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Conservation Easement Design: Saving the Ranch, or Paved with Good Intentions - A Review of Saving the Ranch: Conservation Easement Design in the American West, by Anthony Anella & John B. Wright

Erin Morrow

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BOOK REVIEWS

THE STATE OF THE NATURAL RESOURCES LITERATURE

Erin Morrow* on Conservation Easement Design: Saving the Ranch, or Paved with Good Intentions

Reviewing *Saving the Ranch: Conservation Easement Design in the American West*, by Anthony Anella & John B. Wright (Island Press 2004).

It is often said that life offers only two certainties: death and taxes.¹ In ranching, these inevitabilities may combine to result in tragedy. Estate taxes can be as high as 50 percent of a ranch's fair market value—a value bearing almost no relation to the value of the ranch as a ranch. Estate taxes are especially important for ranches because many are “wealthy” in terms of real property, but also suffer from cash-flow, liquidity, and profitability constraints. Heirs and devisees—who have often spent most of their lives working on the ranch—may therefore be forced to sell all or part of the property just to pay the estate taxes. Poor tax planning commonly results in ranch subdivision, a decrease in open space and wildlife habitat, and the loss of generations of family tradition—not to mention a unique way of life.

Saving the Ranch: Conservation Easement Design in the American West was written to educate landowners, particularly western ranchers, about one alternative to forced subdivision: conservation easements. The book's authors, Anthony Anella, a licensed architect, and John B. Wright, a professor of geography, recognize that a ranch's success is necessarily bound up in the health of its land. *Saving the Ranch* thus capitalizes on the desire of western families to continue their ranching tradition, on tax policies aimed at conserving the integrity of rangeland, and on the growing base of scientific knowledge that ranching is not inherently harmful to (and may even improve) rangeland health. Building on these premises, *Saving the Ranch* sets out to accomplish the worthy goals of preserving land and a way of life in the American West.

For those ranchers who have decided, for one reason or another, that a conservation easement is the best option, *Saving the Ranch* is an invaluable tool replete with useful advice, tips, and insights. A how-to

* J.D. Candidate 2005, Yale Law School; Texas A&M University, B.S. My gratitude to Professor Ellickson, Professor Esty, Evan Young, Jennifer Peresie, as well as Professor Hall and the staff of the *Natural Resources Journal* for their insightful comments on earlier drafts.

1. As Benjamin Franklin famously wrote, “in this world nothing is certain but death and taxes.” Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 310 (16th ed. 1992) (1855).

book for conservation easement creation, it is practical, pragmatic, and (literally) ground breaking. In a step-by-step approach, Anella and Wright take the interested landowner through the entire process of conservation easement creation.

For other ranchers, however, those who are not positive that a conservation easement presents the best option, *Saving the Ranch* oversteps its bounds.² By glossing over many of the larger conceptual intricacies of conservation easements, its authors shortchange those whom they seek to save. According to Anella and Wright, "A conservation easement is a family decision to save your ranch and leave a legacy of good land."³ It is far from clear, however, that conservation easements can either save those ranches most in need of saving—those with no income to shelter—or whether they will indeed leave a legacy of good land.

Part I of this Review provides background information on conservation easements discussing their merits and the important role they can play in the worthy effort to preserve western ranch land. Part II introduces *Saving the Ranch's* most innovative concept, conservation easement design, and expands upon its application. It also reveals the common-sense but often overlooked idea made explicit by *Saving the Ranch*: that private land owners can aid conservation efforts. Finally, part III confronts three problems that inhere in conservation easement creation and are missing from the analysis in *Saving the Ranch*. First, it addresses landowner misgivings and the reasons for them. Second, it argues that conservation easement tax benefits are overstated and that conservation easement tax policy is generally regressive, counter-productive, and unnecessary. Third, the Review considers the consequences of the perpetuity of conservation easements.

I. BACKGROUND INFORMATION

A conservation easement is a non-possessory interest in real property. Typically, income and estate tax benefits are traded for a perpetual prohibition on development. Conservation easements "honor[]

2. For example, although recognizing that conservation easements are not for everyone, the book notes, "the device is extremely sound and proven in the American marketplace." ANTHONY ANELLA & JOHN B. WRIGHT, *SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST* 39 (2004). The book also notes that, although the income tax deduction works best for ranchers with significant incomes to shelter, the "estate tax reduction works for any ranchers who own their land." *Id.* But according to U.S. Department of Agriculture research, the vast majority of ranchers do not need an estate tax reduction. See *infra* notes 79–110 and accompanying text.

3. ANELLA & WRIGHT, *supra* note 2, at 15.

and reward[] land stewardship,"⁴ and have become a popular preservation technique. Today, seventeen million acres in the United States are protected by conservation easements held by more than 1200 land trusts.⁵

The merits of voluntary conservation easements are many.⁶ Their greatest advantage is flexibility. They are tremendously malleable, afford contracting parties a wide variety of options, and can be tailored to address particular conservation needs. Conservation easements respect private property rights. As bottom-up negotiations, they facilitate the development of working relationships between agricultural and environmental communities. In certain circumstances, tax incentives that flow from their creation may enable ranchers to pass on land for yet another generation.⁷ Finally, conservation easements, as demonstrated by *Saving the Ranch*, can be an effective means of preserving ranchland.⁸

Make no mistake: the ranching industry is in trouble. In the early 1900s, nearly 40 percent of Americans lived on farms.⁹ Seventy years ago, 25 percent of Americans lived and worked in rural areas.¹⁰ Today, farming and ranching is the profession of less than two percent of Americans.¹¹ The number of farms has declined from around seven million in 1935 to two million today.¹² Agricultural jobs are becoming increasingly scarce,¹³ and the average age of farm workers is 55 and

4. *Id.* at 3.

5. Bruce Yandle, *Land Trusts or Land Agents?*, PERC REPORT (Dec. 1999), at <http://www.perc.org/publications/percreports/dec1999/landtrusts.php> (last visited May 17, 2005).

6. Involuntary conservation easements also exist. See *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251, 257 (N.J. 1991) (rejecting plaintiff's argument that the involuntary creation of a conservation easement was an uncompensated taking). But they fail to offer many of the benefits inherent in voluntary easements and are not an option suggested in *Saving the Ranch*.

7. Conservation tax benefits, however, are often over-stated. See *infra* notes 79-110 and accompanying text.

8. See generally ANELLA & WRIGHT, *supra* note 2.

9. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *Trends in U.S. Agriculture, A 20th Century Time Capsule*, at <http://www.usda.gov/nass/pubs/trends/timecapsule.htm> (last visited Feb. 25, 2004).

10. *Id.*

11. *Id.*

12. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *Trends in U.S. Agriculture, Farm Numbers and Land in Farms*, at <http://www.usda.gov/nass/pubs/trends/farmnumbers.htm> (last visited Feb. 25, 2004).

13. In just over 20 years, 667,000 agricultural jobs have disappeared. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., *Farm Employment Losses Outstrip Job Gains in Farm-Related Industries in Some Nonmetro Areas*, 10 RURAL CONDITIONS & TRENDS 22, 22, available at <http://www.ers.usda.gov/publications/RCAT/rcat102/Rcat102e.pdf> (last visited Feb. 25, 2004).

rising.¹⁴ The current role of the entire agricultural industry—always cyclical due to weather patterns and production swings¹⁵—is declining even among those western states that have historically relied upon it.¹⁶

Development is the primary threat facing both ranching and the conservation of rangeland.¹⁷ Traditional ranches disappear only to be replaced by shopping centers, the “hobby-farm,” or the “ranchette.”¹⁸ Two million acres of rural land are converted to development each year,¹⁹ and the U.S. Department of Agriculture estimates that 164 million acres of farm and ranchland are currently threatened by encroaching development.²⁰ Per capita consumption of rural land, already double that of a decade ago, shows no signs of slowing.²¹ From 1992 to 1997, for example, the United States lost 11,217,000 acres of natural habitat (an area half the size of Indiana) to development.²² The latest agricultural census spotlights these structural changes; almost 60 percent of

14. U.S. DEP'T OF AGRIC., UNITED STATES AND STATE DATA PRELIMINARY REPORT 2002 CENSUS OF AGRICULTURE 1 (Feb. 2002), at <http://www.nass.usda.gov/census/census02/preliminary/cenpre02.pdf> [hereinafter 2002 AGRICULTURE CENSUS].

15. The livestock industry is particularly susceptible to production swings. The cattle industry, for instance, is subject to an estimated ten-year cycle. The upside of the cycle is characterized by high prices and corresponding (if irrational) heifer retention. The downside is characterized by low prices and cow herd liquidation.

16. See Thomas Michael Power, *The Changing Role of Natural Landscapes in the West: Moving Beyond an Extractive and Tourist Perspective*, SF34 ALI-ABA 27, 31 (2001) (arguing that the role of the natural resources industry is quite small and declining). “The only conclusion that can be reached from these numbers is that the historically important natural resource industries are no longer a dominant force in the Rocky Mountain region’s economies.” *Id.* at 31.

17. ANELLA & WRIGHT, *supra* note 2, at 1.

18. Hobby farms and ranchettes contribute to urban sprawl and do not provide the open-space preservation or wildlife habitat offered by traditional ranches. See generally ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 958–64 (2d ed. 2000).

19. THE ENVIRONMENTAL DEFENSE FUND, *Losing Ground: A State-by-State Analysis of America’s Growing Conservation Backlog*, at http://www.environmentaldefense.org/documents/1328_losingground.htm (last visited Jan. 20, 2005).

20. Gerald Cohn, Southeast Regional Director, American Farmland Trust, Testimony Before the Senate Agriculture Committee, (Mar. 1, 2001), at http://agriculture.senate.gov/Hearings/Hearings_2001/March_1_2001/0301coh.htm.

21. *Id.*

22. The Wildlife Society, *Farm Policy*, available at <http://www.wildlife.org/policy/index.cfm?name=farmbill> (last visited Feb. 26, 2005).

"farms"²³ now generate less than \$10,000 in revenue per year, and over 65 percent are smaller than 180 acres.²⁴

New Mexico, the site of *Saving the Ranch's* case studies, is no exception to national agricultural trends. In the last five years, more than 2500 farms have been converted to non-agricultural uses.²⁵ Of existing farms and ranches, 21 percent are nine acres or less. An additional 21 percent are smaller than 50 acres.²⁶ In short, ranches and rangeland are not only worth saving, they need protection.

II. CONSERVATION EASEMENT DESIGN IN THE "NEW WEST"

Saving the Ranch has two great strengths. First, the authors Anella and Wright introduce the novel concepts of conservation easement design and conservation development, environmentally conscious alternatives to conventional development. Second, *Saving the Ranch* builds a bridge between the "Old West"—and the irrational but intense conflict between landowners and environmentalists—and the "New West"—where environmentalist and landowner alike can focus on what really matters: rangeland health.

A. Conservation Easement Design

Land in the West, as elsewhere, is a scarce resource. Population growth and urban sprawl make the development of some land, irrespective of rancher and conservationist wishes, inevitable. Once the development decision is made, landowners, conservationists, and developers would do well to heed *Saving the Ranch*.

Saving the Ranch's notion of "conservation development" or "conservation easement design" is perhaps its most important. Land

23. The U.S. Department of Agriculture broadly defines a farm to include any place from which \$1000 or more of agricultural products were produced and sold, or normally would have been sold. Econ. Research Serv., U.S. Dep't of Agric., *Farm Structure: Glossary*, at <http://ers.usda.gov/Briefing/FarmStructure/glossary.htm#farm> (last visited Jan. 21, 2005). This breadth encompasses many nontraditional landowners.

24. 2002 AGRICULTURE CENSUS, *supra* note 14, at 1.

25. *Id.* at 94.

26. *Id.* Only 16 percent of New Mexico's farms and ranches are 2000 acres or more. *Id.* The high-desert country of arid New Mexico requires up to 640 acres to run an animal unit (the amount of forage it takes to run a cow-calf pair per year). Yet, an estimated 500 head of mother cows are necessary to support a single family. The majority of New Mexico's agricultural operations are therefore a second source of income, a hobby, or an effort to take advantage of favorable agricultural property tax valuation regimes. Indeed, over 60 percent of the principal farm operators in New Mexico work off-farm, and over half of New Mexico's farms and ranches have annual receipts less than \$2500. *Id.*

protection can be a value-adding principle.²⁷ Land development should be balanced with land protection. Moreover, because conservation values are often capitalized into land prices, proper planning can be both economically rational and sensitive to preservation concerns. Premised on a "love for the land," conservation easement design allows landowners to protect the conservation value of their land while creating limited development.²⁸ Conservation easement design goes one step further, capturing the economic value of conservation.

Chapters four, five, and six of the book outline the conservation development procedure. Conservation areas like watersheds, riparian areas, prime wildlife habitat, erosion-prone slopes, view sheds, horizons, and historic and archeological sites, as well as prime agricultural land, are first identified and set aside. An overlay map incorporating this information is then created.²⁹ For both conventional developers and the ranch family building a new home for a returning son or daughter, overlay maps will facilitate more informed decision making. By focusing on a qualitative land analysis, landowners can determine where development is best placed.

Landscape analysis is also a beneficial (if often overlooked) tool for ranchers who are not considering development. Additional information about the land and its soil, wildlife, plants, and historic resources will allow ranchers to care for their property with even greater knowledge and skill. Landscape analysis and data collection can inform ranchers about land attributes and production methods they may not have considered.³⁰

B. The Old West Meets the New West

Saving the Ranch is based on the "straightforward idea" that a "well-managed ranch is good for the land."³¹ However, the recognition among non-agriculturists that private landowners can and do make valuable contributions to preservation is both unique and important.

27. ANELLA & WRIGHT, *supra* note 2, at 83.

28. *Id.* at 12.

29. *Id.* at 69-73.

30. See Daniel C. Esty, *Digital Earth: Saving the Environment*, ENVTL. SCI. 68, 68-70 (2001) (describing the benefits of information production and dissemination). Belgium, for example, when confronted with its disappointing environmental performance in the World Sustainability Index, changed its practices based in part on the knowledge that similarly situated countries had better practices. *Id.* Ranchers often strive to minimize the visual and environmental impacts that development may have on natural resources and conservation easement design provides them with a valuable tool.

31. ANELLA & WRIGHT, *supra* note 2, at 1.

Rhetoric portrays the western rancher as a staunch anti-environmentalist, and rural landowners are regarded by many as one of the "most anti-environmental demographic groups in America."³² Anella and Wright, however, realize that self-interest requires landowners to be good stewards.³³ Moreover, ranching is not driven primarily by profit motivation; rather, a land ethic, an appreciation of nature, and a way of life are what matter.³⁴

Anella and Wright seek to facilitate a mutually beneficial working relationship between land trusts or other preservation focused entities and private landowners.³⁵ *Saving the Ranch* posits that "[w]ords do not conserve land; people do."³⁶ Its authors then commit this conservation role to the people who own the land, ranchers.

Across the West, ranchers invest their time, money, physical efforts, and very lives to living on the land. Many choose to ranch not because it is profitable, but because it is their way of life, their family tradition, and because they have an intrinsic interest in wildlife, nature, and land.³⁷ These private landowners manage two-thirds of the nation's land. They are the front line in environmental preservation and the primary stewards of much of our nation's soil, water, and air. Ranches today protect grasslands;³⁸ provide feed, water, and habitat for 85 percent of our nation's wildlife³⁹ as well as half of its endangered species;⁴⁰

32. Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land*, in *Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 423.

33. Ranching depends on "reading the land and listening to it...let[ting] the land do most of the talking." ANELLA & WRIGHT, *supra* note 2, at 146.

34. L. Allen Torell & Scott A. Bailey, *Is the Profit Motive an Important Determinant of Grazing Land Use and Rancher Motive?*, in WEST. AGRIC. ECON. ASSOC. SELECTED PAPER SERIES 1 (2000), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=2208&ftype=pdf (finding that profit maximization is an "inadequate model for explaining rancher behavior").

35. The cooperation-based approach taken by Anella and Wright is a major step forward, as rural ranching may be incomprehensible to those who are unfamiliar with it. See James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is It Anyway?*, 19 WM. MITCHELL L. REV. 331, 337 (1993). "The rural community is a place from which one escapes." *Id.*

36. ANELLA & WRIGHT, *supra* note 2, at 58.

37. See, e.g., STEPHEN KELLERT, A STUDY OF AMERICAN ATTITUDES TOWARDS ANIMALS PART II, at 20 (1976) (recounting a study of American attitudes toward wildlife and finding that individuals with a commercial interest in animals, like ranchers, were more naturalistically oriented than any other occupational group); see also Torell, *supra* note 34, at 1.

38. Recent research has indicated that, in arid climates (like much of the western United States), the impact of and disturbance from grazing animals may actually improve rangeland health. See generally ALLAN SAVORY, *HOLISTIC RESOURCE MANAGEMENT* (2001).

39. DELWIN E. BENSON ET AL., *WILDLIFE STEWARDSHIP AND RECREATION ON PRIVATE LANDS* (2002), available at <http://www.tamu.edu/upress/BOOKS/1999/benson.htm>.

and preserve open-space. Moreover, the alternative to ranching is not pristine wilderness but development and increasing sprawl. As Environmental Defense has recognized, "[n]o activity is as important to the nation's landscape and environment as is agriculture."⁴¹

Ranchers genuinely believe that they are among the "first" environmentalists.⁴² They spend seven days a week, 365 days a year working with the land, its soil, and its animals. They have the tools, experience, opportunity, and often the desire to be effective land conservationists. Many ranchers resent the presumption that environmentalists are the only ones who care about the environment. According to one rancher, "They [environmentalists] forget that we were the first conservationists. They paint us with a broad brush, which is incredibly unfair. Who has a stronger connection with and love for the environment than people who work with it?"⁴³

Not only were agriculturists some of the first to recognize the importance of environmental conservation, but some of the most successful conservation efforts have been rancher initiated. The Malpai Borderlands Group (MBG), for example, is a cooperative conservation effort initiated by private landowners.⁴⁴ MBG was formed in the high desert country of southern New Mexico to protect the environment and traditional ranching. The Malpai group offers an innovative solution to the severe drought that often plagues southern New Mexico. In exchange for donating a permanent conservation easement to MBG, a rancher can rest his land by grazing livestock on the 130,000 acre Grey Ranch.⁴⁵ This arrangement protects land from development and from the pressures of drought.

40. Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 319 (1995).

41. The Environmental Defense Fund, *Revitalize Conservation Programs and Farm Communities in the Next Farm Bill*, Nov. 1, 2001, at <http://www.environmentaldefense.org/article.cfm?contentid=389>.

42. Erin Morrow, *The Environmental Front: Cultural Warfare in the West*, 25 J. LAND RESOURCES & ENVTL. L. (forthcoming 2005).

43. *Id.* (citing telephone interview with Amy Pelzer, fifth generation Folsom, New Mexico, rancher (Feb. 20, 2004)).

44. Malpai Borderlands Group, *About Us*, at http://www.malpaiborderlandsgroup.org/malpaiborderlandsgroup/html/about_us.html (last visited Feb. 24, 2005).

45. Deborah Block, *Malpai Borderlands Group: Cattle Ranchers and Environmentalists*, VOA NEWS, Apr. 28, 2002, available at <http://greennature.com/article1034.html>. The Grey Ranch was donated by a local family to The Nature Conservancy and a local conservation organization.

The MBG currently protects 42,000 acres through conservation easements.⁴⁶ Members also participate in affirmative conservation efforts. Voluntary conservation projects include “restoring grasslands with fire, seeding native grass, protecting threatened species, developing waters for wildlife and livestock, and practicing responsible grazing.”⁴⁷ Ranchers and environmentalists were surprised to discover that they had “much more in common than they had thought.”⁴⁸ MBG’s “biggest accomplishment has been to change the [conservationist] view of landowners and ranchers from that of being a hindrance or an obstacle to be overcome into a partner that folks can work with to take care of some of the most special places on the earth.”⁴⁹ In sum, *Saving the Ranch* is a tribute to western ranchers, and rightly so. Ranches and the people who love them can contribute much to the conservation effort.

III. THE PROBLEMS WITH CONSERVATION EASEMENTS

Saving the Ranch is a valuable contribution to the preservation tool kit. The conservation design concept and the facilitation of mutually beneficial relationships between land trusts and ranchers are especially noteworthy. Yet its authors fail to adequately inform ranchers of several problems inherent in conservation easements. First, Anella and Wright give short shrift to landowner apprehension of conservation easements and land trusts. Second, the tax benefits of conservation easements are overstated. Finally, the most troubling element of conservation easements is their irreversibility; the authors of *Saving the Ranch* fail to question the normative assumptions underlying the immortalization of conservation decisions.

A. Landowner Apprehension

The first issue glossed over by *Saving the Ranch* is the fact that many private property owners and grassroots organizations remain skeptical of conservation easements. Some landowners describe conservation easements as an “irreparable mistake.”⁵⁰ “If [a conserva-

46. *Id.*

47. Wendy Glenn, *A Model for Cooperative Land Management: The Malpai Borderlands Group*, SOC’Y FOR CONSERVATION BIOLOGY NEWSL. (May 5, 1997), at <http://www.conbio.org/SCB/Publications/Newsletter/Archives/1997-5-May/NL-SU003.cfm>.

48. Block, *supra* note 45.

49. *Id.* (quoting Bill McDonald, Executive Director, MBG).

50. Jay Zane Walley, *Conservation Easements Rescuing Private Property or the Ruination of Future Generations?*, available at http://www.propertyrightsresearch.org/conservation_easements1.htm (last visited Feb. 26, 2005).

tion easement] seems too good to be true, it probably is."⁵¹ "[Conservation easements are] just another nail in the coffin of private property owners in rural America."⁵² "[The] freshest destruction of the fundamental stick in our bundle of real property rights is, like hari-kari, self-inflicted."⁵³

The primary concern underlying landowner misgivings is the worry that ranchers may not completely understand that they are conveying an interest in land—forever.⁵⁴ Anella and Wright argue that "[c]onservation easements fully respect private property rights."⁵⁵ This is so, however, only because landowners willingly relinquish some sizeable sticks from their bundle of private property rights. They abandon the right to use their land as they see fit, the right to exclude, the right to leave the full value of property to their heirs, and the right to allow those same heirs to decide the property's best use. Those sticks are pulled from the bundle, and the rights they represent are permanently extinguished.

The second concern underlying landowner misgivings is that conservation easements can—and often do—impose substantial obligations on a landowner. Easement provisions may be draconian. Many require a landowner to bear the cost of any conservation effort, to pay all litigation expenses (win or lose), and to allow the conservator to enter the property at any self-determined "reasonable time."⁵⁶ Moreover, "[i]t takes money to honor the wishes of landowners forever."⁵⁷ Ranchers thus assume these substantial obligations only after donating valuable development rights and paying the land trust a conservation endowment that typically ranges from \$5000 to \$20,000.⁵⁸

The question of who will control relinquished rights is of particular interest to western ranchers. The donation of enforcement

51. Joyce Morrison, *Conservation Easements – Too Good to Be True*, ILL. LEADER, Nov. 4, 2003, available at <http://illinoisleader.com/news/newsview.asp?c=9568>.

52. Carol W. LaGrasse, *Conservatives Upset by Environment Part of Faith-Based Bill*, WASH. TIMES, June 18, 2002, available at <http://www.prfamerica.org/Senate-drops-stealth-capital-gains.html>.

53. Floy Lilley, *Who Owns America?*, ECO-LOGIC ON-LINE, Apr. 1, 2000, available at <http://www.sovereignty.net/floy/who.htm>.

54. See Rachel Thomas, *What You Need to Know About Conservation Easements*, at http://www.propertyrightsresearch.org/what_you_need_to_know_about_cons.htm (last visited Feb. 26, 2005).

55. ANELLA & WRIGHT, *supra* note 2, at 16.

56. *Id.* at 155. The Model Deed of Conservation Easement provided by *Saving the Ranch* assigns all litigation costs to a losing landowner, as well as responsibility for the cost of defending against a merit-less claim. *Id.* See also Thomas, *supra* note 54.

57. ANELLA & WRIGHT, *supra* note 2, at 28.

58. *Id.*

rights to a land trust, at least according to *Saving the Ranch*, is in "direct contrast with government regulatory systems of land use control."⁵⁹ Anella and Wright take a decidedly favorable view of land trusts as "a grassroots expression of people's dedication to protect ranch[es], farms, and other undeveloped lands."⁶⁰ Yet the primary goal of most land trusts is conservation and ranching concerns may be subjugated to conservation concerns.⁶¹ Moreover, all land trusts are not created equal. Their goals, missions, and methodology vary. At a minimum, ranchers must understand these differences and choose a land trust with whom they can work.

As the authors of *Saving the Ranch* recognize, ranchers may be hesitant to sign over enforcement rights to federal enforcers.⁶² Unfortunately, many of these same ranchers also distrust environmental groups, sometimes even viewing conservation organizations as the "enemy."⁶³ Therefore, a system channeling regulatory authority to such an organization may not appeal to ranchers. The CEO of the New Mexico Cattle Growers' Association, for example, is cynical of cooperative efforts; she sees conversations with environmental groups as the equivalent of "negotiating with Saddam Hussein."⁶⁴

Any tax-exempt entity with 501(c)(3) status may be granted easement rights.⁶⁵ Ranchers could work with a known and trusted group that is sensitive to ranching needs and challenges. Perhaps a local group composed of neighboring ranchers or a group such as the Colorado Cattlemen's Agricultural Land Trust would be a wise choice. The broad definition of eligible entities in the Uniform Conservation Easement Act, however, is a cause for concern. Easements are forever, but land trusts' composition and goals will inevitably evolve. Can these entities be counted on to remain true to their conservation purposes? Will they

59. *Id.* at 18.

60. *Id.* at 17.

61. For example, *Saving the Ranch* recommends that, because some lawyers and accountants react negatively to conservation easements, ranchers should consult advisors during easement creation that the land trust recommends. *Id.* at 20. Although not a per se conflict of interest, these advisors will clearly be pro-conservation easement and may fail to advise ranchers of other options.

62. *See id.* at 18.

63. *See* Andrea Hungerford, "Custom and Culture" Ordinances: Not a Wise Move for the Wise Use Movement, 8 TUL. ENVTL. L.J. 457, 459 (1995). County supremacy plans, for example, show a deep distrust of both governmental regulation and the environmental movement. *Id.* at 459-60.

64. CAREN COWAN, NO HOME ON THE RANGE: DIARY OF AN EXECUTIVE COWGIRL 7 (2003).

65. I.R.C. § 170(h)(3)(B) (West 2004).

remain sympathetic to ranching concerns? Their stability for time immemorial has yet to be determined.

B. The Reality of Conservation Easement Tax Benefits

Saving the Ranch exaggerates the tax advantages of conservation easements. The book fails to adequately explore the regressive aspects of conservation easement income tax benefits. Worse still, the book completely ignores the perverse incentives such benefits create. Adding to these problems, it overstates the advantages of estate tax deductions, which in most cases are unnecessary.

1. Easement Income Tax Deductions Are Regressive

Conservation easements are a classic example of an upside-down tax policy.⁶⁶ Those ranches most in need of saving do not benefit from conservation easements. In fact, as explained below, the ranches that benefit the most are those that need it least.

A conservation easement is useful for income tax purposes only if a ranch is generating income to shelter. The value of the conservation donation is applied against income earned in the year of the gift,⁶⁷ provided the deduction does not exceed 30 percent of annual income.⁶⁸ An unused deduction can be carried forward for five years.⁶⁹ Easement tax incentives are a textbook illustration of a regressive tax—those with the highest incomes benefit the most from deduction.

The regressive effect of conservation easement deductions is compounded by the fact that most ranches are not profitable. Even among the agricultural industry, ranching is (at least from a purely economic standpoint) a particularly irrational investment of time, money, and labor.⁷⁰ From 1926 to 1968, for example, the return on western ranches ranged from a negative value to 6.5%.⁷¹ Between 1964 and 1996, the rate of return on agriculture assets was 3.29%.⁷² Between 1991 and 1998, the average return rate on livestock production was

66. An upside-down tax incentive is one that provides upper-income easement donors with a greater tax saving than low- or middle-income donors. It is virtually worthless to landowners with no taxable income. See, e.g., Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 720–24 (1970).

67. I.R.C. § 170(d)(1)(A) (West 2004).

68. *Id.* § 170(b)(1)(B)(i).

69. *Id.* § 170(d)(1)(A).

70. See Torell, *supra* note 34, at 2.

71. *Id.*

72. *Id.* at 3.

0.91%.⁷³ In sum, as U.S. Department of Agriculture economics experts note, many full-time ranchers simply do not generate enough income to take advantage of income tax deductions.⁷⁴

2. Income Tax Deductions Create Perverse Incentives

A lack of income, at least according to *Saving the Ranch*, does not prevent landowners from taking advantage of income tax deductions. In a (dubious) attempt to solve ranch cash-flow problems, Anella and Wright recommend that ranchers sell a few house lots or, in other words, subdivide.⁷⁵ An illustrative hypothetical introduces a \$3 million ranch with cash-flow difficulties. The ranch donates a conservation easement worth \$1.5 million. Notwithstanding an annual income of \$50,000 (much higher than the average weekly agricultural wage of \$402),⁷⁶ the ranch is unable to fully utilize income tax deductions. *Saving the Ranch* solves these cash-flow difficulties by subdividing the base ranch and placing five houses on ten-acre lots.⁷⁷

Income tax deductions for conservation easements thus create perverse and counter-productive incentives. That is, the federal tax code creates incentives for ranchers to develop, the very thing conservation easement deductions aim to prevent. Moreover, even if ranchers agreed that development was an acceptable option, many ranchers live in remote areas that may be difficult to subdivide. Their deductions, though, must be made within a five-year window. In the end, of course, the reason many ranchers and other landowners donate conservation easements is to prevent subdivision; they may find the idea of parceling off their place in order to preserve it as absurd as "destroy[ing] the village to save it."⁷⁸

73. *Id.*

74. Ron Durst & James Monke, *Effects of Federal Tax Policy on Agriculture*, AGRIC. ECON. REP. NO. 800, available at <http://www.ers.usda.gov/publications/aer800/aer800.pdf> (last visited Feb. 26, 2005).

75. ANELLA & WRIGHT, *supra* note 2, at 24, 100.

76. In a 2004–2005 survey of career salaries, crop and livestock farmers received the lowest pay, at \$402 a week, followed by hairdressers and fast-food cooks. Career Resources, *Women's Low Pay Linked to Work Hours*, at <http://www.careerone.com.au/resources/story/0,8523,10552168-22547,00.html> (citing RODNEY STINSON, WHAT JOBS PAY 2004–2005 (2005)) (last visited Jan. 20, 2005).

77. ANELLA & WRIGHT, *supra* note 2, at 24.

78. Douglas Herman, "We Had to Destroy the Village to Save It" Dusting off the Phrases of War, at <http://www.strike-the-root.com/3/herman/herman10.html> (last visited Mar. 4, 2005) (attributing the phrase to Vietnam War correspondent Peter Arnett who in turn attributed the quote to an unidentified army officer).

3. Estate Tax "Savings"

The primary tax benefit of conservation easements, as *Saving the Ranch* is quick to point out, flows not from income tax deductions but from lower estate taxes.⁷⁹ Nevertheless, the tax benefits of a conservation easement donation are again overstated.⁸⁰ Any reduction in the estate tax, the "conservation easement takedown," is due to the reduced value of the underlying estate.⁸¹ There are countless ways to reduce the value of an estate. Ranchers could give land away. Or worse, they could destroy its value and realize the same estate tax "benefit" achieved by a conservation easement.

Consider a rancher who donates a qualified conservation easement to a qualified land trust. The value of a conservation easement donation for estate tax purposes equals the reduction in value of the base acreage. Thus, if the value of the rancher's acreage is decreased by \$100,000, the conservation easement is also valued at \$100,000. The maximum estate tax saving possible in 2005 would be \$47,000 (\$100,000 x 0.47 (maximum tax rate⁸²)). This ranch owner would thus "spend" \$100,000 to gain a tax benefit of \$47,000. Ranchers must not overlook the fact that although a conservation easement may result in significant estate tax savings this is so because the value of the underlying estate has itself declined.

As *Saving the Ranch* notes, the 1997 Taxpayer Relief Act (the 1997 Act)⁸³ provides ranchers with additional estate tax relief. A qualified landowner can exclude an additional 40 percent of the value of the land after easement donation.⁸⁴ As explained below, however, the vast majority of ranchers are unable to take advantage of this estate tax reduction.⁸⁵

79. ANELLA & WRIGHT, *supra* note 2, at 100.

80. "The estate tax problem arises because land is valued for estate tax purposes at its maximum value for development (the highest density allowed under local law) even if the property has been used solely for ranching or agricultural purposes for decades or centuries." *Id.* at 102. This is in most cases untrue; see *supra* notes 79-110 and accompanying text.

81. The 1997 Taxpayer Relief Act Section 2031(c) allows an additional exclusion of 40% (up to \$500,000) of the after value of land subject to a conservation easement. I.R.C. § 2031(c)(2)-(3) (West 2004). The rancher must, however, prohibit all but "de minimis use." *Id.* § 2031(c)(5)(d). And the exclusion does not apply to development rights that have been reserved. *Id.* § 2031(c)(5).

82. I.R.C. § 2001(2)(B) (West 2004).

83. Pub. L. No. 105-34, 111 Stat. 788 (1997) (codified as amended in scattered sections of 26 U.S.C.).

84. I.R.C. § 2031(c) (West 2004).

85. See *supra* notes 79-110 and accompanying text (discussing the fact that because of other tax provisions very few landowners benefit from easement donation).

Notwithstanding the regressive nature and perverse structure of conservation tax incentives, conservation easements may still be a good idea for some ranch families. If a rancher is unconcerned with the market value of the underlying estate and simply wishes to pass on an intact ranch, the estate tax benefits of easement donation (if they exist)⁸⁶ apply full force. For example, in one case study outlined in *Saving the Ranch*, estate tax reduction may have been a valuable incentive.⁸⁷ The Woods Ranch was owned by a couple who wished to pass on their land—irrespective of its worth—so that their children could maintain a ranching legacy.⁸⁸ The value of the underlying estate was irrelevant.

On the other hand, if the idea is to pass on to one's heirs the most valuable estate, then reducing estate taxes by decreasing the underlying market value of the estate makes no sense. Moreover, reliance on an ever-changing tax code, particularly when easements are permanent, is questionable. Finally, precisely what are the benefits of conservation easement donation? The following section will show that the estate tax benefits are, for most ranchers, illusory.

4. Estate Tax Reductions Are Largely Unnecessary

Saving the Ranch overstates the estate tax advantages of conservation easement donation. Estate tax reductions are simply unnecessary for the overwhelming majority of ranches today. Out of concern that the estate tax might force the liquidation of many of America's family farms, ranches, and small businesses, Congress enacted the 1997 Taxpayer Relief Act⁸⁹ as well as the Economic Growth and Tax Relief Reconciliation Act of 2001 (the 2001 Act).⁹⁰ Taken together, these two statutes target a number of special provisions at ranchers and other small business owners.⁹¹ As a result of favorable tax treatment, a mere

86. *Id.*

87. The owners of the Hilger Hereford Ranch, by way of contrast, had no heirs and were thus unworried about the estate tax. They sold the ranch to a young family. ANELLA & WRIGHT, *supra* note 2, at 110–12. The Montosa Ranch was co-owned by the Cox family and a California industrialist. Because the Cox's sons were either unable to or uninterested in ranching, the primary motivation for the conservation easement appeared to be realizing equity from the ranch and the ability to deduct that income. *Id.* at 117.

88. *Id.* at 108–09. The problem with this incentive is that estate tax reduction may not have been necessary because of the special use valuation provisions.

89. Pub. L. No. 105-34, 111 Stat. 788 (1997) (codified as amended in scattered sections of 26 U.S.C.).

90. Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.).

91. Their provisions include special-use valuation of ranchland, the installment payment of estate taxes, and deductions for family-owned business interests.

four percent of farm estates end up owing any estate tax.⁹² These provisions, working in tandem with the unified tax credit, do much to "reduce if not eliminate the need to sell farm assets to pay federal estate taxes."⁹³

Under the current federal estate tax system, an individual may transfer an amount equal to the unified lifetime credit without incurring estate tax liability. The 2005 unified lifetime credit is \$2.5 million.⁹⁴ Transfers in excess of this amount are taxed at a graduated rate rising to a maximum of 47%.⁹⁵ Thus, this year, ranchers can transfer an estate worth \$2.5 million without triggering any estate tax. For many small ranches, this exclusion may be sufficient.

a. Special-Use Valuation of Ranch Land

Special-use valuation often renders conservation easement estate tax reductions unnecessary. According to *Saving the Ranch*, "The estate tax problem arises because land is valued for estate tax purposes at its maximum value for development (the highest density allowed under local law) even if the property has been used solely for ranching or agricultural purposes for decades or centuries."⁹⁶ This is generally untrue; while the value of land is typically fair market value on the date of the owner's death, qualified ranchers may elect for special-use valuation.

Since 1976, ranchers and farmers (as well as other closely held businesses) have taken advantage of special-use valuation.⁹⁷ Generally speaking, any family owned and operated ranch is eligible.⁹⁸ Special-use

92. ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ERS BRIEFING ROOM: FEDERAL TAXES: FEDERAL ESTATE TAXES, at <http://www.ers.usda.gov/Briefing/FederalTaxes/TaxesEstateTax.htm> (last modified July 6, 2004) [hereinafter FEDERAL ESTATE TAXES].

93. James Monke & Ron Durst, *The Taxpayer Relief Act of 1997: Provisions for Farmers and Rural Communities*, 764 AGRIC. ECON. REP. 18, available at <http://www.ers.usda.gov/publications/Aer764/aer764.pdf> (last visited Jan. 30, 2005).

94. I.R.C. § 2010(a) (West 2004). The 2001 Act provides for an increase in the unified lifetime credit (to \$3.5 million) and reduction in the maximum tax rate (to 45%) through 2009. *Id.* § 2010(c). The estate tax will be abolished in 2010; the entire 2001 Act, however, is scheduled to terminate on December 31, 2010. Therefore, unless Congress repeals the sunset provision, federal estate taxes will revert back to the law in effect prior to the 2001 Act. If the sunset provision lapses, the 2011 unified credit would be \$1 million, and the maximum tax rate would be 55%. Ron Durst et al., *How Will the Phaseout of Federal Estate Taxes Affect Farmers?* 751-02 AGRIC. INFO. BULLETIN 4, 6 (Feb. 2002), available at <http://www.ers.usda.gov/publications/aib751/aib751-02/aib751-02.pdf>.

95. I.R.C. § 2001(2)(B) (West 2004).

96. ANELLA & WRIGHT, *supra* note 2, at 102.

97. I.R.C. § 2032A (West 2004).

98. To qualify, the property must have been owned by the decedent or a family member and used as a farm or ranch for five of the preceding eight years, *id.* §

valuation provides for tax assessment based on the value of current agricultural use instead of the land's highest and best use.⁹⁹ For ranches so valued, the estate tax benefits associated with conservation easements are superfluous for two reasons. First, farm-use valuation normally reduces the estate tax burden by forty to seventy percent eliminating much of the need for tax reduction.¹⁰⁰ Meanwhile, the underlying market value, in contrast to conservation easement deductions, remains constant.¹⁰¹ More importantly, because property is valued according to agricultural use, the value of development rights has already been excluded. Thus, an estate tax reduction based on a conservation easement donation—and the corresponding decline in underlying market value—is redundant. (In some cases, an additional 40 percent of the base estate may be excludable,¹⁰² but, according to U.S. Department of Agriculture experts, even this additional exclusion will not affect estate taxes.¹⁰³)

b. Qualified Family-Owned Business Interest

The family-owned business provision excludes an additional \$675,000 from estate taxation. The exclusion is in addition to any value excluded by either the unified credit or special-use valuation. To qualify, a ranch must be family-owned and operated.¹⁰⁴ Additionally, each heir must materially participate in the ranching operation for ten years

2032A(b)(1)(C)(i), and be passed on to a qualified heir. *Id.* § 2032A(e)(1)–(2). In addition, the value of the real property must equal 25% of the estate, and real property plus personal property must comprise 50% of estate value. *Id.* § 2032A(b)(1). Finally, either the decedent (or a family member) and the heir must materially participate—defined generally to mean actual full-time personal employment—in the ranch operation. *Id.* § 2032A(b)(a)(C)(ii); Reg. § 20.2032A-3(e)(1).

99. Use-value is calculated by dividing the five-year average annual cash flow (or rental for comparable area land), minus state and local real estate taxes, by an average of the annual effective interest rate for all new Federal Land Bank loans. *Id.* § 2032A(e)(7)(A)(i)–(ii).

100. Durst et. al., *supra* note 94. In 2002, the maximum estate tax reduction is \$820,000. *Id.*

101. Recapture of estate tax benefits is triggered if the property is sold to a non-family member or if the property is converted to a non-ranch purpose within ten years of the decedent's death. I.R.C. § 2032A(c) (West 2004).

102. *Id.* § 2031(c).

103. FEDERAL ESTATE TAXES, *supra* note 92.

104. I.R.C. § 2057(a)(ii) (West 2004). A single family must own at least 50% of the business, two families must own 70 percent, or three families must own 90%. *Id.* § 2057(a)(ii). The decedent's family must have owned at least 30%, *id.* § 2057(a)(iii), and the ranch must comprise more than 50% of a decedent's estate. *Id.* § 2057(b)(iii). Furthermore, the decedent or a family member must have materially participated in the business. *Id.* § 2057(b)(ii).

following the decedent's death.¹⁰⁵ Similar to the special-use provision, recapture of estate tax benefits is triggered if the heir ceases to participate or sells the ranch to a non-family member.¹⁰⁶

c. Installment Payment for Closely Held Businesses

Installment payments are the third reason that most farms and ranches do not incur any estate tax liability. The installment payment provisions of the 1997 Act target farm, ranch, and small business liquidity problems. In general, federal estate taxes must be paid within nine months. However, when a ranch makes up 35 percent of the value of an estate, taxes may be paid over a 14-year period.¹⁰⁷ The interest rate for the first \$1 million in taxable value (above the amount exempted by the unified credit) is two percent.¹⁰⁸ The installment payment provision not only decreases the need for immediate cash and the potential for a forced sale, it also decreases the total amount of estate tax paid (net present value). In 2006, for example, a \$2 million estate utilizing the installment payment provision would have the net present value of its tax cut in half as compared to an estate required to pay the estate tax within the usual nine months.¹⁰⁹

In summary, because of the special-use, family-owned business, and installment payment provisions, along with the increasing unified credit, a conservation easement "takedown" is unnecessary for the large majority of ranch owners. Even the U.S. Department of Agriculture's Economic Research Service is skeptical of the benefits offered by conservation tax provisions. "[G]iven the increased unified credit, the availability of special use valuation and the deduction for family-owned businesses, the number of landowners who are subject to the Federal estate tax and who would benefit from [a conservation tax] exclusion may be relatively small."¹¹⁰ In short, it is possible to "save the ranch" from estate taxes without reducing the value of the underlying acreage.

105. *Id.* § 2057(e).

106. Because the total amount excludable under this provision and the unified credit is limited to \$1.3 million, the provision was repealed in 2004 when the unified credit exemption reached \$1.5 million. *Id.* § 2057(j). If the 2001 Act is allowed to sunset, however, the family-owned business provision will come back into force.

107. No principal is due during the first five years, and the deferred tax is then paid in equal installments for up to ten years; interest is not deductible. *Id.* § 6166. The decedent must actively participate in the ranch. *Id.* § 6166(b)(9).

108. *Id.* § 6601(j)(2). The one million dollar limit is indexed for inflation, and the interest rate on amounts above \$1 million is 45% of the short-term rate plus 3%. *Id.*

109. Durst & Monke, *supra* note 74.

110. FEDERAL ESTATE TAXES, *supra* note 92.

Tax policy notwithstanding, conservation easements may still be a good option for many ranchers. First, in a limited number of circumstances, they do provide tax incentives. For instance, when ranchers cannot take advantage of the aforementioned estate planning strategies, perhaps because they do not materially participate in ranch management, conservation easements may be a welcome choice. Likewise, in rare circumstances, a conservation easement donation may result in a decrease in property tax.¹¹¹

More importantly, it is possible to correct the upside-down tax policy created by conservation easement deductions. My solution would include a refundable tax credit distributed over a five- or ten-year period. Such a credit would eliminate the subdivision incentive and do more to accomplish ranch and land preservation goals than does the current tax code. Because many ranchers are facing financial difficulties, income tax credits could provide the incentive needed to encourage "land-rich" but "cash-poor" ranchers to preserve land and a way of life in the American West.

Finally, as Anella and Wright wisely note, the primary impetus behind conservation easement donation may not be tax reductions, but the desire of ranchers—people whose lives are integrally connected with the land—to see their ranch preserved in its natural state and passed on to future generations.¹¹² The realization that, even if a conservation easement fails to "pencil out," ranchers may still wish to preserve their land is an important one.¹¹³ Studies have consistently shown that, for agricultural producers, quality of life ranks as a much higher motivation

111. Property tax reductions rarely provide an incentive for easement donors. JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS* 25, 56–57 (1988) (citing a variety of reasons, including official reluctance to take conservation easements into account during assessment, fear that reassessment may result in a higher assessment despite easement consideration, and agricultural use valuation). *Saving the Ranch* explains that property taxes will in most cases not be reduced because land is often assessed for property tax purposes according to the value of agricultural use. See ANELLA & WRIGHT, *supra* note 2, at 35. See also N.M. STAT. ANN. § 3.6.5.27(D)(1) (Michie 2002) (valuing property according to production potential, not market value). Nonetheless, in states that value agricultural property according to some other formula, a further reduction in property taxes may be possible. For instance, in Minnesota, agricultural land is classified and assessed at 55% of market value (if homesteaded) or 1% of market value (if unimproved). MINN. STAT. ANN. § 273.13 Subd. 23 Class 2 (a)–(b) (West 2005). See also Ark. Public Serv. Comm'n v. Pulaski County Bd. of Equalization, 582 S.W.2d 942 (1979 Ark.) (holding that a statute taxing agricultural lands according to use violated the state constitutional provision requiring uniform taxation).

112. ANELLA & WRIGHT, *supra* note 2, at 30.

113. The reason that most people donate a conservation easement is because they love their land. *Id.*

than does profit.¹¹⁴ Preserving these values for future generations may prove to be a powerful motivation for ranch families. Profit maximization is not the reason that most people choose to ranch,¹¹⁵ and profit (in the form of tax benefits) is not the only reason ranchers will choose to preserve their land. This desire for preservation brings up the final conservation easement issue that *Saving the Ranch* fails to address adequately: the perpetuity of conservation easements.

C. Conservation Easements Are Perpetual

Forever is a long time. The most significant problem with conservation easements is their imposition upon future generations. Courts have always viewed dead-hand control of life and land with skepticism.¹¹⁶ Conservation easements are the ultimate dead-hand control: they immortalize the conservation decisions of this generation. This may impose significant costs on future generations by deliberately making non-development decisions hard to change.¹¹⁷ To date, these particular beyond the grave directives have been upheld by courts.¹¹⁸

Conservation easements may thus consign future generations to unwise land preservation choices. One problem with conservation servitudes "stem[s] from the unquestioned assumption that today's conservationists are capable of engaging in long-range planning, and that their competence is of such a high degree that they can and should determine which lands merit perpetual protection."¹¹⁹ Changes in

114. Torell, *supra* note 34, at 1-5 (cataloging such studies). A land ethic, rural values, culture, and preservation of a way of life are strong motivations for ranch owners and operators, and for ranch purchasers. *Id.* They may prove to be even more persuasive to ranch owners who wish to pass on this quality of life to heirs.

115. *Id.*

116. Restraints on alienation and other attempts to control future land uses through forfeitable estates are disfavored by courts. *See, e.g.,* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 227-28 (5th ed. 2002); JOHN P. DWYER & PETER MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 149-52 (1998) (recounting hostility toward transfers of estates in land subject to conditions subsequent).

117. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 780 (2002).

118. *See, e.g.,* Sheftel v. Lebel, 689 N.E.2d 500 (Mass. App. Ct.) (1998) (holding that the plain language of an easement prohibited a walkway and pier); Southbury Land Trust, Inc. v. Andricovich, 757 A.2d 1263 (Conn. App.) (2000) (upholding easement but construing plain text to allow single-family home). *See also* Tenn. Envtl. Council v. Bright Par 3 Ass'n, 2004 WL 419720 (Tenn. Ct. App.) (2004) (construing Tennessee law to permit beneficiary enforcement of a conservation easement notwithstanding easement that provided for only grantee enforcement). The court held that in Tennessee conservation easements were held for the benefit of Tennessee residents and as such they had standing to enforce those rights. *Id.*

119. Mahoney, *supra* note 117, at 780.

nature, scientific knowledge, and cultural attitudes are inevitable, and conservation decisions may need to be revisited.¹²⁰

In the rangeland context, for example, a growing body of scientific literature indicates that decades of federal and state conservation policy has been wrongheaded. Rangeland conservation policy has been based on two seemingly common-sense assumptions: (1) land left alone is healthy, and (2) the best remedy for damaged land is to rest it from any form of disturbance, especially livestock grazing.¹²¹ Despite the intuitive appeal of the rest approach, it is often incorrect and has even led to the desertification of rangelands in Libya, Zimbabwe, and the western United States.¹²² As Richard Knight, a Colorado State University professor in the Department of Forest, Rangeland, and Watershed Stewardship, notes, "The emerging consensus from ecologists is, amazingly, premised on the belief that functioning plant and animal communities are the product of periodic disturbance, not 'pure' rest."¹²³

Easements are often touted as an efficient approach to conservation,¹²⁴ yet perpetuity undermines this justification. In the long run, perpetual easements may be far from efficient. Burdened land will never be available for other, more efficient, uses. Tax revenue from foregone uses will support neither rural communities nor their schools.¹²⁵ Moreover, the fact that a particular parcel of land is burdened may mean that other lands, even lands better suited for conservation,

120. *Id.* at 753. As Dan Tarlock and Fred Bosselman observe, "Current environmental law...rests on a simple ecological paradigm which the science has now rejected and replaced with a more complex, open-ended model." Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 866 (1994).

121. See Dan Dagget, *What About Nature, or What Does Nature Have to Say About Grazing*, 3 THE QUIVERA COALITION NEWSLETTER 1 (The Quivera Coalition, Albuquerque, NM), Nov. 1999, available at http://www.quiveracoalition.org/documents/11_99-nature1.html. See generally SAVORY, *supra* note 38.

122. SAVORY, *supra* note 38, at 29, 206.

123. Richard Knight, *Honest Conversations About Biodiversity on Protected Areas, Ranches, and Subdivisions*, in THE NEW RANCH AT WORK: PROCEEDINGS OF A CONFERENCE 61, 64 (Marty Peale ed., 2003).

124. Donated easements are costless and purchased development rights are less costly to acquire than a fee simple. Furthermore, conservation compatible land uses can often be continued and are no longer a high cost of preservation. See Randy T. Simmons & Kimberly Frost, *Accounting for Species: The True Costs of the Endangered Species Act* 10-11, PERC REPORT, Apr. 2004, available at http://www.perc.org/pdf/esa_costs.pdf (recounting the hidden costs of the Endangered Species Act including economic loss from compatible economic activities).

125. In the condemnation context, a Payment in Lieu of Taxes (PILT) is provided to communities faced with eminent domain; a similar system does not exist for conservation easements. Even though the property tax base does not ordinarily decline, the community forfeits the upside potential of economic development.

will be developed. In the Conservation Reserve Program (CRP) context, the forced conversion of conservation-suitable grassland into cropland is known as slippage.¹²⁶ Slippage is not uncommon. For every two acres retired from crop production pursuant to a CRP contract, an additional acre of heretofore unfarmed (and more marginal) land is pressed into service.¹²⁷ Conservation easements, like CRP efforts, may exacerbate the very problems they seek to eliminate. By decreasing the supply of available land, other unprotected (and possibly more conservation suitable) lands will inevitably be developed.

Saving the Ranch makes innovative, forward-looking suggestions aimed at avoiding future conflicts. But at the same time it fails to realize that, precisely because conservation easements are permanent, conflicts are unavoidable. The authors issue a plethora of warnings. "[A]ny possible future [land] use" should be "addressed with care."¹²⁸ Ranchers must "[n]ever sign a conservation easement [they] are uncomfortable with or work with a group [they] are unsure of."¹²⁹ "Succession of ranch ownership and ongoing ranch management are big issues that need to be worked out before [conservation easement completion]."¹³⁰ Finally, the authors warn that there is "no single best way for completing a conservation development"¹³¹ and that the "[c]omplexity of the process should not be underestimated."¹³² But easements are created in perpetuity, and "big issues" will inevitably arise after easement creation as well as beforehand. Ranchers would do well to query how they can possibly predict every – or even most – land uses their heirs may wish to pursue.

In the hypothetical situation where land is valuable because it is "surrounded by subdivision," *Saving the Ranch* counsels against conservation easement creation. In such a case, the owner might sell the ranch and buy a cheaper place "farther out."¹³³ The problem is that many ranch owners are bound to face this situation—now or in the future. By signing a conservation easement, a landowner is precluding future owners from making a choice that the authors themselves recommend.

126. See John H. Davidson, *The Federal Farm Bill and the Environment*, 18 NAT. RESOURCES & ENV'T 3, 38 (2003).

127. *Id.*

128. ANELLA & WRIGHT, *supra* note 2, at 25.

129. *Id.* at 33.

130. *Id.* at 87.

131. *Id.* at 91.

132. *Id.* at 93.

133. *Id.* at 35.

The uncertainty inherent in permanent conservation easements is not insurmountable. Easements provide conservation benefits even if they fall short of perpetuity. And although a conservation easement is an estate in land, it is also a contract. Ranchers could limit the duration of an easement to a renewable term. The Grasslands Reserve Program, for example, wisely provides ranchers with the option of signing up for a 30- or 100-year easement.¹³⁴ Though federal tax incentives are not available if an easement is not created in perpetuity,¹³⁵ these tax benefits are often unavailable or unnecessary.

At the very least, it should be possible to free perpetual easements from what may become obsolete or even counter-productive restrictions. A "no way, no how" stance toward easement amendment is unwise;¹³⁶ an easement, like any good contract, should anticipate future uncertainties. Consistent with centuries of jurisprudence, easements ought to provide for changed circumstances where the preservation purpose becomes frustrated, impracticable, or impossible. One sensible provision might authorize a conservation exchange. Modeled on wetlands banking, a rancher could be allowed to revive development rights in exchange for donation of a substitute conservation easement that better approximates (or is at least equal to) the conservation purposes originally intended. Notwithstanding the sensibleness of modification, conservation easements typically contain provisions designed to "frustrate" modification.¹³⁷ Although amendment through joint agreement is often allowed, conservation organizations permit modification sparingly, and where alteration exists it provides for greater restrictions.¹³⁸

Easements are also subject to revision by courts sitting in equity. Courts may invalidate antiquated easements based on various legal grounds like the doctrines of impossibility, impracticability, and frustration of purpose.¹³⁹ Indeed, the Uniform Conservation Easement

134. See NAT. RESOURCE CONSERVATION SERV., U.S. DEP'T OF AGRIC., *Grasslands Reserve Program*, at <http://www.nrcs.usda.gov/programs/grp> (last visited May 26, 2004).

135. I.R.C. §§ 170(h)(2)(C), 170(h)(5)(A) (West 2004).

136. The model easement provision in *Saving the Ranch* comes close to adopting a per se rule against modification. ANELLA & WRIGHT, *supra* note 2, at 156-57.

137. Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 598 (2004).

138. *Id.*

139. Uniform Conservation Easement Act § 3 cmt. (1981). The unique statutory nature of easements may mean that courts are reluctant to apply equitable doctrines that have historically applied only to real covenants and equitable servitudes. Barton Thompson, *The Trouble with Time: Influencing the Conservation Choices of the Future*, 44 NAT. RESOURCES J. 601, 610 n.34 (2004) (citing Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 279-80 (2002)).

Act provides that courts retain the power "to modify or terminate a conservation easement in accordance with the principles of law and equity."¹⁴⁰ By way of analogy, the cy pres doctrine permits modification of a 501(c)(3) charitable foundation where the charitable purpose becomes impossible.¹⁴¹

Neither ranchers nor conservation organizations, however, should rely on the possibility of future judicial relief. The equitable remedies of contract rescission and reformation are inadequate for two reasons. First, these remedies rest within the discretion of the court, and the standard for court reprieve is high. The cy pres doctrine is exacting in the charitable context, and the *Restatement (Third) of Property (Servitudes)* accords even greater protection to conservation easements: "Because of the public interests involved, [conservation] servitudes are afforded more stringent protection" than other servitudes.¹⁴² Only if no conservation purpose can possibly be served may burdened land be released for other uses.¹⁴³ Second, even if invalidated, perpetual easements impose substantial transaction costs on future generations.¹⁴⁴ The uncertainties inherent in perpetual conservation easements should be carefully considered by a ranch family wishing to preserve their land.

IV. CONCLUSION

Although far from uncontroversial, conservation easements are a significant tool in the land conservation kit. Importantly, they contribute to the development of mutually beneficial relationships between the ranching and environmental communities. In this regard, *Saving the Ranch* is a welcome addition to previous literature. Its insights and advice make clear that appropriately designed conservation easements make sound economic and ecological sense for some, even many, ranchers.

But conservation easements are not a panacea, and they do have their problems. Caution should come from landowner misgivings, from a regressive, counter-productive, and often unnecessary tax policy, and from the uncertainties of perpetuity. At least some ranchers will be unable to utilize conservation incentives short of subdividing, and others will be hesitant to burden future generations with perpetual restrictions. Absent a more narrowly tailored tax code and/or easement provisions

140. Uniform Conservation Easement Act § 3(b) (1981).

141. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 7.11(1) (2000).

142. *Id.* § 7.11 cmt.

143. *Id.* § 7.11(1).

144. Mahoney, *supra* note 137, at 598-99.

that adequately provide for changed and unforeseen circumstances, conservation easements may not be the best choice for these ranchers. The decision to encumber one's ranch with a conservation easement has far-reaching implications. Each ranch must "[j]udge for [it]self" the benefits of conservation easements.¹⁴⁵

REVIEWS

Public Land and Political Meaning: Ranchers, the Government, and the Property between Them. By Karen R. Merrill. University of California Press, 2002. 274 pp. \$50.00 (This review copyrighted by Organization of American Historians. Reprinted with permission.).

I sometimes kid students by suggesting that a difference between them and faculty can be detected in how the word "research" is pronounced. Students tend to emphasize *search*, and faculty *re*. Karen R. Merrill's study of western grazing controversies supports my point. Given the amount of study done on the controversies surrounding the 1934 Taylor Grazing Act (TGA), one would not suspect that there is much need for yet another study. Merrill's deft analysis demonstrates that such is not the case.

The key to Merrill's approach is that it does not disrupt the existing scholarship on this period so much as suggest a way to refocus familiar events to reveal a richer texture. Working with the established theme—ranchers against bureaucrats—Merrill carefully and persuasively reminds us that neither side was as monolithic as the standard narrative tends to imply. In doing so, she presents a story of interaction and change among various voices in the ranching community, in the bureaucratic community, and in the relationship between the two, against a backdrop of changing events and situations. Indeed, though I am always a bit nervous about employing biological metaphors in matters of human history and politics, Merrill's work reads very much like a study of the evolving western public lands and political ecosystem.

Maybe it is my own bias, but one of the more important products of Merrill's approach is that it affords a very empathetic (as opposed to sympathetic) view of the western ranching community. In the current political dialogue, and heavily influenced by so much of the academic scholarship, the ranching community appears to be a self-confident and almost omnipotent force in the federal land decision process. In Merrill's study, it emerges as a community with a far more tenuous self-image, fraught with internal dissension and confronting a

145. ANELLA & WRIGHT, *supra* note 2, at 3.