

# FOREWORD

## CONSERVATION EASEMENTS: NEW PERSPECTIVES IN AN EVOLVING WORLD

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The land trust community and governments at all levels have become married to conservation easements as their land conservation tool of choice. The numbers speak for themselves: as of the date of this writing, there were reportedly 1,700 land trusts that have protected twelve million acres of land by use of conservation easements.<sup>1</sup> The bulk of this growth both in conservation easements and the land trusts that deploy them has occurred since the 1980s when federal income tax incentives became more fully utilized by conservation easement donors. But the parties to this marriage have become complacent and inattentive in the face of a rapidly changing world resulting from global ecological catastrophes such as climate change and accelerated species extinction.

Since its conception, this symposium's purpose has been to avoid restating the conventional wisdom about conservation easements and, instead, to stimulate innovative thinking and reforms in conservation easement law and practice. In addition to raising issues relating to the use of perpetual conservation easements in a rapidly changing world, this symposium considers whether conservation easements truly provide public benefit; whether they are being appropriately tracked so they can be effectively monitored and enforced and taken into account in local, state, and regional land use planning; whether the public is paying an appropriate price for the social benefits provided by conservation easements; and whether the conservation easements that are acquired are not later lost through lack of sufficiently robust legal mechanisms or inappropriate interpretations of the law. Whether readers agree or disagree, the ideas they will encounter here will cause them to reassess business as usual.

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This foreword is also available at <http://www.law.duke.edu/journals/lcp>.

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1. Email from Russ Shay, Dir. of Public Policy, Land Trust Alliance, to author (Nov. 4, 2010, 14:21 PST) (on file with author).

In short, the point of every article in this volume is to challenge readers with new perspectives and ways of thinking.

This symposium launches with an article by Jeff Pidot, a former Deputy Attorney General in Maine where he was Chief of the Natural Resources Division, following up on his seminal 2005 work for the Lincoln Institute of Land Policy calling for reform of the nation's conservation easement laws. In this latest work, Pidot gives an account of Maine's experiences in forging and implementing first-in-the-nation legal reforms governing conservation easements. Maine's reformers recognized that the state's burgeoning population of land trusts and their expanding holdings of conservation easements (more than any other state) would inevitably fail under the state's version of the Uniform Conservation Easement Act.<sup>2</sup> The resulting legal overhaul in Maine tackled many of the thorniest topics facing conservation easements nationwide: monitoring; backup enforcement; amendment and termination; tax foreclosure; and merger. Among Maine's reforms is the mandate that all conservation easement holders annually register their portfolios of conservation easements with the state. Because this requirement covers all conservation easements, it has the salutary effect of creating not only an inventory of newly created easements, but also an annual accounting of monitoring and changes in older easements as well.

In preparing this account, Pidot draws upon his own experience in state government as well as interviews, surveys, and observations of other conservation easement participants in Maine. With a view to examining Maine's reforms as a model for other states (most recently, Rhode Island has enacted several of Maine's provisions), Pidot evaluates how Maine's reforms have worked and what further improvements should be considered. As reported by Pidot, Maine's reforms provide lessons for all of us.

Following Pidot's discussion of reforms in state conservation easement law, Daniel Halperin, Stanley S. Surrey Professor of Law at Harvard Law School and former Deputy Assistant Secretary of the Treasury for Tax Policy, discusses federal tax policy concerns relating to the charitable deduction for conservation easement donations as codified in IRC section 170(h).<sup>3</sup> In 1979 and 1980, as Deputy Assistant Secretary, Halperin testified before Congress on behalf of the Treasury Department at the hearings discussing the proposed enactment of section 170(h). His article indicates that many of the Treasury's concerns about the deduction in 1979 and 1980 remain significant problems today.

Halperin notes that when a charity holds only a partial interest in property there is a significant risk the charitable interest will not be protected. This, he warns, is of particular concern in the conservation easement context because the scope of the easement restrictions will often be murky and the holder may have neither the necessary resources for, nor sufficient interest in, enforcement. At a

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2. UNIF. CONSERVATION EASEMENT ACT (2007), *available at* [http://www.law.upenn.edu/bll/archives/ulc/ucea/2007\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.pdf).

3. I.R.C. § 170(h) (2006).

minimum, he argues, easement holders should be required to have established monitoring programs and demonstrate their ability to enforce the easements they acquire. He also discusses the difficulties associated with ensuring the conservation easements provide benefits sufficient to justify the federal subsidy and the substantial risk that the claimed charitable deduction will be overvalued.

Because of the potential for abuse of the tax deduction, Halperin postulates that it would be best to substitute direct government grants to facilitate the acquisition of conservation easements. Alternatively, Halperin argues that if the tax subsidy is retained, Congress should require a government agency—or a large, diversified land trust meeting strict minimum standards—to certify conservation purposes. This certification should express agreement with the valuation the donor claimed for tax purposes, which should be publicly disclosed.

In the next article, James L. Olmsted, a practicing conservation easement attorney and adjunct faculty member at the University of Oregon School of Law's Environmental and Natural Resources Department, focuses on attempts by some governmental and nonprofit entities to make conservation easement data publicly available. The subject of making conservation easement data publicly available prompts powerfully mixed reactions in the land trust community. Olmsted begins with detailed discussion of the pros and cons of collecting and making public various types of conservation easement data. He concludes that the benefits of transparency far outweigh those of secrecy.

Olmsted next traces current efforts by states, land trusts, and other nonprofit entities to create uniform, comprehensive, and easily accessible conservation easement databases and develops criteria against which conservation easement databases should be measured. He concludes with a discussion of the National Conservation Easement Database (NCED), an ambitious—and in the author's opinion much needed—project undertaken by the Conservation Biology Institute, the Trust for Public Land, the Defenders of Wildlife, Ducks Unlimited, and NatureServe. As the NCED is expected to “go live” later in 2011 or early 2012, publication of this article will raise awareness of this new and valuable tool.

Consistent with the reformist character of the symposium, in the next article Jesse J. Richardson, Jr., Associate Professor of Urban Affairs and Planning at Virginia Tech University, and Amanda C. Bernard, a land conservation professional, lay out arguments in favor of directly including conservation easements within local land use planning and zoning processes. As a starting point, the authors note that placing substantial amounts of land under perpetual conservation easements can have profound implications for land use planning and zoning. For example, placing a conservation easement on land that is designated for future development in the local government's comprehensive land use plan may cause the development to instead leapfrog beyond the conservation easement and further from the population center. In addition, the

preserved land may later be surrounded by development. Unfortunately, according to the authors, most state conservation easement enabling acts, as well as the Internal Revenue Code provisions that drive many conservation easement acquisitions, largely ignore these impacts. The authors contend state enabling authority should be modified to incorporate land use planning principles; local comprehensive plans and zoning ordinances should explicitly regulate the location of conservation easements; and the federal income tax incentives for conservation easements should be eliminated or radically changed to include these considerations.

In the following article, Julie Ann Gustanski, President and Senior Economic Strategist at Resources Dimensions and editor of *Protecting the Land: Conservation Easements Past, Present and Future*,<sup>4</sup> and John B. Wright, Professor of Geography at New Mexico State University, and author of *Rocky Mountain Divide: Selling and Saving the West*,<sup>5</sup> find a disconnect between the social benefit of some conservation easements and the price paid by the public, whether in terms of direct expenditures or indirect subsidies through income tax deductions for donated easements. However, unlike Halperin and Richardson, Gustanski and Wright focus not on reform of federal and state tax incentives but, instead, upon needed reforms in the underlying valuation of conservation easements. Having worked with conservation easements since the 1980s, Gustanski and Wright look at the transition in the use of conservation easements over time and assert that the use of conservation easements has shifted from largely opportunistic protection of prized local parcels to landscape-scale strategic collaborations. Gustanski and Wright suggest that landscape ecology, biogeography, conservation biology; and inventories of farmland, ranchland, scenic open space, and historic resources should form the basis for ranking the importance and degree of threat to eco-regions and landscapes. In contrast with these progressive determinates of conservation easement acquisition strategy, Gustanski and Wright find that permanent land protection through conservation easements is still often determined by a complex tapestry of inappropriate drivers such as land-tenure patterns, economics, regional cultural values, politics, emotion, local and regional governmental policies, land trust objectives, and the intergenerational dynamics of families who own key properties.

In search of a comprehensive model for conservation easement evaluation for this purpose, Gustanski and Wright examine conservation easements that maximize the net conservation value at the landscape scale. The formulation of the net value of an easement is developed from an integrated valuation approach that accounts for the quality of the resource, development threats, and ongoing transaction and stewardship costs. Gustanski and Wright test this valuation strategy by employing case studies in which the net value

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4. PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT AND FUTURE 69 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

5. JOHN B. WRIGHT, ROCKY MOUNTAIN DIVIDE: SELLING AND SAVING THE WEST (1993).

maximization is measured across a gradient of landscapes from remote to rural residential to the urban-suburban fringe.

Adena R. Rissman, Assistant Professor in the Department of Forest and Wildlife Ecology at the University of Wisconsin–Madison, addresses the challenges of evaluating the effectiveness of existing conservation easements by combining empirical, social, and ecological research. As Rissman observes, conservation organizations—such as land trusts—commonly claim that the conservation easements they acquire “save” land. According to Rissman, however, fairly evaluating conservation easement effectiveness requires interdisciplinary research that reaches beyond legal analysis to examine how easements influence human behaviors, which in turn influence environmental conditions. She also notes that conservation easement effectiveness is not a fixed target; it is influenced over time by social and ecological change.

Rissman introduces a framework for examining conservation effectiveness and applies that framework to ongoing debates over conservation easement permanence versus flexibility. Among her observations, she finds that conservation easement tools designed to provide flexibility, such as dynamic easement terms, management plans, holder administrative discretion, conservation easement amendment, and conservation easement termination, nevertheless pose significant administrative and stewardship challenges. To illustrate these ideas, Rissman uses a case study of rangeland conservation easements in the Lassen Foothills of northern California. The study relies on Rissman’s multidisciplinary social and ecological research to examine the design of conservation easements, their direct and indirect effects on landowner behavior, and their impacts on projected housing growth and ecosystem protection.

In contrast to previous articles, Laurie A. Wayburn, Co-Founder and President of the Pacific Forest Trust, more unqualifiedly endorses the use of conservation easements, particularly on working lands, as essential tools for protection of privately owned natural lands. According to Wayburn, the traditional approach to protecting public trust resources such as wildlife and the private forests they inhabit is predominantly regulatory and proscriptive of resource management actions. Wayburn argues that legislatively protecting these resources should involve proactive landowner cooperation, but the contrary has more often been the norm, as legislation has been largely limited to prohibiting and restricting landowner resource management. Additionally, landowner litigation has led public agencies to rely upon court-proven enforcement mechanisms even when such approaches fail to meet the needs of resource protection. According to Wayburn, traditional agency regulation is typically time-limited, narrowly focused, and tends to address symptoms rather than causes.

Wayburn instead advocates complementary approaches to address the limitations of traditional regulatory tools and specifically focuses on conservation easements. She notes that conservation easements are voluntary,

incentive-based, perpetual, tailored to specific properties, broadly resource- and ecosystem-focused, and guide resource management to favor public trust resource protection. Easements, she argues, work *with* landowners' self interest—rather than limiting it. As such they offer a complementary tool to regulation, fostering restoration and the permanent protection of listed species habitat on private lands.

The next two articles in the symposium confront what is perhaps the major fault line in conservation easement practice and theory today—namely, the collision of early conceptions of conservation easements as maintaining the status quo in a static world and the realization that the world is constantly changing. Jessica Owley, Associate Professor at University at Buffalo Law School, challenges land trust orthodoxy by observing that reliance on conservation easements as static and perpetual restrictions is coming under challenge with evolving scientific understanding that natural systems change at a far more rapid pace than previously assumed. According to Owley, this is nowhere more dramatic than in the context of global climate change. In responding to landscape changes caused by climate shifts, users of conservation easements have two main options: change conservation easements to fit the landscape, or change the landscape to fit conservation easements.

As explained by Owley, both options present benefits and challenges in implementation. To accommodate a changing world, conservation easement drafters usually include broad or multiple purposes sections to increase the legal flexibility and resiliency of the conservation easements. Where conservation easement holders' ultimate goal is to maximize the number of acres protected from development, flexible conservation easements may present a viable and attractive method of protection. In contrast, where a specific conservation value or habitat is the concern, active management of the land may be more appropriate than use of conservation easements. Owley points out, however, that when conservationists instead respond to climate change by working to bring the landscape in line with easement terms, burdens on all parties involved are likely to increase. Owley posits that both of these options conflict with the essential nature of conservation easements, leading to a third option: making different decisions about where and how to use conservation easements. It follows then that conservation easements are only desirable in a narrower category of purposes and thus may be overly relied upon as a land-conservation tool.

In contrast to Owley's broader approach, W. William Weeks, Adjunct Professor at Indiana University Maurer School of Law and Director of the Conservation Law Clinic, expresses concern about a specific conservation easement problem: the effects of ecological changes on easement-protected land designed to conserve rare species or natural communities. As Weeks observes, a plethora of problems can be expected to arise from the use of conservation easements, historically drafted upon the assumption of a static world, to protect lands that by their nature exist in a state of flux. Like Owley,

Weeks notes that this problem will be exacerbated by effects of climate change. Problematically, conservation easements are not easy to substantially amend or terminate under either state law or relevant federal law. Accordingly, Weeks suggests reform in the law that would allow trading of conservation easements. Tradable easements would allow the economic value bound up in them to be used to deploy conservation easements over land that better serves the biological objectives that originally motivated creation of the easements.

Such “tradable easements for vulnerable conservation objectives” (TEVCOs as stylized by Weeks) could become a new and more flexible way to use conservation easements to preserve both the biological and the monetary values bound up in their conservation purposes. A “TEVCO” would require a narrowly applicable adaptation of the definition of perpetuity that currently characterizes federal tax regulations. That is, current regulations consider the perpetuity requirement to be met even though the conservation purposes of an easement become impossible or impractical to achieve, provided that the restrictions are extinguished by a judicial proceeding and the proceeds are used in a manner consistent with the original easement purposes. As envisioned by Weeks, TEVCO rules would allow determinations in limited circumstances regarding impossibility to be made by easement holders without court involvement. Likewise, Weeks suggests that the adaptation proposed for federal law might also be useful for states that require conservation easements to be perpetual.

The final two articles in the symposium address the importance of retaining conservation easements that continue to provide public benefits. This is a key consideration given the significant public investment in conservation easements and the unique and often irreplaceable conservation and historic values they protect. Richard Brewer, Professor Emeritus at Western Michigan University’s Department of Biological Sciences and author of *Conservancy: The Land Trust Movement in America*,<sup>6</sup> focuses on the potential legislative nullification of a presumably perpetual conservation servitude. As an illustration, Brewer examines the Colony Farm Orchard case, which involved the Michigan legislature in 2009 and 2010 stripping from a piece of land an otherwise viable perpetual servitude dedicated to providing open space for public use. That the holder of the servitude, Western Michigan University, partnered with the legislature makes for an even more dismaying tale. Brewer also provides a general examination of potential vulnerabilities to conservation easements, not the least of which is the tendency of governmental entities to be less than faithful partners in land conservation arrangements. In the face of such vulnerabilities, Brewer cautions against over reliance on perpetual conservation

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6. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 169–75 (2003).

easements and concludes that “[i]t is time for a renaissance of protection in fee.”<sup>7</sup>

Last, but not least, the symposium concludes with an article by Nancy A. McLaughlin, Robert W. Swenson Professor of Law at the University of Utah College of Law, who has published many articles analyzing cutting-edge legal issues in the conservation easement context. In this symposium, she takes on the issue of merger; specifically, the question of whether conservation easements are automatically extinguished pursuant to the real-property-law doctrine of merger if their government or nonprofit holders acquire title to the encumbered land. Moving well beyond the cursory treatment one typically finds of this issue, McLaughlin carefully analyzes the doctrine and concludes that merger generally should not occur in the conservation easement context because the unity of ownership that is required for the doctrine to apply typically will not be present. For merger to occur, “the two estates must be in the same person at the same time *and* in the same right.”<sup>8</sup> When a government or nonprofit holder of a conservation easement acquires title to the encumbered land, the two estates will be “in the same person at the same time,” but they generally will *not* be held “in the same right.”<sup>9</sup> McLaughlin also notes that this is not an unimportant technicality. She explains that there will be significant negative public policy ramifications if the doctrine of merger, which developed solely as a title simplification device, is misapplied to terminate conservation easements.

In conclusion, in the last forty years, the growth in the number of land trusts and the conservation easements they hold has been dramatic. Not surprisingly, the number of issues, controversies, theoretical fracture lines, and intellectual cross-currents regarding the use of conservation easements has likewise multiplied. Indeed, full blown ideologies now exist within the practice and scholarship of conservation easements. We invite our readers to explore the many ideas for conservation easement reform offered in this symposium and hope that in the process more ideas will emerge. There is no task more important than preserving our natural world and few means of doing so more effective than the careful and appropriate use of conservation easements.

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7. Richard Brewer, *Conservation Easements and Perpetuity: Till Legislation Do Us Part*, 74 LAW & CONTEMP. PROBS. 249, 278 (Fall 2011).

8. Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279, 279 (Fall 2011) (quoting *Pappas v. Pappas*, 177 N.W.2d 401, 404 (Minn. 1970) (emphasis added)).

9. *Id.*