will be to preserve the ranch for her son and save both income and estate taxes, she is unlikely to complain. If Laura wants her charitable income tax deduction, she must donate to either a government entity or qualified conservation organization as discussed above. She assumes the Local Area Land Trust qualifies. If she wants her deduction, she *must* grant the easement "in perpetuity."

Despite the constraints on the potential transaction, Laura has choices. She may drop the idea, give up the ranch, find some other way of paying estate tax, or find another tax shelter mechanism. She may give up the idea of the charitable deduction and grant a less-than-perpetual easement. She may grant a perpetual easement and get all the benefits. If she takes this third option, she presides over the happy marriage of public goals, as expressed in the legislation, and her private desires.

B. *What Governments Did*

If Laura grants an easement to the Local Area Land Trust, she will do so at her kitchen table or in the modest land trust office with no government representative present. The transaction will have the trappings, and "magic," of a private deal. Yet, governments have acted at three levels to make that deal both possible and attractive.

First, the state legislature fashioned the novel, negative, in gross, conservation easement—a real property right which Laura may grant—and authorized the land trust to hold it. In doing so, it delegated a traditional sovereign regulatory function to a private entity. The "negative easement in gross" created by the Deadlock transaction means no more or less than a right for the holder of the easement, private or public, to regulate activities on the servient estate. The holder of the conservation easement operates as a regulatory authority charged with enforcing the mandate set forth in the conservation easement document, just as a public agency operates as an authority charged with enforcing the mandate generated by the municipal zoning code or state wildlife law.

Second, the federal tax code provides Laura with both positive and negative incentives. Potential estate tax liability on the unburdened ranch creates a financial incentive to do something to shelter its value before she dies. The charitable income tax deduction provides motivation to convey

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85. Laura lives in Colorado where the law only requires a "Conservation easement in gross" to be:

> appropriate to the retaining or maintaining . . . land, water, or airspace, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, recreational, forest, or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.

See supra notes 32-46 and accompanying text; *see infra* notes 97-106 and accompanying text.

development rights in the form of a conservation easement. Potential local property tax and state income tax savings sweeten the pot.

Third, governments—federal, state, and local—have acted as market participants in the "open space" market. Their interest in open space significantly increases Laura's chances of getting cash compensation for her easement both by creating a secondary market in which the Local Area Land Trust may resell her easement and by providing direct funding to private entities to buy easements like Laura's. Government market participation also influences the cash value of Laura's easement by supporting the novel notion that the right to regulate someone else's land, nowhere near your own, has a significant value and the not-much-older idea that open space has value.

All this government influence does not taint the private transaction with the negatives associated with government. It does not destroy the private magic. Why not? From Laura's point of view the answer is relatively simple. While governments shape her motivations and offer her tools with which to achieve her goals—with a few exceptions—they neither make decisions for her nor do they review the decision she makes. The easement will be executed and recorded as a normal "private" land transaction, unquestioned unless challenged in court. Laura (or her accountant) will calculate the tax benefits she receives. While she may run a significant risk of an audit, the issues in the audit will probably be limited to quantitative matters, like the value of the easement conveyed.[86]

IV. THE LONG RUN

Unfortunately, after Laura dies and the ranch passes down to the next generation or the one after, perceptions of the nature of the transaction may change. Although government influence will diminish, the nature of the arrangement will seem more and more like the most despised aspect of government: regulation. The fact that the original transaction vested regulatory power in the Local Area Land Trust was unimportant to Laura because her wishes and the requirements of the regulatory regime were identical. However, as the ranch passes into other hands that regulatory power may take on much greater significance. The congruity of public good and private desire may disappear.

A. *The Third Generation*

Laura grants the easement to the Local Area Land Trust and leaves the burdened possessory estate—the Deadlock Ranch—to her son, Martin. During his tenure he respects her wishes as to the ranch's maintenance and, as a result, gets along well with the people from the Local Area Land Trust. Three decades pass. Martin dies and his daughter, Nora, receives the ranch through his will. By now, the potential economics of the ranch have changed. As a

86. *See, e.g.*, McLennan v. United States, 994 F.2d 839 (Fed. Cir. 1993); Schwab v. Commissioner, No. 5297-90, 1994 WL 223175 (U.S. Tax Ct. May 25, 1994).

result of continued declines in the price of beef, the ranch is still worth $500,000 for the uses allowed by the easement. Ranching is now less common in the area and a buyer who intends to ranch might be hard to find. However, if the easement did not exist, the ranch would be worth *$15 million* for development.

Nora is a moral person, but, like most of us, grew up in town. She has no interest in ranching and barely remembers her grandmother Deadlock. She cannot imagine any reasonable grandmother would have wanted to deprive her of a life of cultural enrichment and leisure just to preserve a thousand acres of scrubby ranchland. She goes to a lawyer and tells the lawyer that something has gone terribly wrong. The lawyer tells her the bad news. The easement that her grandmother granted to the Local Area Land Trust "runs with the land" and binds all future owners, regardless of their feelings on the subject. The restrictions are perpetual, and, therefore, neither Nora nor her heirs have any hope of outlasting them. While Laura had choices, Nora apparently has none.

In Nora's eyes the easement is privatized regulation. The voluntariness of the transaction, so important to her grandmother, is insignificant to Nora. The private nature of the transaction is cold comfort. The people who run the Local Area Land Trust, strangers to Nora, value "her" ranch as open space and wildlife habitat and can summon the government's assistance in the form of court action to ensure that Nora preserves the ranch for those purposes. More than anything else, it is the "public" law, in the form of legislation and courts, which separates Nora from her millions. The only quirk in the otherwise common regulatory situation is that the job of regulating the Deadlock Ranch has been delegated to a private entity.

B. *What Nora May Argue*

At this point, Nora may decide, however unwillingly, to abide by her grandmother's wishes. Or, she may decide to cast the dice, venturing a significant sum in litigation fees in an attempt to "break" the easement in the hope of recouping a much greater sum by selling or developing the unburdened ranch. Assume the die is cast, Nora returns to her lawyer and, suddenly, many of the elements which made the original transaction such a happy marriage of public and private now may aid in the frustration of the public goal.

1. Attacking the Holder

State conservation easement statutes require that a land trust be a "charitable" organization committed to the preservation of land. Nora may assert that the Local Area Land Trust is or was not. The Colorado statute and others like it explicitly define "charitable" status in terms of the federal tax code. As discussed above, the tax code requires that an organization pass a series of tests to qualify as a "charitable organization."[87] Thirty years have passed. The Local Area Land Trust has never had an adequate staff. Papers attesting to the

87. *Supra* notes 47-61 and accompanying text.

minimum requirements for charitable, non-profit organization status may be hard to come by.

The fact that the Internal Revenue Service accepted the land trust as a "qualified organization" at the time of the transaction creates a presumption as to its status "as long as there are no substantial changes in its character, purposes or methods of operation."[88] However, in referencing the federal tax code in its conservation easement statute, Colorado and states like it, have placed no time limits on the requirement. Further, reference to the federal tax law in the Colorado statute gives Nora an opportunity to make her challenge to this federally formulated status in a state court.

A tax-exempt charitable organization must be organized exclusively for exempt purposes.[89] The presence of a single [nonexempt] . . . purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly [exempt] . . . purposes."[90] By asserting that the land trust engages in significant non-charitable activities, Nora can attack the land trust's charitable status and the capacity of the land trust to qualify as a holder of conservation easements under state law.

A particularly troubling line of cases for land trusts hold that otherwise charitable organizations, whose activities benefit for-profit organizations with which they maintain a business relationship, are ineligible for tax-exempt status.[91] Land trust operations often involve arrangements with local for-profit organizations and land trust preservation acquisitions can enrich private holders of nearby land by guaranteeing their scenic vistas or open space access.[92] In *McLennan v. United States*,[93] the Internal Revenue Service challenged the tax-exempt status of the Western Pennsylvania Conservancy, asserting that the land trust had forfeited that status by engaging in "private inurement."[94]

Imagine, for example, that Nora files a subdivision plan with the appropriate local authorities. The Local Area Land Trust gets wind of the plan and, after getting no satisfaction from Nora, files an action in the Colorado

88. BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS § 36.1 (6th ed. 1992).

89. The income tax regulations provide that "[a]n organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." Treas. Reg. § 1.501(c)(3)-(1)(c) (as amended in 1990).

90. Better Business Bureau v. United States, 326 U.S. 279, 283 (1945), *quoted in* Tax. Ct. Mem. Dec.

91. Housing Pioneers v. Commissioner, 65 T.C.M. (C.C.H.) 2191 (1993) (holding ineligible for 501(c)(3) status a charitable low income housing organization whose activities benefitted associated commercial entities).

92. A number of parties challenging tax-exempt status in federal court have found their claims barred on standing grounds. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991). Standing might be less of a problem for parties challenging the tax-exempt status of a specific land trust holding a specific easement that directly affected the plaintiff's financial status. This is particularly true when the removal of tax-exempt status might directly prevent the organization under attack from enforcing that easement as a result of conditions imposed by state conservation easement law.

93. 23 Cl. Ct. 99, 103 (1991).

94. The United States Claims Court dismissed the claim on the ground that it was not redressable by that court. *McLennan*, 23 Cl. Ct. at 103.

District Court for the county in which the Deadlock Ranch is located, seeking an injunction to prohibit the sale of any subdivision lot, arguing that the conservation easement Laura signed prohibits subdivision. Nora's lawyer answers the Land Trust's complaint by admitting the existence of the prohibition against subdivision, but asserting that the Land Trust is not entitled to enforce it because the Land Trust cannot be a conservation easement holder under Colorado law. Nora's lawyer's papers paint a picture of the Local Area Land Trust as a clique of local landowners who have manipulated the state conservation easement statute and federal tax law for their own personal ends and financial gain—private land use control to achieve private ends. As a result, Nora's lawyer argues, the Land Trust is not a "charitable" organization. In the face of this argument, the local district judge must decide whether or not to enforce the terms of the easement as written thirty years before, terms that reduce the value of the land Nora owns to a small part of its potential.

Many conservation easements provide the easement holder with the power to transfer the easement to another charitable organization, a "back-up grantee."[95] If Nora can establish, however, that the Local Area Land Trust is not a valid easement holder, she can argue that it lacks the power to transfer the easement to another.[96]

2. Attacking the Circumstances

The state statutes authorizing conservation easements require that they be created in ways that further preservation. Nora may assert that the easement under which she suffers was not. While *we* know that Laura Deadlock granted the easement for a "conservation purpose," the incentive structure imposed by federal tax law almost assures that she had other reasons to grant the easement. If Nora asserts that the transaction was no more than a tax shelter masquerading as preservation, she may question the validity of the property right created by state law.[97]

In states like California, which have specific purpose requirements for the existence of conservation easements,[98] Nora may make arguments based on motives now thirty years in the past. Laura's correspondence with Martin is likely to contain more about the tax benefits of the easement than the beauty and preservation-worthiness of the ranch they both knew well.

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95. JANET DEIHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 111-16 (1988).

96. If the terms of the easement give the back-up grantee a perpetual option to take the easement from the Local Area Land Trust or an executory interest transferring the easement to the back-up grantee upon the failure of the Local Area Land Trust, the interest may violate the Rule Against Perpetuities, common law or statutory. Although under the Uniform Statutory Rule, adopted in Colorado, COLO. REV. STAT. §§ 15-11-1101 to -1107 (1990), the option could last only for 90 years.

97. *Compare* McLennan v. United States, 23 Cl. Ct. 99, 103 (1991) (rejecting an IRS attack on a conservation easement transaction).

98. *See supra* notes 32-46 and accompanying text.

In states like Colorado, in which the restrictions need be "appropriate" for the enumerated statutory purposes,[99] Nora's arguments will be different but equally dangerous. Thirty years will have brought unexpected changes. Nora will argue that the easement is no longer "appropriate" for a conservation purpose. Traditionally, the equitable doctrine of changed conditions allows a court to alter or terminate a real covenant or equitable servitude when changed conditions in or around the burdened land frustrate the original purpose of the restriction.[100] The doctrine of changed conditions is probably applicable to conservation easements.[101] The combination of the doctrine of changed conditions and the preservation-appropriate requirements in conservation easement statutes may provide fertile ground for arguments to invalidate easements when plaintiffs like Nora can convince a court that the easement no longer serves a purpose the legislature contemplated.

Imagine, for example, that during Martin's ownership of the Deadlock Ranch, the Hypothetical Power Authority condemned a right-of-way for a high-tension power line across the ranch.[102] Assume the power line, hanging eighty feet in the air from large steel poles, affects the scenic nature of the ranch but does not prevent its operation as a ranch. Nora files her subdivision plan. The Land Trust sues. Nora's lawyer can argue that the existence of the power line frustrates Laura's original intent and renders the easement "inappropriate" for protection of the purposes set forth in the Colorado statute, and thereby challenge the enforceability of the easement.

Statute-based arguments like those discussed above, if successful, would likely result in the invalidation of the conservation easement. The limited, novel, and statutory nature of conservation easements suggests that any purported conservation restriction that fails to meet the requirements of the state statute that authorizes it is invalid, supported by neither legislative action nor common law tradition. The prefatory note accompanying the 1995 pocket part to the Uniform Conservation Easement Act states:

> The Act *enables* durable restrictions and affirmative obligations to be attached to real property to protect natural and historic resources.
>
> The Act *thus makes it possible* for Owner to transfer a restriction upon the use of Blackacre to Conservation, Inc., which will be enforceable by Conservation and its successors . . . .[103]

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99. *See supra* notes 37-45 and accompanying text.

100. AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES §§ 4.10, 9.39 (A. James Casner ed., 1952).

101. Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989); Korngold, *supra* note 12, at 484-86.

102. Condemnation is a serious issue in the long-term preservation of conservation easements. *See* Town of Libertyville v. Bank of Waukegan, 504 N.E.2d 1305 (Ill. App. Ct. 1987) (under Illinois' Township Open Space Act, town lacked authority to condemn conservation easement on qualified agricultural land); BRENDA LIND, THE CONSERVATION EASEMENT STEWARDSHIP GUIDE 78-80 (1991).

103. UNIF. CONSERV. EASEMENT ACT, comment to 1995 pocket part (emphasis added). The lists of explicit immunizations from common law property doctrines common in authorization statutes further highlight the statute-dependent nature of conservation easements. The Uniform law provides seven:

> A conservation easement is valid even though:

In 1985, in *Parkinson v. Board of Assessors*,[104] the Supreme Judicial Court of Massachusetts struck down a conservation restriction covering three tracts of land totaling 82.17 acres because, in the court's opinion, the restriction was ambiguous about the extent of the grantors' reserved right to maintain a single family residence "with usual appurtenant outbuildings and structures."[105] In the following year, in response to a motion for rehearing, the court reversed itself, holding that the restriction met all the requirements of the state's conservation restriction law.[106] Although a victory for the validity of conservation easements and restrictions, the *Parkinson* case highlights the statutory dependence of these novel conservation property rights.

3. The Statute of Limitations

Rather than force a court challenge of the Local Area Land Trust's right to enforce the terms of the easement, Nora may simply violate its provisions and hope the Local Area Land Trust takes no action until the statute of limitations has run. Many states have extremely short statutes of limitations for property or contractual claims. Arguably, the statute of limitations, for conservation easement enforcement claims in Colorado is one year.[107]

Assume the Local Area Land Trust has received two easements a year for each year since Laura transferred her original easement. The land trust has at least sixty easements to monitor. The overburdened land trust staff try to adequately monitor each easement once a year as the Land Trust Alliance's Land Trust Standards suggest,[108] but to do so they must monitor more than one easement a week. If the Land Trust limits easement monitoring to the season during which its inspector has a good chance of seeing the Deadlock Ranch under less than six inches of snow, the available part of the year will shrink to six months and the number of easements to be monitored per week multiply to

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

UNIF. CONSERV. EASEMENT ACT § 4. A servitude that fails to satisfy the statutory definition of "conservation easement" cannot benefit from these and similar statutory protections.

104. 481 N.E.2d 491 (Mass. 1985).

105. *Parkinson*, 481 N.E.2d at 492-93.

106. Parkinson v. Board of Assessors, 495 N.E.2d 294, 296 (Mass. 1986).

107. Conservation easements typically contain building restrictions concerning real property. Two Colorado cases have determined that set-back requirements are building restrictions concerning real property. McDowell v. United States, 870 P.2d 656, 658 (Colo. Ct. App. 1994); Styers v. Mara, 631 P.2d 1138, 1139-40 (Colo. Ct. App. 1981). In Colorado, the statute of limitations for actions involving "any building restriction concerning real property" is one year. COLO. REV. STAT. § 38-41-119 (1990).

108. LIND, *supra* note 102, at 28.

three or more. A single monitoring omission might foreclose any meaningful remedy for a major violation of the easement restrictions.

Imagine, for example, in April of year 30 the Local Area Land Trust does its annual inspection of the Deadlock Ranch. Nothing is amiss. In May of year 30, Nora starts construction of the Deadlock Spa and Resort. By the end of the summer, the foundations of the garish buildings have been put in place, the ranch roads have been paved, and miles of new plumbing installed. In April of year 31 the land trust returns to do its inspection. To avoid trouble, Nora has taken the opportunity to vacation elsewhere. Four inches of late snow hide the ground level improvements. The Land Trust representative walks the property boundaries and visually surveys the entire thousand-acre property in the fading evening light, but fails to notice the new foundations and roads. In April of year 32 the land trust returns again to find the completed resort. The land trust calls its lawyers to take immediate action. Nora argues that the land trust should have discovered the construction when it began almost two years before and the statute of limitations bars any enforcement action.[109]

4. The Problem of Perpetuity

The perpetual nature of conservation easements makes them precarious. The real property system favors alienability, relying on market transfer to provide the highest and best use for land.[110] Under some circumstances, courts have invalidated interests which effectively restrain alienability.[111] Generally, courts' willingness to accept restrictions that limit alienability has been inversely proportional to the duration of the restriction.[112] Accordingly, perpetual restrictions should be subject to a high level of scrutiny.[113]

When a property interest is held for preservation we are inclined to accept preservation as the highest and best use of that property. When a property interest is held for other purposes, however, and somehow restricted for pres-

109. This analysis does not change the "discovery rule" tolling statutes of limitations until the plaintiff knew or should have known about the condition giving rise to her claim. Tolling applies to violations of COLO. REV. STAT. § 38-41-119. The statute makes no reference to discovery and its applicability may be an open question. *See McDowell*, 870 P.2d at 658. Whether or not the discovery rule applies, the statute should run from the initial groundbreaking.

110. For an excellent discussion of this aspect of the conservation easement issue, see Dana & Ramsey, *supra* note 12, at 2, 21-31.

111. Cast v. National Bank of Commerce, 183 N.W.2d 485 (Neb. 1971) (invalidating the condition on a defeasible fee as a de facto restraint on alienability).

112. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 3.4 (Tent. Draft No. 2, 1991) [hereinafter PROPERTY (SERVITUDES)](addressing direct restraints on alienation) ("In determining the injurious consequences likely to flow from enforcement of a restraint on alienation, the nature, extent, and duration of the restraint are important considerations. . . . Another important factor is the nature of the property interest and the type of land or development involved. Generally, greater restraints are justified on estates of lesser duration than on estates of longer duration . . . .").

113. Dana and Ramsey point out that the common law is more inclined to accept long-term restraints on alienation when those restraints are created on behalf of a charitable organization, like a land trust, because we assume that a property right created in favor of a charitable organization does the public some good and should not be struck down. Dana & Ramsey, *supra* note 12, at 28-29. However, the inflexibility of a conservation easement once granted and the length of time for which it may last, make a variety of attacks on this presumption of public good very easy as, I hope, the rest of this section illustrates.

ervation, the analysis becomes more complicated. The conservation easement—with its restrictions tailor-made to achieve the wishes of the original landowner, the land trusts, and the government—has the potential to severely restrict the alienability of the underlying possessory interest—Nora's interest in the ranch. If, under the terms of the easement, the ranch can only be used to raise cattle, then only cattle ranchers will buy it. If people stop raising cattle in the mountains of Colorado, then no one will buy it. The specificity and durability of the restrictions the easement imposes are among its greatest virtues, but, from Nora's point of view, they may also provide a persuasive argument for invalidating it.

The Tentative Draft of the *Restatement (Third) of Property (Servitudes)* draws a distinction between "direct" and "indirect" restraints on alienation—subjecting the former sort to invalidation if they are "unreasonable"[114] and the latter sort to invalidation only if they are without "rational justification."[115] Conservation restrictions are "indirect" restraints on alienation and are therefore subject to the rational justification standard.[116] This indirect/direct distinction, however, is new in the *Restatement Third*[117] and the reported cases still suggest that any restraint may be struck down if "unreasonable."[118]

In his article, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, Professor Gerald Korngold, no great fan of perpetual conservation servitudes, provides a variety of doctrine- and policy-based arguments to challenge perpetual conservation easements.[119] Korngold asserts that courts might imply a "reasonable duration" to terminate conservation easements. This approach allows a court to impose "reasonable" limitations on land use restrictions when no express point of termination exists.[120] Korngold also asserts that the relative hardship doctrine provides a basis for terminating conservation easements. The doctrine gives a court authority to deny injunctive relief for violation of a covenant or servitude if issuing the injunction would do more harm than it would prevent.[121] While application of this doctrine would not prevent land trusts from collecting damages for violations of easements they held, damages would not preserve the land and would be extremely difficult to prove.

Korngold fears that these doctrines will be inadequate to make land subject to conservation servitudes as alienable as he would like. Proponents of preservation should scrutinize these doctrines, however, because they give

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114. PROPERTY (SERVITUDES), *supra* note 112, § 3.4.

115. *Id.* § 3.5.

116. *Id.* § 3.5 cmt.

117. *Id.* § 3.5 reporter's note.

118. Turner v. Clutts, 565 So. 2d 92 (Ala. 1990) (suggesting that restrictions that amount to a prohibition of all use of the servient estate are void); Automatic Sprinkler Corp. v. Kerr, No. 11-017, 1986 WL 7307 (Ohio Ct. App. June 30, 1986) (modifying restriction limiting use of site to corporate headquarters on ground that it was unduly restrictive).

119. Korngold, *supra* note 12, at 480-95 (these include reasonable duration doctrine, changed conditions doctrine, and relative hardship doctrine).

120. *Id.* at 479-80.

121. *Id.* at 486-89.

courts the power to weigh the values protected by a conservation easement against the value of the alienability of the land in which those values are embodied. For example, in our hypothetical case, the district court judge might be inclined to balance the $14.5 million the easement costs Nora against the values (say, 980 acres of open space, 150 acres of elk winter range, five beaver ponds and lodges, one golden eagle nest, etc.) protected by the Deadlock conservation easement.

5. The Problem of Resources

The responsibility of enforcing the private regulation embodied in a conservation easement falls on the land trust rather than on the state. The land trust may have a small fraction of the financial resources Nora is willing to spend in litigation and much less incentive to protect a thirty-year-old transaction than Nora has to achieve her personal enrichment. The treasury regulations governing the tax deductibility of easement gifts provide little incentive for funding enforcement of easements.[122] How can a land trust with an annual budget of $10,000 a year and no paid staff members hope to defend its rights created by a conservation easement from an attack by a landowner who may have tens of millions of dollars to gain by developing the servient land? The scales tilt even more when the land trust may find itself challenged by more than one such landowner.

In contemplating these arguments, one must start by accepting that some conservation easements certainly *should* be struck down. Humans' capacity to predict the future is spotty at best and limitations on land use created in perpetuity will inevitably generate problems. If, in fifty years, the Deadlock Ranch is an urban waste surrounded by a mountain city of five million people—absurd for ranching, unavailable as a park under the terms of the easement, a dump and breeding ground for all manner of urban ills, and loved only by the open-space crazed principals of the anachronistic land trust—then the easement should go. Once we accept this, the issue becomes how do we tell the easements that really no longer serve a significant public purpose from those for which someone is merely motivated to argue a lack of public purpose for personal financial reasons. This sometimes difficult and often factual sifting will be left to the courts. In many cases, the complex and financially exhausting task of defense will fall on private land trusts.

In sum, the limitations that governments placed on Laura's original transaction—to shape it to further a public purpose—provide ammunition for her granddaughter in her attempt to frustrate that public purpose. The private, local nature of the transaction, so congenial to the first generation, now provides the third generation with a relatively smaller and weaker adversary in her attempt to overturn her grandmother's wishes.

122. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations*, 19 HARV. ENVTL. L. REV. 303, 349 (1995).

V. CONCLUSION: FACING OUR PROBLEMS

As I noted earlier, these problems are not insurmountable. Solutions abound, some traditionally private, others traditionally public. Indeed, the few reported court cases involving the enforcement of conservation easements suggest the willingness of courts to enforce conservation restrictions and respect the policy behind them.[123] It is the contemplation of the potential side-effects of these solutions that is, perhaps, most intriguing, and draws us back to the New Private Law. What can be done to protect the public good associated with transactions like Laura's from Nora's private desires without destroying the "private magic" which allows the conservation easement transaction to do more for the public good than traditional public regulation?

"Private" solutions seem the obvious place to start because they are least likely to dissipate the private magic. Careful easement drafting, the inclusion of attorneys' fee-shifting provisions (allowing prevailing easement holders to recover their fees) in easement documents, and the careful creation and maintenance of extrinsic evidence of the intent of parties to the transaction will help. Careful maintenance of land trust records and scrupulous observance of the requirements of non-profit organization status are also important. For the conciliatory, arbitration clauses concerning changed conditions will seem a wise inclusion.[124] For the more bloody-minded, "poison-pill" arrangements whereby the underlying possessory interest in the ranch is rendered defeasible upon the frustration of the conservation purpose (to Laura Deadlock so long as used as a ranch . . .) may seem attractive. But will these be sufficient? They may deprive Nora of many of her arguments, but they will not remove her financial incentive, nor will they remove the insecurity of any perpetual land use limitation.

The obvious "public" solution to the remaining problems is creation of a government right, and duty, to third-party enforcement of easement conditions.[125] If state governments can enforce the terms of the easement against

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123. Madden v. The Nature Conservancy, 823 F. Supp. 815 (D. Mont. 1992) (holding that a conservation servitude could be created by reservation); Bennett v. Commissioner of Food & Agriculture, 576 N.E.2d 1365 (Mass. 1991) (holding enforceable a conservation restriction on the location of a dwelling even though the state conservation restriction statute did not specifically reference dwelling location restrictions); Goldmuntz v. Town of Chilmark, 651 N.E.2d 864 (Mass. App. Ct. 1995) (holding that construction of in-ground swimming pool was not improvement of existing dwelling subject on property subject to conservation restriction).

124. LIND, *supra* note 102, at 59-61.

125. The Uniform Conservation Easement Statute takes a significant step in this direction by including a "third-party right of enforcement" to be held by a party other than the easement holder. The comment accompanying the statute states:

> Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement . . . . But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person.

Nora or defend in any action she brings to break the easement, then the financial power of the state more than matches her multi-million dollar incentive. Of greater value, the state may speak in court, for the people, about the public value of the easement. But if we create such a public right, will future Laura Deadlocks grant easements? Will they come to see the whole land trust movement as a disguised public land grab? Will the private magic disappear?

As we wandered out of the auditorium into the misty California sunshine, it occurred to me that the pile-clad activists around me—few of whom were lawyers—had put their trust in the complex and sometimes contradictory balance of public and private law that undergirds the land trust movement. The validity of the work they did and the future of the places they loved best depended upon it. We lawyers may smile secretly at "private magic" and the idea of legal limitations in perpetuity, but they take these ideas at face value and sell them to landowners across the country. We owe them our best thinking and best efforts in preserving the balance and the magic.

UNIF. CONSERV. EASEMENT ACT § 3.5 cmt. (1981).