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Conservation Easements and the Public Good: Preserving the Environment on Private Lands

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ABSTRACT

This article underscores the importance of privately held lands in protecting ecosystems and biodiversity and demonstrates the power of conservation easements to protect such lands by encouraging landowners to act in ways that further both their own self-interest and the public good. This article explores how land trusts use conservation easements to preserve the natural environment on private lands through five case studies—the Montana Land Reliance in Montana, the Jackson Hole Land Trust in Wyoming, the Marin Agricultural Land Trust in California, The Nature Conservancy's land conservation efforts in California, and the Asphepoo, Combahee, and Edisto Basin project in South Carolina. These case studies demonstrate the critical role that private lands play in preserving larger regional ecosystems and illustrate how conservation easements protect the environment on private lands and enhance ecosystems on public lands.

I. INTRODUCTION

The future of land conservation and ecosystem preservation efforts will focus on private lands. Although nearly 60 percent of the land in the United States is privately owned,[1] most of the effort toward protecting ecosystems and preserving biodiversity has been aimed at the approximately 30 percent of the land owned by the federal government.[2] That this is the case should not be surprising—until now it has proved easier to influence what happens on land owned by the government than

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1. RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 9 (1996).

2. David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* 19 HARV. ENVTL. L. REV. 303, 310 (1995).

on land owned by millions of private citizens.[3] But future efforts to protect biodiversity and ecosystems in the United States must include private lands.

There are few intact ecosystems today that exist solely on public lands.[4] And yet, in some cases there are still remarkably intact ecosystems that exist almost exclusively on private lands.[5] One-quarter of all ecosystem types are inadequately represented on federal lands, and seven percent are not found on federal lands at all.[6] Most of the wetlands in the contiguous United States are privately owned.[7] Approximately half of all threatened and endangered species in the United States are found exclusively on private lands, and 20 percent of the remainder spends half of their time on private lands.[8]

A primary tool for protecting the environment on private lands is the conservation easement, a technique for protecting land that imposes specific limitations on how property owners can use or develop their land. Conservation easements enable the more than 1,200 land trusts in the United States to accomplish many important conservation objectives on private lands without owning the fee interest.[9] Both the number of land trusts and the amount of private land protected by them has increased

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3. *See, e.g., id.* For a review of efforts to protect biodiversity on federal lands, see Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 14-41 (1997).

4. For example, the largest intact ecosystem in the contiguous United States is the Greater Yellowstone Ecosystem (GYE); while most of the land in the GYE is under federal ownership, critical riparian areas and winter range for wildlife are often in private ownership. TIM W. CLARK & STEVEN C. MINTA, GREATER YELLOWSTONE'S FUTURE 10 (1994).

5. The ACE Basin (the watershed of the Asphepoo, Combahee, and Edisto Rivers) in South Carolina is an example of a large, relatively intact ecosystem that has a larger percentage of private lands than public lands. See *infra* note 238 and accompanying text for a discussion of the ACE Basin.

6. David W. Crumpacker et al., *A Preliminary Assessment of the Status of Major Terrestrial and Wetland Ecosystems on Federal and Indian Lands in the United States*, 2 CONSERVATION BIOLOGY 103, 111-12 (1988).

7. *Clinton Administration Proposal on Protection of U.S. Wetlands*, 24 Env't Rep. (BNA) 793 (Aug. 24, 1993).

8. CONSERVATION ON PRIVATE LANDS: AN OWNER'S MANUAL 4 (Constance E. Hunt ed., 1997).

9. The Land Trust Alliance defines a land trust as a "nonprofit organization that, as all or part of its mission, works to conserve land by undertaking or assisting direct land transactions—primarily the purchase or acceptance of donations of land or easements." LAND TRUST ALLIANCE, 1998 NATIONAL DIRECTORY OF CONSERVATION LAND TRUSTS, at v (1998). Most land trusts are small organizations with a local or regional focus; a few have a statewide or multi-state focus. *Id.* In this article, the term "regional land trust" will be used to refer to those organizations that do not have a national focus. In addition, there are a handful of national organizations that work to preserve private lands. The most significant of these is The Nature Conservancy.

sharply in the past decade.[10] In the 1980s, many states enacted statutes that both eliminated the common law constraints on conservation easements and allowed private non-profit organizations to hold conservation easements. Today, 46 states have some form of a conservation easement statute.[11] The amount of acreage that land trusts have protected under conservation easements between 1988 and 1998 increased by more than 400 percent to over two million acres.[12] In many cases, conservation easements provide the best, and perhaps only, tool for preserving open space and ecologically sensitive lands that are in private hands.

Private lands provide significant habitat for flora and fauna. Bald eagles, for example, nest on private lands along the Snake River near Jackson Hole, Wyoming. The most extensive blue oak woodlands in California are on private ranch lands. In coastal South Carolina, one of the largest wetland ecosystems in the eastern United States is located almost entirely on private lands. Private lands used for farming and ranching, such as the large dairy ranches in California's Marin County, provide important environmental benefits as open spaces.

This article examines the use of conservation easements and presents five case studies that explore how land trusts use conservation easements to preserve the natural environment on private lands. The five case studies—the Montana Land Reliance in Montana, the Jackson Hole Land Trust in Wyoming, the Marin Agricultural Land Trust in California, The Nature Conservancy's land conservation efforts in California, and the

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10. For example, in 1988 there were 741 land trusts in the United States compared to 1,213 in 1998, and land protected by these organizations more than doubled. *Id.* at v, vii. Today, land trusts protect over 17 million acres of private land. Local and regional land trusts have protected more than 4.7 million acres. *Id.* at vii. The Nature Conservancy and other national organizations have protected over 13 million acres. *Id.* at 197-99. The Nature Conservancy alone has protected over 10 million acres. The Trust for Public Lands has protected one million acres, and the Conservation Fund has protected 1.5 million acres. Conservation easements accounted for almost half of all the land protected by local and regional land trusts between 1988 and 1998. *Id.* at vii. Acquisition of private lands for transfer to public ownership is the other principal tool used by land trusts. *Id.* Land trusts, however, do purchase the fee interest in land that they retain.

11. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND 26, 32-33 tbl.2.2 (Julie Ann Gustanski & Roderick H. Squires eds., 2000). *See also* Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 109 n.158 (1997).

12. The amount of acreage protected by local and regional land trusts increased from 290,000 acres in 1988 to almost 1.4 million acres in 1998. LAND TRUST ALLIANCE, *supra* note 9, at vii. In addition, The Nature Conservancy held conservation easements on over 800,000 acres in 1998, an increase from 236,700 in 1989. *Id.* at 198. *See also* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L. J. 2, 2 n.1 (1989) (citing an interview with The Nature Conservancy noting the acreage that it held in conservation easements in 1989).

Asphepoo, Combahee, and Edisto (ACE) Basin project in South Carolina—illustrate how preserving private lands provides many environmental benefits. In these studies, private landowners working together with land trusts have preserved ecological and open space benefits by using conservation easements.

This article has two objectives: to underscore the importance of private lands in protecting ecosystems and biodiversity, and to demonstrate how conservation easements act as powerful tools for protecting private lands by encouraging landowners to act in ways that further both their own self-interest and the public good. The next section of this article begins by addressing the fundamental question of how self-interested private action by landowners can also serve the larger public interest by protecting the environment on private lands. The third section explores the concept and functions of conservation easements. It examines the constraints that the common law historically placed on conservation easements, reviews state enabling statutes, discusses the tax benefits for donating a conservation easement, and examines problems of enforcement and termination. The fourth section examines the essential role that private lands play in any comprehensive effort to preserve ecosystems and biodiversity by summarizing the results of five case studies that provide an overview of how conservation easements are used by non-profit organizations to achieve environmental preservation on private lands. The article's next section addresses the benefits of using conservation easements as a tool for protecting ecologically critical private lands. The final section returns to the question of the role of private action in providing for the public good by protecting the environment on private lands and suggests that self-interested and publicly motivated behavior by individual landowners can be the foundation of a powerful land ethic.

II. PRIVATE ACTION, CONSERVATION EASEMENTS, AND THE PUBLIC GOOD

How can the public protect the natural environment on private lands from development? Traditionally this has been accomplished through government regulations that restrict how landowners use their land based on the need to provide for the public health and welfare, and for socially desirable uses of private lands prescribed through zoning regulations.[13] Although government regulatory approaches are subject to constitutional limits and to changes in political will, they are nonetheless powerful and

13. See *infra* note 280 and accompanying text for a discussion of the limitations of government regulatory power on private lands.

effective tools for providing for the public good.[14] In this manner, the public good may be provided for through public action.

The public good may also be provided for by private action. In the case of conservation easements, private organizations (land trusts) get together with private landowners and agree to protect the natural environment on the landowner's property. This agreement is in the narrow self-interest of both the land trust and the property owner—the land trust is interested in protecting the land and the landowner is interested in receiving tax benefits and income or may be motivated by a desire to protect the land. It is essential to understand that this approach to providing environmental conservation on private lands is not the same thing as the privatization of environmental protection. This approach does not suggest that the protection currently provided by the government should be provided by private entities. Instead, this approach encourages private action in pursuit of a public good in addition to, or apart from, the government's protection of the environment.

Traditional approaches to environmental protection have generally ignored the possibility that private actors might work together to protect the environment independent of government regulation. Since the private sector is the source of much environmental degradation and pollution, it is often assumed that private actors alone cannot protect the environment. The corollary to this assumption is that the solution to environmental degradation must come by way of public action to protect the environment. This description of the problem is somewhat simplistic; public actors and public actions also degrade the environment and private actors frequently take steps to protect their property from environmental degradation. There is, nevertheless, a deep-rooted tension between the public and private sectors when it comes to environmental protection.[15]

When private actors do act to provide a conservation benefit, a typical concern is that the public interest may not be adequately protected or that the action may not be in the public interest at all. This concern is rooted in a belief that the public interest in environmental protection is best

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14. For example, the Fifth Amendment of the United States Constitution prohibits the taking of private property for a public use without just compensation. See *infra* note 285 and accompanying text for a discussion of the takings issue and other limitations on the government's powers.

15. Professor Rose, for example, notes the tension that is often inherent between environmental protection and private property. Rose writes, "Environmental protection often seems to be at loggerheads with private property." Carol M. Rose, *Property Rights and Responsibilities*, *in* THINKING ECOLOGICALLY 49, 49 (Marian R. Chertow & Daniel E. Esty eds., 1997). Rose proposes, however, that this does not need to be the case; she argues, "both secure property rights and effective environmental protection share a common goal—the enhancement of the total social well-being, both private and public." *Id.*

achieved through some form of public action to guard against the excesses of private self-interest.[16] For example, commentators who question whether conservation easements are truly in the public interest believe that some form of government oversight is needed to ensure that the public interest is protected.[17] Indeed, some commentators argue that only public entities should hold conservation easements.[18] This is premised on their belief that there is an inherent tension between the public good and private self-interest. The literature on common property resources, however, shows that this is not necessarily the case: the solution to many common property problems can be to promote behavior by individual property owners that is in their own self-interest and also furthers a larger common goal.[19]

Conservation easements are one means of protecting the environment on private lands. As private agreements to protect the environment, conservation easements are uniquely suited to private lands. Conservation easements, however, are not a substitute for government regulation or for public ownership of land. Effective long-term environmental protection on private lands will depend on the private actions of individual landowners as well as on government regulation.

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16. Boyd, Caballero, and Simpson summarize the problem in discussing species protection as follows: "'Land conservation' means that the interests of private landowners are sacrificed to achieve a public benefit, whereas 'development' means that social goals must yield to the full exercise of the property owner's rights. Thus, land conservation often entails a clash of mutually exclusive interests, as private development interests are curtailed in order to achieve the public benefit of [environmental] protection." James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L. J. 209, 211 (2000).

17. *See, e.g.*, George Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 462-65 (1984); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1100-02 (1996); Farrier, *supra* note 2, at 346-47.

18. Korngold, *supra* note 17, at 462.

19. For an excellent discussion of how self-interested actions help resolve common property problems see ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 1-28 (1990) (Chapter 1 provides a useful overview of approaches to resolving common property problems). Professor Mansbridge also provides an excellent overview of how individuals can act both in their own self-interest and be motivated by the larger public interest at the same time. Jane Mansbridge, *On the Contested Nature of the Public Good, in* PRIVATE ACTION AND PUBLIC GOOD 3, 3-17 (Walter W. Powell & Elisabeth S. Clemens eds., 1998). Mansbridge explains that "discovering that one can do well by doing good encourages doing good." *Id.* at 14. Mansbridge's point is that if one can advance their own self-interest while also doing something that is in the public interest, then that individual has a strong motivation to act in the public interest. Mansbridge offers an explanation of how "individuals broaden their goals and satisfactions so that they can take some pleasure in the goods of others, find some satisfaction in working for collective ends, and feel fulfilled in acting according to principles that they have made their own." *Id.* at 16.

Indeed, private and public actions to preserve the natural environment can complement each other. Despite the expansive powers of government to regulate conduct on private lands, private landowners are unlikely to protect the environment on their land unless it is their choice. Any truly effective effort at protecting the environment on private lands will undoubtedly need to rely to a substantial extent on the individual actions of private landowners.

III. WHAT ARE CONSERVATION EASEMENTS?

In the past two decades, conservation easements have emerged as a key legal tool for preserving the environment on private lands. Conservation easements are privately initiated land-use restrictions designed to protect and preserve private lands from development.[20] Conservation easements are commonly used to protect open space, preserve wildlife habitat and other sensitive ecological lands, and to prevent development of agricultural lands. Conservation easements can also be used to preserve historical structures and cultural sites. The property protected may be forest, wetlands, agricultural lands, or natural open space. The owner retains title to the land—a conservation easement is a nonpossessory interest in the land—and may continue to use the land subject to restrictions imposed by the easement.[21] Thus, the owner retains all rights to the property that the owner possessed prior to the easement subject to the restrictions imposed by the easement. The owner may continue to exclude the public from lands protected under a conservation easement, unless the easement provides for public access.[22] The owner may also sell the property or pass it onto heirs, but the property remains bound by the terms of the conservation easement—conservation easements run with the land and are usually perpetual unless the easement stipulates otherwise.[23]

Typically, a conservation easement prohibits any further development of the land unless it is related to a use of the land that is permitted by the easement.[24] For example, a conservation easement on a cattle ranch will generally prohibit the owner (current or future) from subdividing the property; the owner, however, is permitted to continue using the property as a cattle ranch and is allowed to make improvements

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20. *See generally* JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 5-9 (1988); SAMUEL N. STOKES ET AL., SAVING AMERICA'S COUNTRYSIDE 224-31 (1997).

21. *See* 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.01 (Michael Allan Wolf ed., 1999).

22. *Id.*

23. *Id.*

24. DIEHL & BARRETT, *supra* note 20, at 5.

to the property that are related to the operation of the property as a cattle ranch. Indeed, insuring that the property will remain a working ranch may be one of the primary reasons behind the conservation easement.

A. Conservation Easements and the Common Law

The conservation easement is a creature of statute, not the common law.[25] Indeed, under the common law a conservation easement is not a traditional easement, a real covenant, or an equitable servitude.[26] The common law did not recognize a restriction on land use that was not held by an adjoining landowner and that ran with the land in perpetuity.[27] Under common law, a variety of tools, referred to as servitudes, are used to create nonpossessory interests in real property. Examples of common law servitudes include easements, real property covenants, and equitable servitudes. The law of servitudes is one of the most technical and antiquated areas of property law.[28] These common law mechanisms for creating nonpossessory interests in property overlap in some key aspects, but they also differ in respect to how they are created and whether they run with the land, thereby binding successors in interest. Conservation easements create a nonpossessory interest in real property similar, but not identical, to any of these common law servitudes.

1. *Conservation Easements as Negative Easements in Gross*

A conservation easement functions much like a negative easement in gross.[29] A negative easement is a restriction on land use that prevents the owner of the property that the easement encumbers (referred to as the servient estate because it is the property that is burdened by the easement) from doing specific activities on this property. A negative easement always benefits another piece of property. An example of a negative easement is a restriction that would prevent a property owner from constructing a structure or fence that would block a neighbor's view.[30] In such a situation, the neighbor's property is referred to as the dominant estate because it is

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25. *See id.*; John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 324 (1997); Dana & Ramsey, *supra* note 12, at 17; Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L. J. 1187, 1193 (1989).

26. *See, e.g.*, Hollingshead, *supra* note 25, at 326-33.

27. 4 POWELL, *supra* note 21, § 34A.01.

28. *See generally* Susan F. French, *Toward a Modern Law of Servitudes: Reviewing the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

29. Hollingshead, *supra* note 25, at 328; *see also* 4 POWELL, *supra* note 21, § 34A.01.

30. Hollingshead, *supra* note 25, at 326; *see also* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY 723-24 (1998); French, *supra* note 28, at 1266-69.

the property that is benefited by the easement. In contrast to negative easements, affirmative or positive easements (which are more common than negative easements) entitle the dominant estate to make use of the servient property in some manner. An easement held by the dominant estate for access across the servient estate is an example of an affirmative easement.[31] A conservation easement is similar to a negative easement because it restricts how the owner of the servient estate may use the property.

An easement in gross is an easement that involves a servient estate but no dominant estate—in other words, there is no property that is directly benefited by the easement.[32] An easement held by a land trust that restricts development in order to preserve open space is an easement in gross because the benefit is not tied to any specific piece of property; rather, the benefit accrues to the land trust or organization that holds the easement. An easement that benefits another piece of property is an appurtenant easement.[33] An easement for an access road is an appurtenant easement because its purpose is tied to the piece of property that the road accesses. A conservation easement resembles both a negative easement and an easement held in gross, but the common law does not recognize a negative easement in gross.[34] Negative easements under the common law are appurtenant because they benefit a specific piece of property. Easements in gross under the common law are usually restricted to affirmative commercial activities such as an easement for a railroad right-of-way or a utility line.[35] Thus, conservation easements are an anomaly without precedent in the common law of easements.

2. Conservation Easements as Real Covenants and Equitable Servitudes

A conservation easement also resembles a real property covenant in that it is a promise regarding the use of land.[36] However, under common law a real covenant that is held in gross usually cannot bind a successor in interest.[37] In order for a real covenant to bind a successor, both the benefit and the burden of the promise must run with the land and the parties must

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31. *See* Hollingshead, *supra* note 25, at 326-27; DWYER & MENELL, *supra* note 30, at 723-24; French, *supra* note 28, at 1266-69.

32. *See* Hollingshead, *supra* note 25, at 327; DWYER & MENELL, *supra* note 30, at 724. Traditionally, the common law recognized only four types of negative easements: easements for light, air, support, and the flow of artificial streams. *See* French, *supra* note 28, at 1267; Dana & Ramsey, *supra* note 12, at 13.

33. *See* Hollingshead, *supra* note 25, at 327; DWYER & MENELL, *supra* note 30, at 724; French, *supra* note 28, at 1266-69.

34. *See* 4 POWELL, *supra* note 21, § 34A.01.

35. French, *supra* note 28, at 1268.

36. *See* Korngold, *supra* note 17, at 437 (arguing that a conservation easement most closely resembles a real covenant).

37. Hollingshead, *supra* note 25, at 330-31; *see also* Dana & Ramsey, *supra* note 12, at 15-16.

intend for the burden to run. [38] Because there is no dominant estate that holds the conservation easement, the benefit cannot run with the land, only the burden runs with the land.[39] A minority of jurisdictions and the Restatement of Property[40] hold to the traditional rule that both the benefit and the burden must run with the land in order for the covenant to bind successors in interest.[41]

A real covenant is typically enforced by an award of damages if the promise is breached.[42] Under the common law, equitable relief, or an injunction, was not an available remedy for enforcement of a real covenant.[43] Clearly, enforcing a promise not to develop a piece of property by use of an injunction is more conducive with the rationale that underlies a conservation easement. An award of damages might compensate the holder of the easement monetarily, but the objective for acquiring the easement—preventing future development—is defeated. Thus, while a conservation easement bears some resemblance to a real covenant—both are promises that can restrict the use of property—the common law of real covenants is not compatible with the rationale and intent that underlie conservation easements.

The common law doctrine of equitable servitudes is probably more analogous to a modern conservation easement than is a real covenant.[44] Equitable servitudes, like real covenants, are promises regarding the use of the land; however, enforcement of equitable servitudes does not require privity of estate.[45] The lack of a privity requirement makes it more likely that an equitable servitude can run with the land. In addition, equitable servitudes are typically enforced by an injunction. Traditionally, however, equitable servitudes required the benefit to be appurtenant to the dominant

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38. Under the common law of real covenants, in order for the burden to run with the land, the restriction must touch and concern the land, and there must be vertical and horizontal privity of estate. Vertical privity is a relationship between the covenantor and the subsequent property owner and horizontal privity is a relationship between the original covenantor and the original covenantee. For the benefit to run, the restriction must touch and concern the land and there must be vertical privity. For the burden to touch and concern the land, the promise must relate to the land. *See* DWYER & MENELL, *supra* note 30, at 757-60; *see also* French, *supra* note 28, at 1270-75.

39. Since there is no dominant estate, the requirement that the benefit, as well as the burden, touch and concern the land is not satisfied. Dana & Ramsey, *supra* note 12, at 15-16. In addition, the lack of privity between the successor in interest and the original covenantee also implies that the burden cannot run with the land. *Id.*

40. RESTATEMENT OF PROPERTY § 537 (1944).

41. Hollingshead, *supra* note 25, at 330-31.

42. DWYER & MENELL, *supra* note 30, at 760; French, *supra* note 28, at 1275-76.

43. Hollingshead, *supra* note 25, at 331.

44. *Id.* at 331-32.

45. *Id.*; *see supra* note 38.

estate; thus, an equitable servitude held in gross was a problem.[46] A few jurisdictions and the Restatement of Property allow equitable servitudes in gross, but this position has not been adopted by a majority of jurisdictions.[47]

3. Rationale for Common Law Constraints on the Use of Servitudes

The common law rules governing easements, real covenants, and equitable servitudes do not comport well with the concept of a conservation easement. Indeed, there is a bias in the common law against negative restrictions on land use that runs with the land in perpetuity. The rationale behind this bias derives from the general prohibition in the common law against dead-hand controls on property that restrain alienability.[48] The common law rules regarding the need for privity, touch and concern requirements, and appurtenancy all serve to restrict the ability of a current landowner from restraining the ability of future landowners to market the property freely. Professor French notes that two fundamental concerns underlie these traditional requirements—economic productivity and fairness.[49] She writes,

> Concerns over economic productivity have caused courts to design requirements to keep land free from burdens and restraints that unduly limit its productive use. Concerns over fairness have led to development of rules which protect parties from liabilities that a reasonable person would not expect to have incurred, and which meet their reasonable expectations.[50]

One can question whether these concerns still justify maintenance of the old common law rules.[51] While the common law rules protect the

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46. Dana & Ramsey, *supra* note 12, at 17; French, *supra* note 28, at 1277.

47. Dana & Ramsey, *supra* note 12, at 17.

48. *See id.* at 22; Korngold, *supra* note 17, at 457.

49. French, *supra* note 28, at 1282.

50. *Id.*

51. Professor French has suggested that there is a need to reform the common law of servitudes, not so much because the original rationales underlying the rules are outdated, but because of "the overlapping doctrines, the obsolete terminology, and the oblique approaches to problems that it has retained from the past." French, *supra* note 28, at 1303-04. French explains, "Early law restricted the creation of running servitudes because it lacked the means to terminate them. Since modern law can terminate servitudes, it no longer needs to restrict their creation." *Id.* at 1305. Thus, French argues that servitudes should be treated like any other agreement—"if the agreement itself is valid, the law should give effect to the parties' intentions, enforcing the agreement until it becomes obsolete or unreasonably burdensome." *Id.* At which point, French argues, the servitude should be terminated. Professor Epstein agrees with Professor French that the common law of servitudes is in need of reform; however, he does not see a need to retain a role for the courts to intercede in order to modify or terminate the servitudes if the servitude becomes obsolete. Richard A. Epstein, *Notice and Freedom of*

long-term marketability of land by restricting the use of servitudes, they do so at the cost of restraining the ability of willing parties to agree freely to provisions regarding the future use of the land.[52] Modern recording laws and title insurance virtually eliminate the possibility that a future buyer will be unaware of any servitudes attached to the property.[53] In addition, productive use of land today is not always measured by productive economic value. The preservation of ecological diversity, agricultural lands, and open space serves an important public good. Furthermore, it is not always the case that a servitude that restricts how land may be used in the future will drive down the value of the land; servitudes that protect the land by preventing specific uses may actually increase the value of the land and the value of nearby land.

B. Conservation Easement Statutes

Because the common law of servitudes does not provide for negative easements or servitudes held in gross that run with the land in perpetuity, states have enacted enabling statutes that provide for conservation easements. These statutes eliminate many of the common law impediments to conservation easements—such as the restriction against negative easements held in gross, as well as privity, and touch and concern requirements. In addition, most of these statutes allow both public agencies and qualifying non-profit conservation organizations to hold conservation easements. The individual state statutes vary considerably. Some statutes cover only land conservation, while others cover both land conservation and historic preservation.[54] Further, some states have multiple statutes governing scenic, open-space, and conservation easements.[55]

Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1358 (1982). Epstein argues, "with notice secured by recordation, freedom of contract should control." *Id.* It is a misconception, Epstein contends, to hold that restraints on servitudes protect individual freedom by protecting the alienability of property. *Id.* at 1359-60. Such a protection adheres to the land and not the individual who owns the land. Thus, Epstein concludes that courts should protect consensual restraints on alienation, rather than strike them down. *Id.*

52. *See* Epstein, *supra* note 51, at 1355-56; *see also* Blackie, *supra* note 25, at 1199.

53. Blackie, *supra* note 25, at 1199.

54. *See* 4 POWELL, *supra* note 21, § 34A.02 for a discussion of the different types of statutes. *See also* Mayo, *supra* note 11, at 28-30. For a state-by-state review of conservation easement statutes, see generally PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

55. *See* 4 POWELL, *supra* note 21, § 34A.02[1]. Scenic highway easement legislation dates from the 1930s; indeed, the earliest conservation easements were used in Boston in the 1880s to protect parkways designed by Frederick Law Olmstead. *Id.* The U.S. Fish and Wildlife Service has used conservation easements to protect waterfowl habitat since the 1930s. *Id.* The planner, William H. Whyte, is most commonly credited with introducing the concept of

The first states to enact conservation easement statutes were California in 1959 and New York in 1960.[56] These early statutes permitted only public agencies to hold easements[57] and provided very little guidance on when and how conservation easements should be used, and thus these statutes were not used extensively.[58] In 1969, Massachusetts enacted the first statute that allowed both public agencies and non-profit organizations to hold conservation easements.[59] Similar legislation followed in other states. Montana enacted a statute allowing non-profit organizations to hold conservation easements in 1975[60] and California enacted a comprehensive conservation easement act in 1979.[61]

In 1981, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Conservation Easement Act (UCEA).[62] The Act, which stipulates that public agencies and non-profit organizations may hold easements, provides a model for states to follow when drafting conservation easement statutes. Eighteen states and the District of Columbia have adopted the UCEA.[63] Today, only four states—Wyoming, Pennsylvania, North Dakota, and Oklahoma—do not have any form of a conservation easement statute.[64]

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conservation easements to urban and land-use planning in the late 1950s. *Id.* at § 34A.02[3].

56. *See* THOMAS S. BARRETT & PUTNAM LIVERMORE, THE CONSERVATION EASEMENT IN CALIFORNIA 34 (1983). (discussing The Scenic Easement Deed Act of 1959). In California, for example, three statutes provide for scenic, open-space, and conservation easements: The Scenic Easement Deed Act of 1959, the Open-Space Easement Act of 1974, and the Conservation Easement Act of 1979. *Id.* at 20-21. The differences in these three statutes illustrate the evolution of the conservation easement concept in California. The 1959 statute only allows public agencies to secure scenic easements. The 1974 Act is more expansive than the 1959 statute, and it was amended in 1977 to allow non-profit organizations with prior public approval to hold conservation easements. The 1979 Act allows qualified private parties to create a conservation easement without prior public approval. All three statutes still may be used in California; although, as Barrett and Livermore note, it is unclear why a public agency would still want to use the 1959 Act. *Id.*

57. *Id.*

58. *See id.* at 12.

59. *See* 4 POWELL, *supra* note 21, § 34A.02[3].

60. Robert M. Knight & Nancy K. Moe Dye, *Attorney's Guide to Montana Conservation Easements*, 42 MONT. L. REV. 21, 25-26 (1981).

61. BARRETT & LIVERMORE, *supra* note 56, at 18-19.

62. *See* 4 POWELL, *supra* note 22, § 34A.02[2]; UNIF. CONSERVATION EASEMENT ACT §§ 1-6, 12 U.L.A. 163 (1996 & Supp. 1999) [hereinafter UCEA].

63. *See Table of Jurisdictions Wherein Act Has Been Adopted, in* UCEA, 12 U.L.A. 15 (Supp. 1999).

64. Mayo, *supra* note 11, at 32-33 tbl.2.2. *See also* Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 109 n.158 (1997). Despite the lack of enabling legislation, these states still permit the use of conservation easements in some form. *See generally* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, *supra* note 54.

1. Definition of Conservation Easement

The state statutes differ somewhat in how they define conservation easements and in the scope of uses or activities that conservation easements can restrict. The UCEA, for example, defines a conservation easement as

> a nonpossessory interest of a holder in real property imposing limitations or affirmative obligation the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[65]

Some states that have adopted the UCEA have modified the reach of the statute. Maine, for example, omits reference to preserving historical properties from their statute.[66]

Many of the states that have not adopted the UCEA incorporate a similar definition of a conservation easement in their statute. California, for example, defines a conservation easement as

> any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominately in its natural, scenic, historical, agricultural, forested, or open-space condition.[67]

Montana employs a similar definition; however, it does not cover historic structures:

> "Conservation easement" means an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.[68]

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65. UCEA § 1(1), 12 U.L.A. 170 (1996).
66. *See Action in Adopting Jurisdictions* following UCEA § 1, 12 U.L.A. 171 (1996).
67. CAL. CIV. CODE § 815.1 (West 1982).
68. MONT. CODE ANN. § 76-6-104(2) (1999).

The Montana statute further lists specific activities that a conservation easement may restrict including the construction of structures, dumping of soil or waste, removal of vegetation, surface excavations, and acts that are not consistent with the conservation and preservation of soil, water, fish, and wildlife resources.[69] Neither the UCEA nor the California statute provides a similar list of restricted activities; however, both statutes clearly allow for such restrictions.

2. Common Law Impediments Abolished

The state conservation easement statutes are usually quite clear in their intent to create a nonpossessory interest in land that is negative in nature, held in gross, and runs with the land, notwithstanding any impediments that the common law might impose on such restrictions. For example, the UCEA states,

> A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern the real property; or (7) there is no privity of estate or of contract.[70]

Similar language appears in most state conservation easement statutes.[71] In the comment that follows Section 4 of the UCEA, the model statute's authors explain that a basic goal of the UCEA "is to remove outmoded common law defenses that could impede the use of easements for conservation or preservation ends."[72]

3. Non-Profit Organizations May Hold Conservation Easements

All 18 states that have adopted the UCEA and most of the other states that have adopted comprehensive conservation easement statutes provide that either a government body or a charitable organization whose

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69. *Id.* at § 76-6-203.

70. UCEA § 4, 12 U.L.A. 179 (1996).

71. *See, e.g.*, CAL. CIV. CODE § 815.7(a) (West 1982) ("No conservation easement shall be unenforceable by reason of lack of privity of contract or lack of benefit to particular land or because not expressed in the instrument creating it as running with the land."); *see also* MONT. CODE ANN. § 76-6-210(2) (1999) ("No conservation easement shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of such conservation easement not being an appurtenant easement or because such easement is an easement in gross.").

72. *Comment* following UCEA § 4, 12 U.L.A. 179 (1996).

purpose is conservation or preservation of natural or cultural resources may hold a conservation easement.[73] Limits are often placed on the types of non-profit organizations that can hold conservation easements. The UCEA allows any charitable corporation, association, or trust whose purpose is the protection of scenic, natural, or cultural resources to hold a conservation easement.[74] Some states, including states that have adopted the UCEA, permit only non-profit organizations that qualify as 501(c)(3) organizations under the federal tax code to hold conservation easements.[75]

Most statutes require a non-profit organization that holds conservation easements to have as its primary purpose conservation of natural resources or preservation of historic structures.[76] This requirement is also found in the federal income tax code. In order for a grantor to receive a tax benefit from the donation of a conservation easement, the organization holding the easement must "have a commitment to protect the conservation purposes of the donation."[77] The rationale behind this requirement is to ensure that the easement is held by an organization that has an interest in enforcing the easement, and thus the easement is a legitimate effort to protect the property and not merely an effort to secure a tax break.[78]

C. Enforcement, Duration, and Termination of Conservation Easements

1. *Enforcement*

Enforcement is key to maintaining the integrity of a conservation easement. If the purpose of the easement is to preserve open space or wildlife habitat, those values will be lost if a property owner attempts to develop the property in a manner inconsistent with the easement. It is difficult to re-create wildlife habitat or open space if houses or a shopping center have been built on the property. Thus, the easement holder must be in a position to enforce the easement if necessary. The key to enforcing a

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73. UCEA § 1(2), 12 U.L.A. 170 (1996); 4 POWELL, *supra* note 21, § 34A.02[2]. See Mayo, *supra* note 11, at 36-37 for a state-by-state list of what types of organizations may hold conservation easements. Roderick H. Squires notes that 45 states and the District of Columbia allow non-profit conservation organizations to hold conservation easements. Roderick H. Squires, *Introduction to Legal Analysis*, *in* PROTECTING THE LAND 69, 69 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

74. *See* UCEA § 1(2), 12 U.L.A. 170 (1996).

75. *See Action in Adopting Jurisdictions* following UCEA § 1, 12 U.L.A. 171 (1996); *see also* CAL. CIV. CODE § 815.3(a) (West 1982). In Montana, a private organization that qualifies as a 503(c) corporation may hold a conservation easement. MONT. CODE ANN. § 76-6-104(5)(b) (1999).

76. *See, e.g.*, MONT. CODE ANN. § 76-6-104(5)(c) (1999); CAL. CIV. CODE § 815.3(a) (West 1982); UCEA § 1(2), 12 U.L.A. 170 (1996).

77. Treas. Reg. § 1.170A-14(c) (as amended in 1999).

78. *See* 4 POWELL, *supra* note 21, § 34A.03[2].

conservation easement is monitoring; without regular monitoring, a land trust or other holder of the easement is unlikely to discover violations of the easement. The UCEA does not mention the right of the easement holder to inspect the property, but the model statute does not prohibit this right, and it is almost always written into the easement.[79]

The UCEA stipulates that an enforcement action may be brought by the holder of the easement, a third party authorized to enforce the easement, or a person authorized by other law.[80] While all states appear to allow the holder of the easement to enforce the easement,[81] generally only those states that have adopted the UCEA allow for enforcement by other parties. The rationale behind third party enforcement is that it is useful to allow a third party to enforce an easement if the holder is unable or unwilling to enforce the easement. [82] A person authorized by other law to enforce a conservation easement generally means the attorney general of the state in which the easement is located.[83]

The UCEA does not address remedies, although the availability of equitable relief to enforce the terms of the easement seems implied.[84] Equitable relief or an injunction is the obvious and most appropriate

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79. *See, e.g.*, DIEHL & BARRETT, *supra* note 20, at 175.

80. UCEA § 3, 12 U.L.A. 177 (1996). The UCEA also allows the owner of the property burdened by the conservation easement to bring an action affecting the conservation easement. Presumably this allows for an action by the owner of the fee simple against a tenant or between tenants in common. But it also seems to provide that the owner of the fee simple may bring an action to modify or terminate the conservation easement. *See* 4 POWELL, *supra* note 21, § 34A.03[4].

81. The language that states use to identify who may bring an action to enforce a conservation easement is not always clear. Montana, for example, allows non-profit organizations to hold conservation easements. It also provides for enforcement, and further stipulates "[n]o conservation easement shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of such conservation easement not being an appurtenant easement or because such easement is an easement in gross." MONT. CODE ANN. 76-6-210(2) (1999). But in the very next section of the statute, enforcement appears limited to the "owner of the dominant tenement." MONT. CODE ANN. 76-6-211(1) (1999). Thus, the question becomes whether the non-profit organization that holds the easement is the dominant tenement despite lack of privity of estate. There is no published case law explaining these enforcement provisions despite the fact that Montana has more acreage protected under conservation easements than any other state. One can only assume that the Montana Legislature intended those authorized to hold conservation easements also retain the right to enforce them.

82. *See* 4 POWELL, *supra* note 21, § 34A.03[3]. Of those states that have adopted this provision of the UCEA, only New York has authorized third party enforcement. *Id.*

83. *See Comment* that follows UCEA § 3, 12 U.L.A. 177 (1996). Powell suggests that this provision is unnecessary in that if an attorney general has the power to enforce the easement by some other law, that power is not dependent on the inclusion of this provision. 4 POWELL, *supra* note 21, § 34A.03[4]. No non-UCEA state has adopted this provision.

84. 4 POWELL, *supra* note 21, § 34A.03[4].

remedy. The objective of a conservation easement—preservation of open space or protection of scenic or historical qualities—is best ensured by the ability of the easement holder to secure an injunction that prevents the property owner from violating the easement. Some states, however, provide for damages in addition to equitable relief and permit the prevailing party to recover attorney's fees.[85]

There have been few published cases dealing with the enforcement of conservation easements, but the cases that do exist indicate a strong tendency by courts to enforce the terms of the easements.[86] In upholding conservation easements, courts have cited the public policy benefits of the easement and the intent of the legislature to provide a means for conserving private lands.[87] To the extent that problems do arise, they often involve successors in interest to the property that is encumbered by an easement. The new property owner may not share the same concern for conserving the land as that of the original owner, or the new owner may view the easement as a burden and try to invalidate it. Courts have held that conservation easements are valid against successors in interest.[88]

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85. California, for example, permits both the recovery of damages and attorney's fees in addition to an injunction. CAL. CIV. CODE § 815.7 (West 1982).

86. *See, e.g., Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365 (Mass. 1991) (upholding the right of the Massachusetts Commissioner of Food and Agriculture to enforce the expressed conditions of an agricultural conservation easement).

87. In *Bennett*, for example, the court noted "the Legislature has recognized the enforceability of certain easements in gross by public officials and charitable entities where the public purpose of the restriction is clear." *Id.* at 1367. In *Parkinson v. Bd. of Assessors*, 495 N.E.2d 294, 295 (Mass. 1986), the Massachusetts Supreme Court reversed its initial decision holding that a conservation easement was not valid because it was ambiguous. After the court accepted a petition for rehearing by the state Attorney General, it subsequently held that the conservation easement was valid because it complied with the terms of the state statute. *Id.* In accepting the petition for rehearing, the court explained, "The Attorney General represented that conservation restrictions like the one here in issue are consistently recognized as valid, that many other existing conservation arrangements are legally affected by the decision in this case, and that the result here is important to the cause of environmental conservation. This information was not presented to the court at any time before the petition for rehearing was filed." *Id.* at 295 n.1.

88. *Bennett* involved a challenge by a successor in interest. 576 N.E.2d at 1366. In *Madden v. The Nature Conservancy*, 823 F. Supp. 815, 816-17 (D. Mont. 1992), Madden challenged the validity of a conservation servitude that TNC had placed by reservation on a ranch that it sold to a party named Boone. The ranch changed hands several times before it was bought by Madden. Madden claimed that the servitude was invalid under Montana law because TNC granted the easement to itself before selling the ranch to Boone. *Id.* at 817. The court held that the conservation easement was valid because it was created contemporaneously with the transfer of title between TNC and Boone, and thus it was enforceable against Madden. *Id.* at 818. TNC claimed the conservation servitude was valid under both Montana's statute regarding servitudes and its conservation easement statute. *Id.* at 817. The court based its ruling on the servitude statute and did not discuss the validity of the conservation servitude

Enforcement is commonly cited as a concern regarding the long-term effectiveness of conservation easements.[89] A conservation easement has little conservation value if the holder is not in a position to enforce the easement. Larger land trusts have the staff and other resources needed to effectively monitor and enforce easements, but this may not be true of smaller land trusts that often rely solely on volunteer staff.[90] A recent survey of 315 conservation easements in the San Francisco Bay Area found some type of violation on 43 easements.[91] More violations occurred on easements held by land trusts than those held by public agencies.[92] The land trusts, however, were far more likely to monitor their easements than were public agencies (75 percent of easements held by land trusts were monitored, while only 30 percent of easements held by public agencies were monitored), and thus more likely to discover violations.[93] The most common violation was proliferation of exotic species; other common violations included overgrazing, construction of structures, erosion, moving earth, and garbage dumping.[94]

2. Duration and Termination

Most states are flexible about the duration of the term of a conservation easement, but in general conservation easements run in perpetuity. The UCEA stipulates that a conservation easement "is unlimited in duration unless the instrument creating it otherwise provides."[95] Some states require that if the term is less than in perpetuity, it must be at least a minimum number of years—for example, the Montana statute stipulates that a conservation easement must be for a term of at least 15 years.[96] In addition, for the landowner to receive a federal tax benefit from the donation of an easement, the easement must run in perpetuity.[97]

State conservation easement statutes may include some language regarding termination of the easement. The UCEA, for example, provides that "[t]his Act does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law of

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under the conservation easement statute. *Id.* at 818.

89. *See, e.g.*, Cheever, *supra* note 17, at 1100.

90. *Id.* The Land Trust Alliance estimates that 40 percent of land trusts are staffed solely by volunteers. LAND TRUST ALLIANCE, *supra* note 9, at v.

91. BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS 23 (1999).

92. *Id.*

93. *Id.*

94. *Id.* at 24.

95. UCEA §2(c), 12 U.L.A. 173 (1996).

96. MONT. CODE ANN. § 76-6-202 (1999).

97. *See* I.R.C. § 170(h)(2) (1994).

equity."[98] This language implies that a state's existing statutes and case law regarding easements apply to the termination of a conservation easement. Other state statutes, however, are silent on the question of termination. For example, the California and Montana statutes do not discuss termination. Nevertheless, the assumption is that common law rules governing termination of easements apply.[99]

Termination of a conservation easement presents something of a conundrum—by statute, a conservation easement is supposed to be perpetual. Indeed, the very purpose of conservation is to ensure that what is there now will be there in the future. An early draft of the California conservation easement statute contained provisions regarding termination, but these were dropped in order to strengthen the emphasis on the perpetuity requirement.[100] Barrett and Livermore point out, however, that what is intended to be perpetual may not be so in fact.[101] There may be reasons to terminate a conservation easement; thus, they argue that it would be better if legislatures were explicit about termination, rather than leaving it to the courts to apply common law doctrines such as changed conditions.[102]

The application of the common law doctrine of changed conditions to conservation easements is an unsettled question. The doctrine of changed conditions stands for the proposition that a court may terminate a real covenant or an equitable servitude if conditions have changed to the degree that the restriction no longer makes sense or it creates an undue hardship on the servient estate.[103] Traditionally, the doctrine applied to real covenants and equitable servitudes but not to easements.[104] Whether the doctrine of changed conditions applies to a conservation easement depends in part on whether a conservation easement is viewed as being more similar to a common law easement or to an equitable servitude or real covenant. Blackie notes that courts have terminated easements using the doctrine of changed conditions, but they are much more reluctant to use the doctrine to

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98. *See* UCEA § 3(b), 12 U.L.A. 177 (1996).

99. *See* BARRETT & LIVERMORE, *supra* note 56, at 32-34; Professor French notes that a court can terminate an easement on a finding of abandonment or misuse, but in the absence of such a finding the owner of the servient estate will have to negotiate with the owner of the dominant estate to terminate a valid easement. French, *supra* note 28, at 1269.

100. BARRETT & LIVERMORE, *supra* note 56, at 32.

101. *Id.*

102. *Id.* at 33.

103. French, *supra* note 28, at 1280-81; Blackie, *supra* note 25, at 1206-07.

104. French, *supra* note 28, at 1269, and Blackie, *supra* note 25, at 212, explain that the doctrine of changed conditions traditionally applied to real covenants and equitable servitudes because they were regarded as promises concerning the land, whereas an easement was an interest in real property.

terminate an easement than they are to use the doctrine to terminate a real covenant or equitable servitude.[105]

The need to terminate a conservation easement on the basis of changed conditions has not been a real concern. Conservation easements have not been used long enough and in large enough numbers for a true changed conditions situation to arise. Whether it will arise or not is a matter of speculation. The common scenario presented in the literature is a situation where a conservation easement is intended to preserve habitat for an endangered species and that species either no longer exists or does not use the habitat anymore.[106] If there is truly no longer a reason for a conservation easement to exist, then the land trust would have little interest in maintaining the easement and would probably be willing to extinguish the easement in return for some other conservation benefit (an easement on different property) or by selling the easement back to the owner of the servient estate.[107] Indeed, many conservation easements contain language regarding extinguishment for such situations.[108] Courts, however, will still need to decide when and how to extinguish an easement; thus, Barrett and Livermore were probably correct in arguing that it would be better if the conditions for termination of a conservation easement were explicit in the statutes, rather than relying on the courts to solve the problem when and if it arises.[109]

D. Conservation Easements and Tax Law

A landowner who donates a conservation easement may be eligible for a reduction in federal income taxes, a reduction in the value of the property for the purposes of estate taxes, and a reduction in the value of the property for the purpose of property tax valuations. Indeed, these tax factors can be a significant component of a landowner's motivation to donate the easement in the first place. The tax laws regarding conservation easements are complex, and it is unnecessary for the purposes of this article

105. Blackie, *supra* note 25, at 1214.

106. *See, e.g.*, BARRETT & LIVERMORE, *supra* note 56, at 33; Blackie, *supra* note 25, at 1216.

107. Blackie argues that in situations where the purpose of a conservation easement is specific, a court might apply the cy pres doctrine to reformulate the purpose of the easement. Blackie, *supra* note 25, at 1216-17. For example, in the situation of a conservation easement intended specifically for preservation of habitat for an endangered species, the easement could be reformulated to provide some broader conservation goal. For conservation easements that already have a broad conservation goal, reformulation seems to be of less use.

108. *See* DIEHL & BARRETT, *supra* note 20, at 160.

109. BARRETT & LIVERMORE, *supra* note 56, at 33.

to explain them in great detail.[110] Nevertheless, it is helpful to have a basic understanding of these tax laws in order to understand how tax benefits can influence a landowner's decision to donate a conservation easement.

The federal tax code allows a landowner to deduct the charitable contribution of a conservation easement if it meets the test of a "qualified conservation contribution."[111] In order to qualify for the deduction, the contribution must be a "qualified real property interest"—in the case of a conservation easement, the real property interest must be a perpetual restriction on the use of the land.[112] The contribution must also be to a "qualified organization," which includes a variety of public entities as well as private 501(c)(3) organizations whose purpose is conservation of natural or cultural resources.[113] Finally, the contribution of the easement must serve a conservation purpose. Qualifying conservation purposes include (1) preservation of land for public outdoor recreation and education uses; (2) protection of habitat for plants, fish, wildlife, or similar ecosystems; (3) preservation of open space (including farmland and forests); and (4) preservation of historic structures.[114] The amount of the income tax reduction most commonly is based on the fair market value of the property without the easement minus the value of the property with the easement at the time the easement is established.[115] The typical landowner may then use the value of the easement to reduce their adjusted gross income by 30 percent a year for six years or until the value of the contribution is used up.[116]

A landowner may also use a donated conservation easement to reduce the value of the property that is burdened by the easement for the purpose of determining estate taxes.[117] In general, the same qualifying provisions that apply to a conservation easement for a reduction in income tax also apply to reductions in estate taxes—the donation must be a perpetual restriction in land use for conservation purposes to a qualified

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110. For a more complete treatment of tax laws and conservation easements, see 4 POWELL, *supra* note 21, at § 34A.04-0.6.

111. I.R.C. § 170(f)(3)(B)(iii) (1994). *See also* Treas. Reg. § 1.170A-14 (as amended in 1999).

112. I.R.C. § 170(h)(2) (1994).

113. *Id.* at § 170(h)(3).

114. *Id.* at § 170(h)(4).

115. *See* Treas. Reg. §1.170A-14(h)(3) (as amended in 1999); Hollingshead, *supra* note 25, at 353-54. Powell explains that this method is the most common because it is often difficult to use a comparable value approach that compares the value of the property in question to similarly situated pieces of property since there are rarely enough similar nearby sales to make a reliable comparison for valuation purposes. 4 POWELL, *supra* note 21, § 34A.06[1].

116. *See* Treas. Reg. § 1.170A-14(h) (as amended in 1999); 4 POWELL, *supra* note 21, § 34A.06[1].

117. *See* Hollingshead, *supra* note 25, at 354-56; I.R.C. § 2055 (Supp. IV 1998); Treas. Reg. § 20.2055-2 (as amended in 1994).

organization.[118] The reduction in estate taxes can be a significant benefit because it can often reduce the value of the property to a point where it is practical for landowners to pass on the property to their heirs, rather than forcing the heirs to sell the property to pay the estate taxes. The reduction in the value of the estate is the current value of the property without the easement minus the value of the property with the easement. A 1997 amendment to the tax code provides an additional incentive to ranchers and farmers. Section 2031(c) of the tax code, added by the Taxpayer Relief Act 1997, allows ranchers and farmers in certain situations to exclude an additional 40 percent of the value of the property covered by a conservation easement.[119]

Finally, a landowner who donates a conservation easement may qualify for a reduction in property taxes.[120] Property taxes are typically calculated on an ad valorem basis—the fair market value of the property and its improvements based on the highest and best use. Many states, however, will consider the reduction in the value of property resulting from a conservation easement when determining property taxes.[121]

The ability of landowners to deduct the value of a donated conservation easement from their income taxes, the ability to reduce the value of the property for estate tax purposes, and the potential reduction in property taxes are powerful incentives for donating conservation easements. These tax benefits are attractive to both wealthy landowners who buy ranch and farm land for leisure activities, as well as to cash-poor but land-rich property owners who make a living off the land.

E. Conservation Easement Deed

The legal document that establishes a conservation easement is a deed that transfers the interest in real property (*i.e.*, the restrictions on the use of the property for conservation purposes) from the grantor to the

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118. Treas. Reg. § 20.2055-2 (as amended in 1994).

119. Taxpayer Relief Act of 1997, P.L. 105-34, § 508, 111 Stat. 788; *see also* I.R.C. § 2031(c) (Supp. IV 1998). For example, if a ranch has a value of $1 million, and the rancher donates a conservation easement that reduces the value of the property to $500,000, under section 2031(c) the rancher can reduce the value of the property by another $200,000 (40 percent) for estate tax purposes. The Code places several restrictions on the use of this provision: *e.g.*, the donation must meet the requirements of § 170(h) and the property must be near a city or a national park, a wilderness area, or a national forest. *Id.*; *see also* Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, *in* PROTECTING THE LAND 55, 60-62 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

120. *See* 4 POWELL, *supra* note 21, § 34A.05; Hollingshead, *supra* note 25, at 359-60.

121. Hollingshead notes that at least 24 states have legislation that allows for a reduction in property tax valuations if the property is encumbered with a conservation easement. Hollingshead, *supra* note 25, at 360.

grantee.[122] The language in the deed is designed to protect and preserve the rights of the grantor and the grantee and to ensure that the easement itself is in compliance with federal tax regulations that govern conservation easements. Care in drafting the document can reduce the risk of confusion and problems in the future. States generally require that the deed of a conservation easement be recorded in compliance with applicable state recording laws.[123]

A typical conservation easement deed will begin by providing a legal description of the property, include a list of recitals that outline what the parties intend to accomplish by establishing a conservation easement, and cite the relevant state statute that authorizes the creation of the easement.[124] In addition, the deed will contain a detailed discussion of the affirmative rights and interests conveyed outlining what uses and practices are permitted and what uses and activities are not permitted, and providing the grantee with the right to enter and inspect the property to ensure compliance. The deed also includes a description of the reserved rights of the grantor, and commonly contains an arbitration clause, a clause regarding who bears the cost of enforcement actions (the grantor), a clause that stipulates terms for terminating the easement (usually by judicial action), and a clause regarding assignment of the easement by the grantee.[125]

IV. HOW CONSERVATION EASEMENTS ARE USED TO PRESERVE THE ENVIRONMENT ON PRIVATE LANDS—FIVE CASE STUDIES

The five cases studies in this article demonstrate how conservation easements can serve the narrow self-interest of the property owner as well as further the larger common goal of land stewardship and environmental protection. Indeed, by promoting such self-interested, publicly motivated behavior, conservation easements can contribute to a truly revolutionary environmental ethic in which landowners willingly protect the environment on their lands.

The purpose of presenting the following case studies is to demonstrate how different land trusts and conservation organizations use conservation easements to conserve open space, protect habitat for plant and animal species, preserve regional ecosystems, and safeguard other

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122. For a detailed discussion of a conservation easement deed, see DIEHL & BARRETT, *supra* note 20, at 156-208.

123. *Id.* at 202.

124. *Id.* at 167.

125. *Id.* at 194-204.

important environmental and resource values on private lands. These case studies provide a range of examples that represents the activities of land trusts in the United States to protect acreage using conservation easements. Four of the case studies focus on the efforts of individual organizations, while the fifth case study examines a project involving several conservation organizations and state and federal agencies. Two case studies examine conservation easements as a tool primarily for protecting ecological diversity; two other case studies examine how land trusts use conservation easements to achieve a range of goals; and one case study examines a land trust whose primary purpose is preservation of agricultural lands.

The case studies are based on a series of interviews, conducted in person or over the telephone, with one or more staff members of each organization.[126] The interviews focused on three questions: (1) Does your organization have an overall strategy for using conservation easements? (2) How does your organization use conservation easements to preserve environmentally or ecologically significant private lands? (3) What types of problems are you encountering with conservation easements? Before discussing the case studies, however, it is helpful to understand the important ecological functions that private lands fulfill. The next section provides a brief introduction to the ecology of private lands.

A. The Ecology of Private Lands

Bringing together public and private lands under a unified ecosystem management approach is essential for protecting larger regional ecosystems and preserving biodiversity. Professor Farrier notes, "[e]xisting areas of publicly owned land are inadequate to conserve representative ecosystems" in the United States.[127] Not only are private lands important in preserving biodiversity independent of public lands, but private and public lands are often intermingled together.[128] Further, as Professor Noss notes, most large protected landscapes (*e.g.*, Yellowstone National Park) "were not selected on the basis of ecological criteria and do not comprise intact ecosystems."[129] Thus, effective efforts at preserving biodiversity on protected public lands must also include similar efforts on neighboring

126. The case studies are also based on documents provided by the land trusts and on the information these organizations make available on their websites.

127. Farrier, *supra* note 2, at 310.

128. In the western United States, for example, it is not uncommon to find public and private lands mixed together in a checkerboard pattern. This checkerboard pattern is an artifact of the nineteenth century when the federal government often granted to railroads every other section of public land in a wide swath along railroad routes.

129. Reed F. Noss, *Protecting Natural Areas in Fragmented Landscapes*, 7 NAT. AREAS J. 2, 3 (1987).

private lands. The reverse is also true, as several of the case studies illustrate—private efforts at biodiversity protection on private lands often depend on collaborative efforts with public agencies neighboring on public lands.

Protecting private lands can also forestall the fragmentation of ecosystems. Many conservation biologists believe that fragmentation of ecosystems—"the reduction in total landscape area and an apportionment of the remaining area into isolated pieces"—is the most serious threat to biodiversity preservation.[130] Ideally, the best strategy for protecting biodiversity is to create the largest possible ecosystem reserves;[131] however, this is not always possible. One strategy for addressing problems of fragmentation is to construct corridors between protected areas. Noss explains,

> The problems of habitat isolation that arise from fragmentation can be mitigated by connecting natural areas by corridors or zones of suitable habitat. Animals and plant propagules travel along corridors, promoting gene flow and recolonization of vacated habitats. [Citations omitted.] An archipelago of isolated reserves can be transformed by corridors into a larger functional unit.[132]

Noss notes that effective corridors can be as narrow as a fencerow for some rodents, but larger mammals may require corridors that are miles wide.[133] Establishing a buffer zone (or series of buffer zones) around a protected reserve that provides additional protection to the core ecosystem protected by the reserve itself is another strategy for dealing with fragmentation.[134] Noss explains, "Buffer zones should effectively insulate sensitive areas from the developed landscape and provide supplementary habitat for many of the species in need of protection."[135] While other land uses are permitted within the buffer zone, the buffer zone can nevertheless functionally increase the size of the protected ecosystem.

Private lands play a key role in implementing strategies for dealing with fragmentation of ecosystems. Large reserves, encompassing tens-of-thousands of acres, can be established on private lands. Corridors can be created across private lands linking together private and public reserves.

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130. *Id.*; *see also* Bruce A. Wilcox & D.D. Murphy, *Conservation Strategy: The Effects of Fragmentation on Extinction*, 125 AM. NATURALIST 879, 884 (1985).

131. Conservation biologists refer to this as "bigness." M.E. Soule & D. Simberloff, *What Do Genetics and Ecology Tell Us about the Design of Nature Reserves?*, 35 BIOLOGICAL CONSERVATION 19 (1986); *see also* Noss, *supra* note 129, at 7; Karkkainen, *supra* note 3, at 10-12.

132. Noss, *supra* note 129, at 5.

133. *Id.*

134. *Id.* at 5-7. *See also* Karkkainen, *supra* note 3, at 13.

135. Noss, *supra* note 129, at 7.

Buffer zones consisting of private lands can be established around large core reserves. The case studies that follow offer examples of these strategies and underscore how the protection of private lands can contribute to larger regional efforts for preserving biodiversity and ecosystems.

B. Montana Land Reliance

The Montana Land Reliance (MLR) has protected more acres under conservation easements than any other regional land trust in the nation—440 easements protecting more than 400,000 acres or roughly 18 percent of all acreage protected by regional land trusts in the nation.[136] The MLR was founded in 1978 and had 23 easements by 1988. That number grew to 130 in 1994, and 380 by the end of 1999.[137] The focus of the MLR is on land conservation in Montana—"the mission of the Montana Land Reliance is to provide permanent protection for private lands that are ecologically significant for agricultural production, fish and wildlife habitat and open space." [138] The property that the MLR has protected includes critical fish and wildlife habitat as well as open space and well-managed agricultural operations.[139]

MLR's two primary purposes for securing conservation easements are to prevent development and to preserve lands in agricultural production.[140] By doing so, these conservation easements also protect important wildlife habitat and open spaces. The MLR does not try to restrict how property owners manage their land. For example, an MLR conservation easement on timberland would still allow the property owner to cut trees, but the easement might require the property owner to develop a timber harvest plan.[141] While the conservation easements tend not to impose land management measures on the property owner, easements might require property owners to take some steps to protect critical ecological lands such as fencing riparian areas to keep cattle out.[142] Each conservation easement is tailored to the specific characteristics of the land

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136. Telephone interview with Chris Phelps, Montana Land Reliance (Oct. 7, 1999); Montana Land Reliance, *Who We Are, What We Do, and How We Do It, at* http://www.mtlandreliance.com/who.htm (last visited Apr. 22, 2001). See *supra* note 9 for a discussion of the difference between regional or statewide land trusts such as MLR and national land trusts like The Nature Conservancy.

137. Telephone interview with Chris Phelps, *supra* note 136.

138. *See* Montana Land Reliance, *Mission, at* http://www.mtlandreliance.com/mission.htm (last visited Apr. 22, 2001).

139. *See* Montana Land Reliance, *2000 Conservation Acheivements, at* http://www.mtlandreliance.com/achieve.htm (last visited Apr. 22, 2001).

140. Telephone interview with Chris Phelps, *supra* note 136.

141. *Id.*

142. *Id.*

and the needs of the property owner. In addition, the MLR works with willing landowners to develop a stewardship program for the land protected by the conservation easement.[143]

All of MLR's conservation easements are donated. The acquisition of easements is split roughly between landowners who are long-time Montanans and landowners who are newcomers to the state or are not residents.[144] The trend, however, has been toward the acquisition of new easements from newcomers to the state. The MLR is trying to find new ways to acquire conservation easements from land-rich but cash-poor Montana ranchers and farmers.[145] Easements are donated for the tax benefits, but there is also a strong land ethic in Montana that underlies decisions by property owners to voluntarily restrict the use of their land.[146] In some cases, placing a conservation easement on the property is the only way that Montana ranchers and farmers can keep the ranch in the family. The reduction in estate taxes that a conservation easement provides often means that heirs can keep the property in the family rather than be forced to sell the property to pay estate taxes.[147]

The MLR stresses that it is a Montana-run organization. The organization's Montana roots and non-advocacy approach to land conservation are essential attributes when dealing with Montana farmers and ranchers, who may be reluctant to deal with an outside organization or a government entity. Being part of the community allows the MLR to accomplish much of its work "around kitchen tables with family members."[148] Access to these kitchen tables is likely to be more difficult for an outside organization or a government agency. The MLR also works with other organizations where possible—for example, The Nature Conservancy,

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. On their website, MLR provides an example of how a tax donation can help a rancher maintain their ranch. A family has owned a ranch for three generations. The parents are in their mid-60s and want to pass the ranch on to their children. The ranch is worth $2 million. The family donates a conservation easement to MLR, which is assessed at 36 percent of the value of the ranch or $720,000. In 1998, each parent is entitled to an estate tax exemption of $625,000. This allows the parents to pass on $1.25 million to their children free of estate taxes. Without the conservation donation, $750,000 would be subject to estate taxes that could range between $277,000 and $412,000. However, the donation of the conservation easement reduces the value of the property to $1,280,000, leaving only $30,000 subject to an estate tax of $11,000 to $16,500. A tax burden of $300,000 or $400,000 might have forced the heirs to sell the property simply to pay the taxes. *See* Montana Land Reliance, *Tax Implications of Conservation Easements, at* http://www.mtlandreliance.com/history.htm (last visited Apr. 22, 2001).

148. *See* Montana Land Reliance, *Who We Are, What We Do, and How We Do It, at* http://www.mtlandreliance.com/who.htm (last visited Apr. 22, 2001).

Greater Yellowstone Coalition, county governments, and the Montana Department of Fish, Wildlife and Parks.[149]

The MLR has protected private lands located within Montana's most significant ecological regions. It has protected over 141,000 acres in the Greater Yellowstone Ecosystem, perhaps the largest intact temperate ecosystem in the world.[150] Chris Phelps of MLR explains that the broad valleys where much of the private property is located in the Greater Yellowstone region are often too large to effectively use conservation easements to easily create corridors across these valleys to link the publicly protected lands.[151] Nevertheless, MLR's acquisitions in Greater Yellowstone, along with efforts by other conservation organizations, have contributed to protecting low elevation private lands that are critical to preserving wildlife habitat in the larger Greater Yellowstone Ecosystem.[152] In the Northern Continental Divide Ecosystem, which includes Glacier National Park, the MLR has worked to acquire conservation easements in the Swan Valley that provide a corridor for grizzly bears migrating between the Madison Range and the Swan Range.[153] The Swan Valley, Phelps explains, is relatively narrow, making it possible to functionally link the surrounding mountain ranges by using conservation easements on the private lands in the valley.[154]

The MLR has had a few enforcement problems but has never been involved in litigation over a conservation easement.[155] The most typical enforcement problems involve a landowner undertaking an activity that is permitted under the easement (*e.g.*, building a shed or access road) but failing to provide notification to the MLR, which is a condition of the easement.[156] One of the more serious problems, according to Phelps, was a situation where a gravel pit operation on an adjoining property dug up land on the property that was protected by a conservation easement. The act did not appear intentional, and the owner of the property that was protected by

149. Telephone interview with Chris Phelps, *supra* note 136.

150. Montana Land Reliance, *Ecosystem Conservation, at* http://www.mtlandreliance.com/ecocon.htm (last visited Apr. 22, 2001). See TIM W. CLARK & STEVEN C. MINTA, GREATER YELLOWSTONE'S FUTURE (1994), for a discussion of the Greater Yellowstone Ecosystem.

151. Telephone interview with Chris Phelps, *supra* note 136.

152. John B. Wright notes that the private lands protected in Greater Yellowstone by MLR and other organizations provide "critical habitat for elk, deer, moose, bison, grizzly bear, wolves, and migrating waterfowl." John B. Wright, *The Power of Conservation Easements: Protecting Agricultural Land in Montana, in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 392, 395 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

153. *Id.*

154. Telephone interview with Chris Phelps, *supra* note 136.

155. *Id.*

156. *Id.*

the easement and the parties responsible for the gravel pit worked out a settlement in which the damaged land was restored.[157]

The MLR monitors its properties once a year. Monitoring generally consists of meeting with the property owner, going over a checklist covering key factors regarding the easement and the property, and touring the protected property.[158] Fundraising has been key to the MLR's success; the MLR maintains a Land Protection Fund of over $4 million that is used in part to fund monitoring and enforcement. Phelps explains that the MLR also has funds available to litigate if necessary.[159] While sale of properties encumbered with a conservation easement is a concern, it has not caused any problems for the MLR. Under the terms of the easement, a landowner must notify the MLR when the property is sold. Phelps says that this happens in perhaps half of the sales.[160] The MLR, however, generally knows what properties are for sale through its monitoring program. In addition, local real estate brokers have been helpful in informing the MLR of what properties are for sale.[161]

C. Jackson Hole Land Trust

The Jackson Hole Land Trust (JHLT) operates in Teton County, Wyoming, home to some of the most spectacular mountain scenery and significant wildlife habitat in the United States.[162] Within the boundaries of the county are Grand Teton National Park, a large portion of Yellowstone National Park, and the National Elk Refuge. The JHLT was established in 1980 to help preserve private lands in Jackson Hole (a broad valley that sits at 6,400 feet and is surrounded by high mountains) that provide critical wildlife habitat, scenic vistas, and open space, and are part of the region's ranching and agricultural heritage.[163] Only three percent of the county is private land, and almost all of this land is located in the valley.[164] The Jackson Hole area is a popular summer and winter recreation spot and tourist destination. The valley has experienced tremendous growth in the past twenty years. Ranch lands and private open space have been converted

157. *Id.*

158. *Id.*

159. *See* Montana Land Reliance, *2000 Financial Report*, *at* http://www.mtlandreliance.com/finance.htm (last visited Apr. 22, 2001).

160. Telephone interview with Chris Phelps, *supra* note 136.

161. *Id.*

162. *See generally* Jackson Hole Land Trust, *Home Page*, *at* http://www.jhlandtrust.org (last visited Apr. 22, 2001).

163. http://www.jhlandtrust.org/frequent.shtml (last visited Apr. 22, 2001).

164. Telephone interview with Marry McBryde, Project Program Assistant, Jackson Hole Land Trust (Oct. 6, 1999).

into subdivisions or sold as lots for *trophy homes* and *ranchettes*.[165] So far, JHLT has protected over 12,000 acres of private land under conservation easements out of a total of 74,000 acres of private land in Teton County.[166]

The JHLT primarily seeks donated easements and targets properties that meet certain criteria. For example, the JHLT seeks land that provides important wildlife habitat, contains known wildlife migration routes, or buffers wildlife habitat; land that is in active ranching or agricultural use; land that is visible from highways and rivers or from Grand Teton National Park and national forest lands; land that is in a natural state; land that is adjacent to public lands; land that is in close proximity to other private lands that are already protected; private land adjacent to a significant river or stream; and land that is large enough to retain its scenic or natural qualities regardless of what happens on neighboring parcels.[167] McBryde explains that JHLT tends not to prioritize among these various criteria and currently has 70 to 80 properties on its target list.[168] A property may be a good candidate because it is a particularly good example of one of these qualities or because it provides a mix of benefits.[169] The JHLT also has launched a capital campaign to raise funds to help purchase conservation easements on the top properties on the target list; so far it has raised $11 million of its $25 million goal.[170]

Berry explains that ecosystem protection and landscape level planning is an important part of JHLT's strategy for acquiring conservation easements.[171] Private land in Jackson Hole often provides critical wildlife habitat. For example, 90 percent of the mule deer in Grand Teton National Park winter on private lands in the valley. Many of the most important bald eagle nesting sites in the valley as well as critical cutthroat trout spawning streams are also located on private land. The JHLT acts opportunistically

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165. *Trophy homes* and *ranchettes* are terms used to describe a scenario typical in much of the rural West where a large ranch is sold and subdivided, and the lots are then sold to wealthy outsiders who build large "trophy" homes or establish a mini-ranch referred to as a ranchette. For a discussion of suburbanization in Jackson, see Jon Catton, *From Jackson Wyoming, a Warning About Sprawl*, 16 GREATER YELLOWSTONE REPORT, Winter 1999, at 10. For a more general discussion of suburbanization in the rural Mountain West, see Susan Ewing, *My Beautiful Ranchette*, 31 HIGH COUNTRY NEWS, May 10, 1999, at 9.

166. Telephone interview with Mark Berry, Stewardship Director, Jackson Hole Land Trust (Oct. 15, 1999); telephone interview with Tim Lindstrom, Staff Attorney, Jackson Hole Land Trust (Feb. 28, 2001).

167. Jackson Hole Land Trust, *FAQ: What type of property is appropriate for protection with a Jackson Hole Land Trust conservation easement?*, *at* http://www.jhlandtrust.org/frequent.shtml (last visited Apr. 10, 2001).

168. Interview with McBryde, *supra* note 164.

169. *Id.*

170. Interview with Lindstrom, *supra* note 166.

171. Interview with Berry, *supra* note 166.

and goes after such properties as they become available. For example, JHLT has just completed an effort to establish a buffer of easement-protected private lands bordering a section of the boundary of Grand Teton National Park after working for 20 years to acquire easements on all of the key properties.[172] The final acquisition of this effort was an easement on State of Wyoming school trust land the state was going to sell for development.

McBryde explains that the property owners who donate easements are committed to protecting the land—they "love their land."[173] Some property owners, McBryde claims, are not interested in the tax benefits—land protection is their motivation.[174] The JHLT will buy easements if landowners do not want to donate easements, or even the property itself, if it is necessary to protect an especially important piece of land. For example, JHLT recently bought a 35-acre piece of property—Poison Creek—that is critical bighorn sheep habitat because the owner did not want to donate an easement.[175] The JHLT hopes to eventually transfer this property to the Forest Service.

The success of the Jackson Hole Land Trust in using conservation easements is particularly interesting because Wyoming is one of only a few states that do not have a conservation easement statute. To create a valid conservation easement in Wyoming, the grantor must donate an acre of property to the JHLT in addition to the easement.[176] The easement is then attached to the donated one-acre parcel making the easement appurtenant to a property owned by JHLT, thus creating a situation where JHLT has a dominant estate and holds a negative easement over the neighboring servient estate.[177] To enforce an easement in court, JHLT will need to rely on Wyoming's statutes and common law governing easements and servitudes.[178] Clearly, a state conservation easement enabling statute would simplify the process of establishing a conservation easement and add validity to the concept of conservation easements that presently may not exist under Wyoming law.[179]

Unfortunately, JHLT is facing its first serious enforcement problem—a landowner who owned a lot adjacent to property protected by a conservation easement cut down several hundred large cottonwood trees

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172. *Id.*

173. Interview with McBryde, *supra* note 164.

174. *Id.*

175. *Id.*

176. *Id. See also* Baldwin, *supra* note 64, at 109; Dan Schlager, *Wyoming Conservation Easement Legislation Narrowly Fails*, JACKSON HOLE LAND TRUST NEWSL. (Jackson Hole Land Trust, Jackson, Wyo.), Spring & Summer 1996, at 6.

177. *See* Baldwin, *supra* note 64, at 110.

178. Interview with Berry, *supra* note 166.

179. *See* Schlager, *supra* note 176, at 6.

on the easement protected property to create a view from his lot.[180] The Jackson Hole Land Trust filed a lawsuit against the grantor of the conservation easement who no longer owns the property and the adjacent landowner who cut down the trees. Subsequent discovery revealed that the adjacent landowner and JHLT had been given conflicting rights to the property protected by the conservation easement. In a settlement agreement, the new owner of the property protected by the easement, JHLT, and the adjacent landowner who cut down the trees have recognized a limited view corridor area on the protected property. The adjacent landowner also agreed to pay the owner of the property protected by the easement and JHLT $1.35 million and permit restoration of the cleared area. The adjacent landowner and JHLT continue to pursue their claims against the original grantor of the conservation easement.[181] Berry explains that JHLT wants property owners to understand that JHLT will enforce its conservation easements if they are violated.[182]

Despite this current enforcement problem, JHLT works to establish a cooperative relationship with landowners as part of its monitoring program, which includes annual inspections of the property.[183] Berry explains that the objective is to establish a partnership with the landowner and not to become "the land trust police."[184] Berry also explains that monitoring is key not only to effective enforcement of easements but also to building a working relationship with the landowner and to achieving stewardship objectives.[185]

D. The Marin Agricultural Land Trust

The Marin Agricultural Land Trust (MALT) protects agricultural lands and open space in Marin County, California. Marin County is one of nine counties that make up the San Francisco Bay Area, which is home to over six million people. Marin County sits across the Golden Gate Bridge

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180. Interview with Berry, *supra* note 166.

181. Interview with Lindstrom, *supra* note 166.

182. Interview with Berry, *supra* note 166.

183. Berry also notes that JHLT will help property owners with land stewardship objectives such as removing noxious weeds or enhancing wildlife habitat. The easements themselves also may include specific provisions to protect wildlife, such as restricting certain land uses and even the presence of people around eagle nesting sites during certain times of the year. *Id.*

184. *Id.*

185. *Id.* McBryde notes that there have been few problems arising from the sale of lands encumbered with easements, but it is her belief that there have been few such sales. She explained that if a property encumbered by a conservation easement sells, JHLT is very proactive in meeting the new owner and explaining the terms of the easement. Local real estate brokers also can be helpful in informing prospective buyers that a particular piece of property is encumbered with a conservation easement. Interview with McBryde, *supra* note 164.

from San Francisco and is home to some of the wealthiest suburbs in the Bay Area. The county is famous for its beautiful open spaces and scenic vistas—Muir Woods National Monument, Point Reyes National Seashore, Mount Tamalpias State Park, and part of the Golden Gate National Recreation Area are located in Marin County. The county also has a strong agricultural tradition—twenty-five percent of the milk purchased in the Bay Area comes from Marin dairies.[186] Much of the western portion of the county is undeveloped and remains in agriculture—primarily dairies and ranches. MALT currently holds 43 easements covering 29,707 acres, which is approximately 20 percent of the privately held agricultural land in the county.[187]

MALT's primary purpose is to preserve and maintain the agricultural character of western Marin County by securing conservation easements on agricultural lands in order to maintain a viable agricultural economy in Marin County and to prevent agricultural land from being converted into subdivisions. MALT was established in part to counter plans to build new highways and suburbs in western Marin County.[188] MALT accomplishes this goal by buying conservation easements from willing sellers. All of MALT's conservation easements are purchased. According to Robert Berner, Executive Director of MALT, land is the primary asset of farmers and ranchers in western Marin.[189] Selling a conservation easement is a means for a farmer or rancher to raise needed capital to buy land or equipment, and it provides an alternative to selling or developing the property.[190] The decision to sell a conservation easement is a business decision for the farmer or rancher. Berner notes that this does not imply that landowners do not care about preserving their lands; rather, it reflects a business necessity.[191] Indeed, it may provide the needed capital that allows the farmer or rancher to stay in business. Providing ranchers and farmers with an opportunity to sell development rights and conservation easements to a land trust rather than sell their land to developers allows ranchers and farmers an opportunity to realize some profit from the development potential of their property while maintaining the land in agriculture.[192] Indeed, the opportunity to sell the development rights has helped to

186. *See* STOKES ET AL., *supra* note 20, at 172.

187. MALT, *What Is a Conservation Easement*, *at* http://www.malt.org/easement.htm (last visited Apr. 10, 2001).

188. *See* MALT, *Preserving Agriculture in Marin: MALT's First Ten Years (Tenth Anniversary Report 1990)*, *at* http://www.malt.org/articles/tenyrs.htm (last visited April 10, 2001).

189. *Id.*

190. *Id.*

191. Interview with Robert Berner, Executive Director, Marin Agricultural Land Trust (Sept. 30, 1999).

192. *Id.*

maintain a viable agricultural economy in Marin, which itself is key to the long-term preservation of the county's agricultural landscape—it has helped to provide "the basis for the expectation that agriculture has a future in Marin County."[193] MALT also works with landowners to develop a stewardship program by helping landowners develop strategies for preventing erosion or controlling the spread of noxious weeds.

MALT received its initial funding from the California Coastal Commission and the Buck Trust.[194] MALT then championed a statewide conservation ballot initiative, which eventually made $776 million available for land conservation projects throughout California.[195] Marin County's share was $15 million and MALT entered into an arrangement with the county to use this money to purchase conservation easements to preserve agricultural lands.[196] These funds, however, ran out in 1997, and MALT is currently working to develop other funding sources—mostly on a project-by-project basis.[197]

MALT has had few enforcement problems and has never been involved in litigation over enforcement of a conservation easement.[198] MALT retains the right to inspect the property and monitor compliance with the terms of the conservation easement.[199] The problems that do arise, according to Berner, usually involve situations where the landowner is illegally dumping waste on the property or the owner is overgrazing the property.[200] MALT attempts to work out these problems with the landowners, rather than resort to litigation. So far MALT has had no problems with the sale of land encumbered with conservation easements.[201] There have been some sales of land encumbered with easements, but as Berner points out, most landowners who sell a conservation easement to MALT intend to hold onto the land. Berner notes that ownership succession

193. MALT, *About MALT*, *at* http://www.malt.org/aboutmal.htm (last visited Apr. 10, 2001).

194. MALT, *Preserving Agriculture in Marin: MALT's First Ten Years (Tenth Anniversary Report 1990)*, *at* http://www.malt.org/articles/tenyrs.htm (last visited Apr. 10, 2001).

195. *Id.*; California Wildlife, Coastal and Park Land Conservation Bond Act of 1988, CAL. PUB. RES. CODE §§ 5900-5938 (West Supp. 2001).

196. Interview with Berner, *supra* note 191.

197. *Id.*

198. MALT was named as a party in a lawsuit where the owner of property adjacent to the property that MALT held a conservation easement on sued over an issue concerning an access easement. The dispute had nothing to do with the conservation easement. *Id.*

199. MALT, *Sample Agricultural Conservation Easement and Development Rights*, *at* http://www.malt.org/sampleea.htm (last visited Apr. 10, 2001).

200. Interview with Berner, *supra* note 191.

201. Berner notes, however, that some landowners have asked MALT whether they can purchase back the easement, but MALT has always refused these requests. *Id.*

will create problems sooner or later.[202] He is not too concerned about the problem of changed conditions—language in the easements or the conservation easement statute will probably take care of any problems when they do arise.[203] Because MALT easements carry a dual purpose of agriculture and open space preservation, Berner notes that MALT has been reluctant to include an affirmative duty in the easements to use the property for agriculture because such a duty might make the easement more vulnerable to a changed condition argument in the future.[204] Preservation of open space values is less susceptible to a changed conditions challenge than is an affirmative duty to maintain an agricultural operation.[205]

E. The Nature Conservancy of California

The Nature Conservancy (TNC) is an international land conservation organization that has protected more than 12 million acres in the United States and 80 million acres abroad through outright acquisitions and conservation easements.[206] TNC protects more acreage under conservation easements in the United States than any other private non-profit organization—over 1.2 million acres.[207] Preservation of biological diversity is TNC's primary objective—"The mission of The Nature Conservancy is to preserve the plants, animals, and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive."[208] TNC has divided the United States into 63 ecoregions.[209] Through its network of state offices, TNC identifies a "portfolio" of sites that collectively preserve all of the native species and ecological communities found within the ecoregion.[210] TNC uses a variety of techniques including conservation easements, fee simple acquisition, land donations, pre-acquiring land for public agencies, and working with landowners and partners to protect portfolio sites within an ecoregion.[211] Within California, TNC recognizes 12 ecoregions and manages 16 major landscape-scale conservation projects, safeguards about 100,000 acres under

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202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. http://www.tnc.org (last visited April 10, 2001.
207. Correspondence with Laurel Mayer, California Regional Counsel, The Nature Conservancy (Jan. 2001) (on file with author).
208. THE NATURE CONSERVANCY, CONSERVATION BY DESIGN: A FRAMEWORK FOR MISSION SUCCESS, at introductory page (1997).
209. *Id.* at 8.
210. *Id.*
211. Telephone interview with Chris Kelly, Director of Real Estate, California Nature Conservancy (Oct. 21, 1999).

conservation easements, and protects a total of about one million acres.[212] TNC's program in California is too large and diverse to describe in detail here, but an examination of a few of its recent projects provides some useful insight into how TNC in California, as well as across the country, uses conservation easements to preserve species and ecological communities.

Conservation easements are one of the many tools TNC uses in California. Laurel Mayer, the California Regional Counsel for TNC, explains that the California office increasingly relies on conservation easements to achieve the goals and objectives of landscape-scale conservation.[213] According to Mayer, TNC can achieve its conservation goal with an easement at a fraction of the cost of acquiring the fee title.[214] Chris Kelly, former head of real estate for the California office, explains that conservation easements enable TNC to preserve ecological values on those lands where private use of property still makes sense, even after the conservation goals are met.[215] For example, ranching and farming are fine when those uses are carried out in ways that are compatible with conservation goals. TNC works with landowners and ranchers in developing management strategies and monitoring programs for the lands it protects by means of conservation easements.[216] TNC has had no significant enforcement problems in California.[217]

TNC establishes conservation easements in two ways; it either purchases the easement from a willing landowner or accepts a donated conservation easement from a conservation-minded landowner, or it buys the land and resells it with a conservation easement attached. Kelly notes that one method is not necessarily preferable to the other; it is more a matter of what the landowner wants to do.[218] For example, TNC recently purchased a conservation easement on the 37,000-acre Denny Ranch in Northern California near Mount Lassen because the owner did not want to sell the ranch, and TNC could accomplish its conservation goals by using an easement.[219] Conservation values on the Denny Ranch include extensive blue oak woodlands, unique seasonal wetlands called vernal pools, riparian

212. CONSERVATION BY DESIGN, *supra* note 208, at 8; interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

213. Interview with Laurel Mayer, California Regional Counsel, The Nature Conservancy (Oct. 10, 1999); correspondence with Mayer, *supra* note 207.

214. Interview with Laurel Mayer, California Regional Counsel, The Nature Conservancy (Oct. 10, 1999); correspondence with Mayer, *supra* note 207.

215. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

216. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

217. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

218. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

219. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207.

corridors, and deer habitat.[220] The primary threat to the Denny Ranch was fragmentation—the ranch could have been cut up into subdivisions or used for more intensive agriculture such as vineyards or orchards.[221] The conservation easement that TNC purchased prevents subdivisions, restricts cultivation, and places controls on grazing.[222]

In the Mount Hamilton area near San Jose, California, TNC purchased two large ranches totaling 61,000 acres in 1999.[223] The properties were a historic purchase for TNC—they contain extensive blue oak and valley oak woodlands, and they are home to eagles, hawks, falcons, mountain lions, bobcats, deer, and potentially threatened species such as the California red-legged frog and the southwestern pond turtle.[224] Located on the edge of the San Francisco Bay Area, the properties were vulnerable to development. Wells Fargo Bank had acquired title to the ranches through foreclosure. Kelly notes that Wells Fargo did not want to own the ranches, and thus the bank was not interested in selling a conservation easement.[225] In order to protect the property, TNC had to purchase the property. But TNC is not interested in running the ranches, so it has already sold one of the ranches with a conservation easement attached and is looking for a buyer for the other ranch.[226] Kelly notes that buying land and reselling it with a conservation easement attached does give TNC greater flexibility in crafting a conservation easement; however, TNC is still constrained by what a willing buyer will accept in terms of restrictions when considering the purchase of a property.[227]

In Southern California, between San Diego and Los Angeles, TNC is involved in a project using conservation easements and land acquisitions to establish a wildlife corridor linking its 7,000-acre Santa Rosa Plateau

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220. Interview with Kelly, *supra* note 211; correspondence with Mayer, *supra* note 207. *See also* THE NATURE CONSERVANCY OF CALIFORNIA, THE LASSEN FOOTHILLS: LARGE-SCALE CONSERVATION IN A WORKING LANDSCAPE 2 (n.d.) [hereinafter THE LASSEN FOOTHILLS].

221. Interview with Kelly, *supra* note 211.

222. *Id.*

223. *See also* THE NATURE CONSERVANCY, THE MOUNT HAMILTON PROJECT: LARGE-SCALE CONSERVATION IN A WORKING LANDSCAPE 8 (March 1999) [hereinafter THE MOUNT HAMILTON PROJECT]; *Conservancy Launches Mount Hamilton Project by Purchasing Two Big Ranches*, THE NATURE CONSERVANCY OF CALIFORNIA NEWSLETTER (The Nature Conservancy, San Francisco, Cal.), Winter 1998-1999, at 1.

224. *Id.*

225. Interview with Kelly, *supra* note 211.

226. *Id.* TNC is also working with the U.S. Fish and Wildlife Service to establish a national wildlife refuge that contains the most critical habitat areas. THE MOUNT HAMILTON PROJECT, *supra* note 223, at 8.

227. Interview with Kelly, *supra* note 211.

Reserve (the Reserve) with the nearby Cleveland National Forest.[228] TNC refers to this project as the Tenaja Wildlife Corridor. Kelly notes that the private land that lies between the Santa Rosa Plateau and the national forest is fragmented on paper (broken into numerous parcels) but remains in a mostly undeveloped state. The goal of the project, according to Kelly, is to enlarge the protected area enough for large predators to use it as a migration corridor between the Reserve and the national forest. So far, TNC has protected more than 500 acres in the Tenaja Corridor. The easements restrict building sites, prohibit the introduction of non-native plant species, restrict the type of fencing, and even control the use of lights.[229] Kelly explains that buying lots and reselling them with conservation easements attached accomplishes the biological benefit of enlarging the biological preserve without TNC actually having to own the land.[230] In some cases, TNC will reconfigure the parcels before selling them with easements attached to protect key areas and reduce the number of parcels.[231]

F. ACE Basin Project in South Carolina

The ACE Basin is one of the largest, undeveloped coastal wetland ecosystems on the Atlantic Coast covering over 350,000 acres and located along the South Carolina coast south of Charleston. The name refers to the watershed of three rivers—the Asphepoo, Combahee, and Edisto.[232] For more than a hundred years, from the mid-1700s to the late-1800s, the ACE Basin was used for rice cultivation. As rice cultivation began to decline in the late 1800s many of the plantations were converted into waterfowl hunting retreats. This succession of land uses has allowed a remarkable wetland ecosystem that has been in private ownership for over two centuries to remain relatively intact.[233] The ACE Basin is home to a wide variety of wildlife including numerous waterfowl, songbirds, fish, and upland species. The Basin is also home to many threatened and endangered species including alligators, bald eagles, wood storks, and the shortnose

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228. *Id.*; THE NATURE CONSERVANCY, THE TENAJA CORRIDOR: A PROGRESS REPORT 1 (March 1999) [hereinafter THE TENAJA CORRIDOR].

229. Interview with Kelly, *supra* note 211.

230. *Id.*

231. TNC explains, "A property already subdivided into two dozen unimproved lots could be reshaped so that the critical habitat—for instance, land along a creek—would be protected as part of a preserve and the rest of the property would be divided into only five or six lots on which limited development would be allowed. The Conservancy would place conservation easements on these lots, then resell them to conservation-minded buyers who agree to the terms of the easement." THE TENAJA CORRIDOR, *supra* note 228, at 3.

232. Telephone interview with Ashley E. DeVane, ACE Basin Bioreserve Coordinator, The Nature Conservancy of South Carolina (Oct. 10, 1999).

233. *Id.*; S.C. DEP'T NATURAL RESOURCES, THE ACE BASIN PROJECT (1997).

sturgeon.[234] TNC has identified 33 types of wetland and upland native plant communities in the ACE Basin.[235]

In 1988, a coalition of private landowners, non-profit conservation organizations, and state and federal agencies formed a task force to develop a strategy to protect the ACE Basin from resort development and urban expansion.[236] The task force includes TNC of South Carolina, Ducks Unlimited, The Lowcountry Open Land Trust (LOLT), the U.S. Fish and Wildlife Service, and the South Carolina Department of Natural Resources.[237] By 1999 these organizations, working with private landowners, protected over 133,000 acres in the ACE Basin; almost 50,000 of these 133,000 acres are protected under 37 conservation easements.[238] TNC holds 10 conservation easements covering 9,500 acres.[239] The LOLT, a local land trust, has 13 conservation easements in the ACE Basin encompassing 10,000 acres.[240] Ducks Unlimited also holds several large conservation easements in the ACE Basin, including a 9,000-acre easement covering a single plantation.[241] TNC also has purchased several large plantations that it has resold or transferred to public ownership—for example, the headquarters of the ACE Basin National Wildlife Refuge is located on a 2,000-acre rice plantation that TNC purchased and then sold to the Fish and Wildlife Service.[242] The following case analysis focuses on the efforts of TNC and the Lowcountry Open Land Trust.

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234. *See* U.S. FISH & WILDLIFE SERVICE, ACE BASIN NATIONAL WILDLIFE REFUGE (July 1999).

235. *See* S.C. NATURE CONSERVANCY, THE NATURE CONSERVANCY'S ROLE IN THE ACE BASIN (1999) [hereinafter NATURE CONSERVANCY'S ROLE IN ACE BASIN]; http://nature.org/states/southcarolina/preserves/art1529.html (last visited Apr. 21, 2001). *See also* http://www.tnc.org/states/southcarolina/about/art1396.html (last visited Apr. 21, 2001).

236. Interview with DeVane, *supra* note 232; NATURE CONSERVANCY'S ROLE IN ACE BASIN, *supra* note 235.

237. NATURE CONSERVANCY'S ROLE IN ACE BASIN, *supra* note 235.

238. Other protected areas include two large state owned wildlife management areas encompassing over 20,000 acres; the 11,000 acre ACE Basin National Wildlife Refuge; the 10,000 acre ACE Basin National Estuarine Research Reserve; and the 9,800 acre Nemours Plantation, which is maintained by a private wildlife foundation. *Conservation Sites*, ACE BASIN CURRENT EVENTS (S.C. Dep't Natural Resources, Green Pond, S.C.), Summer 1999, at 8. See also a South Carolina statute, effective June 1, 2001, that creates a state income tax credit, with limitations, for donations of land or conservation easements. South Carolina Conservation Incentives Act, 2000 S.C. Acts 283. *See* http://www.tnc.org/states/southcarolina/news/news363.html (last visited Apr. 21, 2001).

239. Interview with DeVane, *supra* note 232.

240. Telephone interview with Sharon Richardson, Director of Land Protection, Lowcountry Open Land Trust (Oct. 12, 1999.

241. *ACE Basin 1988-1998: A Decade of Unparalleled Land Protection*, ACE BASIN CURRENT EVENTS (S.C. Dep't Natural Resources, Green Pond, S.C.), Winter 1998, at 6.

242. Interview with DeVane, *supra* note 232.

The primary objective of conservation easements in the ACE Basin is to prevent the destruction of habitat by commercial and residential development. Ashley DeVane of TNC of South Carolina explains that TNC's effort is split roughly equally between acquiring donated conservation easements and acquiring land outright.[243] DeVane explains that the lands acquired outright are usually resold to a public entity that has the resources to manage the land; however, TNC purchased a 1,200-acre plantation for $5.75 million that it plans to resell with conservation easements attached.[244] The plantation was owned by an investment company that had planned to build a resort community and marina on the property, which contains maritime and pine forests as well as fresh, brackish, and salt marshes.[245] The plantation is located along the Edisto River, which provides habitat for endangered species and more than 35 migratory birds.[246] The property also contains one of the three remaining original plantation houses left in the ACE Basin.[247] TNC plans to sell several parcels, including the tract with the house on it, to interested conservation buyers. DeVane explains that a private owner is in a better position to restore the house than is TNC. Part of the plantation will be sold to the county for a nature park.[248] The seller has retained a 100-acre adjoining parcel but has granted TNC a conservation easement.[249]

DeVane notes that TNC has not had any enforcement problems with its conservation easements in the ACE Basin.[250] Some properties with easements have changed hands in the ACE Basin, but so far this has not presented an enforcement problem.[251] TNC maintains a monitoring program in which it meets with each landowner once a year and walks the property. DeVane explains that the landowners understand what they are trying to accomplish by placing their land under a conservation easement; most landowners have no intention of developing their property.[252] These landowners also know to contact TNC before undertaking activities on their property. DeVane explains that the conservation easement program sells itself; landowners come to TNC to donate easements.[253] The effort to secure

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243. *Id.*

244. *Id.*; *The Nature Conservancy Protects Prospect Hill Plantation*, ACE BASIN CURRENT EVENTS (S.C. Dep't Natural Resources, Green Pond, S.C.), Summer 1999, at 1 [hereinafter *Nature Conservancy Protects Prospect Hill Plantation*].

245. Interview with DeVane, *supra* note 232.

246. *Nature Conservancy Protects Prospect Hill Plantation*, *supra* note 244, at 1.

247. Interview with DeVane, *supra* note 232.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

conservation easements in the ACE Basin began when Ted Turner donated a conservation easement on his Hope Plantation in 1988; other landowners followed Turner's example.[254] Each easement, DeVane notes, is tailored to the individual property owner.[255] TNC, however, usually requires a forest management plan as part of the easement. DeVane also notes that TNC tries to work closely with other organizations and with public agencies in the ACE Basin.[256]

Sharon Richardson of LOLT explains that the trust is in a good position to pick up easements on "properties that fall between the cracks"—for example, small properties or properties where the landowners do not want to deal with a national organization such as TNC or Ducks Unlimited.[257] Richardson explains that landowners in the ACE Basin are staunch property rights advocates, but they also have a strong land ethic.[258] LOLT pursues only donated easements. Richardson notes that there can be a domino effect in acquiring conservation easements—LOLT secured an easement on a two-acre parcel in the ACE Basin, then a neighboring landowner donated an easement on a 30-acre parcel, and now another landowner is interested in donating a 200-acre parcel.[259] LOLT inspects properties at least once a year as part of its monitoring program, and it hopes that monitoring will preempt any problems.[260]

V. CONSERVATION EASEMENTS ARE AN EFFECTIVE TOOL FOR PRESERVING THE ENVIRONMENT ON PRIVATE LANDS—LESSONS FROM THE FIVE CASE STUDIES

The most significant lesson from the five case studies is that conservation easements can be used by land trusts in a wide range of ways to achieve environmental protection on private lands. Conservation easements are being used to construct corridors across private lands to allow wildlife to migrate between other private and public lands already protected as habitat, to preserve privately owned open space, to protect the habitat of threatened and endangered species on private lands, and to preserve and even re-construct larger regional ecosystems. These case

254. *Id.*
255. *Id.*
256. *Id.*
257. Interview with Richardson, *supra* note 240.
258. *Id. See also* Sharon E. Richardson, *Applicability of South Carolina's Conservation Easement Legislation to Implementation of Landscape Conservation in the ACE Basin*, *in* PROTECTING THE LAND 209, 218-20 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).
259. Interview with Richardson, *supra* note 240.
260. *Id.*

studies demonstrate that conservation easements are a remarkably effective and efficient tool for preserving the environment on private lands.

A. Strategies and Techniques for Using Conservation Easements

One strength of conservation easements is their flexibility. The representatives of the land trusts interviewed in this study are quick to point out that no two conservation easements are alike. Each easement is a product of negotiation between the land trust and the property owner and is crafted to fit the particular characteristics of the land involved. While the scope and objectives of individual easements may vary greatly depending on the needs of the land trust and the property owner, there is remarkable consistency among the conservation easements examined in these five case studies: they restrict future development of the land by creating a nonpossessory interest in the property that is held by the land trust, they provide for some form of monitoring and enforcement, and they tend to be explicit about permissible uses of the property and affirmative duties or responsibilities that the property owner assumes.

The land trusts in the case studies recognize they are constrained in what they can accomplish with a conservation easement by what the landowner is willing to agree to, but in most cases this has not proven to be a significant obstacle. For example, the conservation easement designed for the Denny Ranch in northern California prevented the fragmentation of the 37,000-acre ranch while allowing the landowner to continue using the property as a cattle ranch. [261] The Tenaja Wildlife corridor is another example of how easements can be crafted in creative ways to achieve the desired conservation goal.[262] Using a combination of fee simple acquisitions and conservation easements, TNC is redesigning the fabric of land ownership in this region to provide a corridor between a TNC reserve and a nearby national forest.

The case studies suggest that landowners are willing to accept substantial restrictions on how they can use their land. The Jackson Hole Land Trust, for example, restricts landowners from even walking on their property near eagle nests during the nesting season. There is a point, however, where the easement may become so restrictive that the landowner is simply not willing to accept the provisions, or an organization trying to sell a property with an overly restrictive easement will not be able to find a willing buyer. At that point, a land trust will need to consider other options for achieving its conservation goals, such as acquiring and retaining

261. *See generally infra* section V., D.
262. *See id.*

the fee simple interest in the property or pre-acquiring the property for a public agency.[263]

The case studies also illustrate how conservation easements can protect and preserve very large properties or combinations of properties, and how conservation easements can functionally enlarge habitats and even help restore ecosystems. In California, TNC's conservation easements on Mount Hamilton preserve over 60,000 acres of private ranch land.[264] The protection of these lands with conservation easements is part of a larger effort to protect 500,000 acres of undeveloped lands (both private and public) in the Mount Hamilton area, which is one of the largest remaining unprotected natural areas in California.[265] The Montana Land Reliance uses conservation easements to protect over 130,000 acres of private land in the Greater Yellowstone Ecosystem, the largest intact ecosystem in the United States.[266] In South Carolina's ACE basin, conservation easements are used to help protect and restore a 350,000-acre wetland ecosystem that lies almost entirely in private ownership. TNC's Tenaja Wildlife Corridor project is particularly interesting because it shows how the strategic use of conservation easements on a relatively small amount of land can functionally enlarge the habitat for wildlife by linking together already protected habitat.[267] It is the ability to craft conservation easements to meet the needs of these individual situations that makes conservation easements such an effective tool for preserving the environment on private lands.

B. Environmental Benefits and Burdens of Preserving Agricultural Lands

Many conservation easements are used to prevent agricultural lands from being further developed. In the five case studies, almost all of the land protected by conservation easements is land that is or was being put to some agricultural use—most typically, ranching. The Jackson Hole Land Trust, Marin Agricultural Land Trust, and the Montana Land Reliance all cite preservation of agricultural lands as a primary objective. While these organizations are motivated by a desire to maintain a viable agricultural economy, they are also concerned with preserving open space by

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263. For a discussion of these options, see STOKES ET AL., *supra* note 20, at 214-55.

264. *Id.*

265. *See* THE MOUNT HAMILTON PROJECT, *supra* note 223, at 1. The goal of the project "is to protect and ensure the permanent conservation ownership...of nearly 500,000 acres within the Mount Hamilton Area in the next five to seven years [by 2004 to 2006]." *Id.* Approximately 45 percent of the area is already in public ownership. TNC is working with public agencies and private landowners to accomplish this conservation goal. The initial priority is on perimeter properties. Protecting these properties first will ensure protection of the core ecosystem. *Id.*

266. CLARK & MINTA, *supra* note 4, at 10.

267. *See infra* section V., D.

preventing the conversion of agricultural lands to residential or other commercial uses. These easements, however, often do not place many affirmative duties on the landowner to manage the land beyond maintaining the land in agriculture. In some cases, the protection of agricultural lands may be linked to a larger effort at preserving a regional landscape or ecology, but many conservation easements are simply intended to prevent the conversion of agricultural lands into subdivisions or other uses.

Agricultural activity is a significant source of pollution and is responsible for much land degradation.[268] Some conservation biologists suggest that ranches and farms are a greater environmental threat than residential subdivisions.[269] Others have argued that these criticisms do not fully consider the impacts of urbanization on the environment nor account for the beneficial role that grazing can play in maintaining a grassland ecosystem.[270] Resolving these disputes is beyond the scope of this article, but the case studies demonstrate how conservation easements on private agricultural lands can be used to preserve the environment.

Notwithstanding the fact that agriculture is the source of significant environmental harms, private agricultural lands may also provide important ecological benefits. Working with the owner of a large ranch to preserve the environmental and ecosystem benefits that the ranch provides in addition to allowing the property to remain a working ranch may be the only alternative that provides the desired conservation objective short of purchasing the property. TNC, in particular, has used conservation easements to preserve ranch lands that constitute critical components of larger regional ecosystems. TNC's Denny Ranch project is part of a much larger effort to protect 200,000 acres of grasslands and woodlands. Indeed, the opportunity to preserve this ecosystem is due in part to the ranching heritage of the region. The ecology of the region has been preserved because

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268. *See generally* Debra L. Donahue, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY (1999); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263 (2000).

269. *See* Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 CONSERVATION BIOLOGY 629 (1994) (noting that livestock grazing has taken place on 70 percent of the land in the western United States, causing many environmental harms); George Wuerthner, *Subdivisions versus Agriculture*, 8 CONSERVATION BIOLOGY 905 (1994) ("Agriculture...has had a far greater impact on the western landscape than all the subdivisions, malls, highways, and urban centers combined.").

270. *See* Richard L. Knight et al., *Ranching the View: Subdivisions versus Agriculture*, 9 CONSERVATION BIOLOGY 459 (1995). Many authors have written about how grazing can be managed in ways that provide ecological benefits. *See* DAN DAGGET, BEYOND THE RANGELAND CONFLICT: TOWARD A WEST THAT WORKS (1995); ECOLOGICAL IMPLICATIONS OF LIVESTOCK HERBIVORY IN THE WEST (Martin Vavra et al. eds., 1994); ALLAN SAVORY, HOLISTIC MANAGEMENT (1999).

the land is either in public ownership or is part of large private ranches.[271] TNC believes that ranching for the most part has been compatible with the region's ecology.[272] In places where it is compatible, TNC uses easements to place restrictions on grazing to prevent overgrazing and destruction of riparian zones. Short of the public acquiring the Denny Ranch and other similar properties in the Mount Lassen region (which is unlikely since the owners may not want to sell and the government may not want to buy), there is no other practical alternative to preserving this unique California landscape.

The ACE Basin in South Carolina is another example of how a region's agricultural heritage has helped to preserve the region's unique ecology. The wetlands ecology of the ACE Basin has remained intact in part because the land was divided into large rice plantations over two centuries ago. Neither the ACE Basin nor the Mount Lassen examples are intended to suggest that agriculture is not partly responsible for whatever environmental damage has already occurred in these areas; rather, the point is that the ability to protect what remains of the pre-settlement ecosystems in these regions is due in part to the fact that remnants of the original ecosystems remain on these lands. Unless the government is willing to purchase these lands, working with landowners to preserve and restore these remnants may be the only option available for ensuring the continued protection of these ecosystems. This is particularly true if the choice is between maintaining the land as a working ranch or rice plantation or selling it to a developer who will put in roads and build houses and shopping centers.

C. Conservation Easements Are an Effective and Efficient Alternative to Owning the Land

Land trusts have other tools in addition to conservation easements for protecting the environment on private lands. Indeed, many land trusts were in the business of acquiring the fee simple interest in property, conducting bargain sales, or pre-acquiring property for the government long before the use of conservation easements became common.[273] Conservation easements, however, provide an effective and efficient alternative to these traditional methods of preserving property. The purchase of a conservation easement is usually much less expensive than purchasing the fee simple interest in the property. For example, MALT

271. *See* THE LASSEN FOOTHILLS, *supra* note 220, at 3.

272. *Id.*

273. *See* LAND TRUST ALLIANCE, *supra* note 9, at v-vi. *See also* STOKES ET AL., *supra* note 20, at 214-254.

values most of its easements at 25 to 50 percent of the value of the property itself.[274] But more significantly, when a land trust buys or receives a donated conservation easement, it does not become responsible for the day-to-day management of the property. Most land trusts simply are not in a position to maintain large properties. In addition, there are many landowners who are willing to sell a conservation easement but not the property itself. Thus, conservation easements allow land trusts to achieve more conservation on private lands than is possible by relying solely on fee simple acquisitions.

There are times, however, when a fee simple acquisition is either the preferred or only alternative. A landowner may not be willing to sell an easement but is willing to sell the land in fee simple. The Jackson Hole Land Trust was confronted with this choice with its Poison Creek property.[275] The property was critical bighorn sheep habitat, so JHLT purchased the property. TNC of California had no choice but to purchase the Mount Hamilton ranches—Wells Fargo did not want to own them.[276] TNC's ability to buy key properties and resell them with conservation easement restrictions demonstrates how the two methods together can be an effective tool for achieving the desired conservation goal on private lands while maximizing the resources of the land trust.

There are also situations where acquiring and retaining the fee simple interest in property is still the best option for preserving the land. A land trust may choose to own a conservation property because ownership gives the organization rights and privileges that it cannot acquire by conservation easement alone.[277] Conservation easements do not replace the need for fee simple acquisitions, but by enabling a land trust to preserve private lands as open space or wildlife habitat without requiring the landowner to transfer the fee interest in the property to a land trust, conservation easements are a remarkably effective and efficient tool for preserving private lands.

D. Enforcing Conservation Easements in the Future

Conservation easements are such an effective tool in part because there have been few enforcement problems. Only one of the land trusts in the five case studies has had to enforce a conservation easement by litigation. The other land trusts have encountered some easement violations, but these have been worked out without relying on litigation.

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274. *See infra* section IV., D.

275. *See infra* section IV., C.

276. Interview with Kelly, *supra* note 211.

277. *See, e.g.*, Anne O'Brien, *Purchasing Power: Why We Still Buy Land*, 49 NATURE CONSERVANCY 12 (Nov.-Dec. 1999).

Implementation of an effective monitoring program has been a key to avoiding enforcement problems. All of the land trusts in this study have monitoring programs that typically include annual inspection of the property. However, this is not true of all land trusts. Smaller land trusts, in particular, may not have the resources to monitor their easements on a regular basis.[278] Even with a large land trust, the ability to monitor on a regular basis may become more difficult as the number of easements the organization holds increases.

Some of the land trusts in this study have held easements long enough to have properties encumbered by easements sold or transferred to a different owner. So far this has not presented serious problems. For the most part, these organizations have been proactive about meeting new owners. Succession in ownership, nevertheless, remains a concern. At some point, all properties encumbered by conservation easements will change hands. Either they will be passed down to heirs or the property will be sold. The new owners may not be as committed to the conservation goals as the previous owner. There is no reason to believe that courts will not enforce properly constructed and unambiguous conservation easements if a new landowner violates or attempts to revoke the easement. Land trusts, however, must be willing to enforce their easements by litigation if necessary. A conservation easement is of little value if it is not enforced. The potential financial burden on land trusts of litigating conservation easements could make their use less attractive in the future.

E. Conservation Easements Are a Private Tool for Achieving a Public Good

While the government has virtually unlimited authority to decide if and how it wants to preserve the environment on lands that it owns and manages,[279] its ability to regulate what happens on private lands is limited.[280] Yet even on private lands, government agencies have expansive

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278. *See, e.g.*, BAY AREA OPEN SPACE COUNCIL, *supra* note 91, at 14.

279. In *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976), the Supreme Court held that the federal government owned the public lands as both proprietor and sovereign and that "the power over the public lands thus entrusted to Congress is without limitation." *See also* Camfield v. United States, 167 U.S 518, 525 (1897) (holding that the federal government has "power over its own property analogous to the police power of the several states"); United States v. Alford, 274 U.S. 264, 267 (1927) (holding that the federal government can regulate activities on private lands to protect public lands).

280. Both *Camfield* and *Alford* relied on the Property Clause of the Constitution in holding that the federal government may regulate actions on private land if they directly affect public lands, but regulation of non-federal lands under the Property Clause is limited only to what is necessary to protect public resources. *See, e.g.*, Minnesota v. Block, 660 F.2d 1240, 1249-51 (1981); United States v. Lindsey, 595 F.2d 5, 6 (1979).

powers to regulate what landowners can do on their property. Courts have traditionally upheld government regulation of private property under both nuisance law as well as the government's police power.[281] However, the government's power to regulate activities on private land is not without limitation. If the government wants to regulate land use under its police power authority, that regulation must not violate due process, and it must have some relationship to the "public health, safety, morals, or general welfare."[282] The government's power to regulate private property is also limited by the Takings Clause of the Fifth Amendment.[283] The Supreme Court has held "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[284] Recent decisions of the Supreme Court provide some guidance as to when a government regulation goes too far: for example, "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[285]

Conservation easements offer a means for protecting and preserving ecological diversity, open space, and other environmental qualities on private lands without relying on government regulation. The government can preserve the environment on private lands by restricting the right of the landowner to use their property. A conservation easement, on the other hand, creates a property right in the conservation of the land itself.[286] In essence, land conservation becomes another stick in the bundle of rights that comprise property. Landowners are free to sell, donate, or otherwise encumber this property right to land conservation in the same manner that they may sell, donate, or otherwise encumber any other property right possessed. By creating a property right in conservation, conservation easements offer a means to provide the same public good that

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281. The U.S. Supreme Court, for example, upheld the use of zoning as a proper exercise of the state's police power in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

282. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

283. U.S. CONST. amend. V.

284. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

285. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). Professor Sax has argued that one of the points the Court was articulating in *Lucas* is that "[s]tates may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem." Joseph Sax, *Property Rights and the Economy of Nature: Understanding South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1438 (1993). Thus, the government probably could not require a property owner to maintain their property in a natural and undeveloped state for the purpose of environmental protection (i.e., create by a legislative act a conservation easement) without running afoul of the Takings Clause.

286. Cheever, *supra* note 17, at 1086. *See also* Boyd et al., *supra* note 16, at 212.

a regulation is intended to provide—the preservation of the environment on private lands—by purely private means.[287]

Not only can conservation easements accomplish the same objective as government regulation, but the use of conservation easements can also complement government efforts to regulate or otherwise protect the environment. For example, a land trust can protect private lands that the government cannot, and a land trust and the government can work together to achieve a common conservation goal. The case studies in this article provide examples of how land trusts use conservation easements to complement public conservation efforts.

The ACE Basin Project in South Carolina is an example of how land trusts and state and federal agencies can bring together a range of techniques to protect a large ecosystem. Not only do the land trusts pre-acquire property for government agencies, but the land trusts use conservation easements to protect the environment on private lands that the government either is not in a position to buy or otherwise could not protect by regulation. The government can acquire conservation easements on private property in the same way that a land trust does, but as Richardson of the Lowcountry Open Land Trust notes, landowners in the ACE Basin who are willing to deal with a local land trust may not be willing to deal with the government.[288] Furthermore, even if a landowner were willing to sell or donate a conservation easement to a public agency, the agency might

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287. Some commentators have struggled with the question of how to ensure that the public interest is properly protected by private conservation easements. Korngold, for example, argues that private conservation servitudes remove land-use decision making from the democratic process. Korngold, *supra* note 17, at 460-61. He seems most concerned that non-elected elites (i.e., wealthy landowners and those who control land trusts) are vested with power to decide what constitutes public land-use values. Thus, to protect the public interest, Korngold suggests that conservation servitudes should only be held by public entities. He does not acknowledge that lawmakers and bureaucrats often act in the interest of the same private elites with whom he is concerned. Further, public choice theory suggests that public actors do not always act in the public interest. *See, e.g.*, William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283 (1988).

Some commentators have also questioned the purely private notion of conservation easements. For example, they note that the tax benefits offered by the government are a primary motivating factor for a landowner when donating a conservation easement. Cheever, *supra* note 17 at 1091-92; Farrier, *supra* note 2, at 344-45. Because of this tax benefit and the fact that government has enacted legislation allowing for the creation of privately held conservation easements, these commentators argue that the public is entitled to oversee the implementation of a private conservation easement. *See, e.g.*, Cheever, *supra* note 17, at 1091-92. But in a modern industrial economy, virtually all activity is touched in some way by government rules and regulations. For example, it is not clear how a tax break for donating a conservation easement differs in principle from the tax break the average American receives for owning a home.

288. Interview with Richardson, *supra* note 240.

not have the resources to purchase or otherwise maintain the easement, or the agency may not be able to move quickly enough to secure the conservation easement.

The preservation of agricultural lands in Marin County, California, provides significant public benefits—it keeps productive agricultural lands in agriculture and it protects open spaces while curtailing urban sprawl. By using funds made available from the state, MALT has been able to buy conservation easements on roughly 20 percent of the private agricultural lands in the county. The county may have been able to forestall urban sprawl and preserve open space by means of zoning, but zoning is always subject to challenges and politics, thus the protection that the conservation easements provide is probably more permanent.

TNC's Denny Ranch and Mount Hamilton projects in California use conservation easements to preserve remarkably large and wild private lands that likely would not have been protected by public efforts. Unless the government decides to buy the property, preserving ranches that sprawl over tens-of-thousands of acres would be difficult to accomplish by regulation. Zoning and other regulations can shape how large tracts of private lands can be developed, but they cannot prevent development entirely. Even if the government decides that it does want to purchase the property, it must first find the money and then decide what agency will be responsible for the property. These are political decisions that take years to make,[289] and during that time, development may well occur.

The case studies show how conservation easements can be used by land trusts to protect private lands that are adjacent to public lands or to create corridors of protected private land that link together larger areas of public lands. The Jackson Hole Land Trust, for example, created a protected buffer along a portion of the boundary of Grand Teton National Park by securing conservation easements on private lands that abut the park. In northern Montana, the Montana Land Reliance has been able to use

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289. Two recent high-profile government land purchases—the Headwaters Forest in northern California and the Church Universal and Triumphant Ranch near Yellowstone National Park in Montana—underscore the political nature of these decisions. The Church Universal Triumphant property near Yellowstone includes critical winter range for elk and bison that spend most of the year inside Yellowstone Park, but the purchase was delayed and almost derailed over disputes regarding the management of wildlife. Scott McMillion, *Selling off the Promised Land*, 31 HIGH COUNTRY NEWS 1 (March 15, 1999). The Headwaters Forest in California was the largest remaining privately owned stand of old growth redwoods. The deal to purchase the 7,500 acre property took years to negotiate, nearly fell apart the night before a congressionally-imposed deadline to complete the deal, and was tied to the larger political debate over the future of old growth forests in the Northwest. *See* David J. Hayes, *Saving the Headwaters Forest: A Jewel that Nearly Slipped Away*, 30 ENVTL. L. REP. 10131 (2000); *The Headwaters Agreement: A History, Summary and Critique*, HASTINGS W.-NW. J. ENVTL. L. & POL'Y 361 (1999) (current events commentary prepared by journal staff and Kevin Bundy).

conservation easements to help construct a corridor across private lands to allow grizzly bears to move more easily between large areas of protected public lands. TNC's Tenaja project in California uses conservation easements to help link together TNC's Santa Rosa Plateau Reserve with nearby public lands. In all of these examples, the use of conservation easements by private land trusts has produced a positive public gain in conservation.

VI. PRIVATE CONSERVATION, THE PUBLIC GOOD, AND A NEW ENVIRONMENTAL ETHIC

This article began by noting that there are vast tracts of land in America that are privately owned and that provide essential habitat for flora and fauna, protect watersheds, and are valuable for their scenic qualities. The central question this article addresses is how the public can protect the environment on these private lands. Conservation easements held by private trusts that restrict development on private lands offer an effective and efficient approach to protecting the environment. As such, conservation easements are a private tool for providing for the public good of environmental protection on private lands. Conservation easements may also contribute to the emergence of a new environmental ethic on the part of private landowners, an environmental ethic that is based on both self-interested and publicly motivated behavior. Some commentators have questioned whether conservation easements held by private land trusts can effectively protect the public interest.[290] The five case studies demonstrate no inherent conflict between the objectives of private land trusts and the larger public interest in protecting the environment on private lands. Indeed, the case studies demonstrate how the public interest in environmental protection on private lands has been substantially advanced by the use of conservation easements. Conservation easements may be seen as a no-lose proposition; they do not replace or repeal any existing government authority to regulate conduct on private lands. The government remains free to pursue the public interest in protecting the environment on private lands by enforcing existing laws or enacting new legislation.

Conservation easements may be the most appropriate means for protecting the environment on private lands. A conservation easement serves the narrow self-interest of landowners who may be motivated by tax benefits or other economic factors. These landowners are also likely to share the larger goal of land stewardship and environmental protection advocated by the land trusts. Tax benefits and payments for conservation

290. *See supra* note 287.

easements provide landowners with the necessary economic incentive to forego developing the land and further the larger public goal of preserving the environment on private lands. Such self-interested and publicly motivated behavior is the principle upon which conservation easements work. Any truly effective means for protecting the environment on private lands must depend to a substantial extent on the willing actions of private landowners.

Promoting self-interested behavior that also serves the public interest by protecting the environment on private lands can be instrumental in developing a new environmental ethic among property owners. Aldo Leopold's land ethic is itself an appeal to self-interested, publicly motivated behavior.[291] Leopold is seeking an ecological ethic that will help guide a landowner's economic use of their land. Such an ethic will be rooted in a love of and respect for the land in addition to the need to use the land for economic advantage.[292] Leopold believes that we need to cast off the economic determinist model of land use and broaden our appreciation and understanding of the other values that the land affords.[293] Leopold sees in the idea of property much more than narrow economic self-interest. Stewardship and conservation of the land are values that many landowners hold dear—they are part of the concept of property.[294] Providing landowners with a means to achieve these goals that is in their self-interest is key to fostering a truly revolutionary land ethic. Conservation easements are a tool that can help promote this new environmental ethic.

VII. CONCLUSION

In the coming decades, the emphasis on preserving ecological diversity in the United States is likely to shift from public lands to private lands. While there is still much to accomplish with regard to preserving the nation's public lands, the major pieces of the mosaic of protected public lands are already in place. With private lands, however, we have only just begun to understand the ecological importance that these lands play in preserving larger regional ecosystems. Roughly 60 percent of the land in the United States is privately held, but only a very small fraction of this land is managed in a way that protects and promotes the ecological functions that these private lands provide as critical components of larger regional ecosystems. Protecting the environment on private lands will require

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291. Aldo Leopold, A SAND COUNTY ALMANAC 214 (1977).

292. *Id.* at 223.

293. *Id.*

294. See Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 28 (1994), for a broader discussion of how traditional notions of property can encompass a stewardship ethic.

developing new tools for land conservation that are compatible with private ownership. This article has described how one such tool—conservation easements—is used by private conservation organizations around the country to preserve the environment on private lands. The remarkable strength of conservation easements is that they can serve both the self-interested needs of the private landowner as well as provide for the larger public good of environmental conservation and ecological preservation.