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Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions

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I. Introduction

For the past decade, traditional environmental lawyers—advocates for the public interest, governments, and regulated parties—have watched, with mixed feelings, the dramatic rise of a distinct form of land conservation. Private, nonprofit land trusts[1] appear to be everywhere, purchasing scenic sections of the California coast,[2] expanding nature preserves in Wisconsin,[3] and encouraging organic farming in Rhode Island.[4] Type "land trust" into your favorite web browser and you will be presented with an almost endless list of organizations, large and small, who are working to preserve a broad array of public and private lands—from wetlands and wildlife habitat, to farm and ranch lands, to historic sites.

Traditional environmental lawyers have not always known how to respond to the rapid growth in the number of these private or quasi-private land conservation transactions. A few have embraced the new development, but many have responded with benign, or not-so-benign, neglect. Some were not distressed when, in May 2003, the *Washington Post* published a three-part exposé taking The Nature Conservancy, the nation's largest and most well-endowed land trust, to task.[5] There is a significant danger that such negative publicity will confirm the suspicions of some environmental lawyers regarding the intentions of the fast growing "land trust community" and the efficacy of their land conservation transactions.

The cultural differences between traditional environmental lawyers and the land trust community contribute to the atmosphere of skepticism. Environmental litigators and regulatory lawyers take uncompromising positions (their clients' positions) on specific projects, regulatory actions, and agency decisions. These positions provide the foundation for most of the work they do. Members of the land trust community, while just as committed to environmental protection, generally avoid taking positions on specific projects, actions, or decisions for fear of alienating the private landowners with whom they work, or the government agencies or other private organizations with whom they may wish to collaborate in the future. Not surprisingly, some members of the land trust community perceive environmental litigators as unnecessarily combative, while some environmental litigators perceive members of the land trust community as lacking all conviction.

One of the authors recently described the idea for this Article to a prominent public interest environmental litigator. The litigator responded that it was the land trust community that excluded environmental lawyers, rather than environmental lawyers who excluded land trusts. We do not believe any group has a monopoly on exclusion. Instead, the exclusion likely is unintentional on both sides and simply a result of the fact that environmental lawyers and members of the land trust community operate in different worlds. Not many local, state, or regional land trusts have lawyers on staff, and the lawyers with whom they interact tend to be transactional lawyers (estate planners and real estate attorneys) rather than environmental litigators. You would be hard-pressed to find a delegation from Earthjustice, the U.S. Department of Justice's Environment and Natural Resources Division, or

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1. Land trusts can be broadly defined as local, state, regional, and national nonprofit organizations that work to conserve land for the benefit of the public through a variety of means, including, most commonly, the acquisition of land and conservation easements by gift, purchase, or bargain purchase. Although in recent years a variety of government open space programs have appropriated the label of "land trust," this Article will focus on the far more common private, nonprofit land trusts.

2. Paul Rogers, *Pristine Beauty: Conservation Gem Bogs Down in Congress*, San Jose Mercury News, Sept. 12, 2003, at 1C.

3. Mike Johnson, *Mequon Preserve Could Grow: Land Trust Plans to Buy Neighboring 52 Acres*, Milwaukee J. Sentinel, Sept. 10, 2003, at 1B, *available at* http://www.jsonline.com/news/ozwash/sep03/168591.asp (last visited Jan. 15, 2004).

4. Tom Meade, *Growth Opportunity: Four Farmers Share Space and New-Found Success*, Providence J., Sept. 2, 2003, at G1.

5. David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, Wash. Post, May 4, 2003, at A1; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, Wash. Post, May 5, 2003, at A1; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, Wash. Post, May 6, 2003, at A1. *See also* Joe Stephens, *Charity's Land Deals to Be Scrutinized*, Wash. Post, May 10, 2003, at A2 (reporting that the U.S. Senate Finance Committee, which is considering proposals to increase the tax incentives available to landowners who donate land and conservation easements to land trusts, "will demand an accounting from [The Nature Conservancy's] leaders").

the American Bar Association's (ABA's) Section on Environment, Energy, and Resources at the annual Land Trust Rally sponsored by the Land Trust Alliance.[6] You would be equally hard-pressed to find the executive director of a land trust at an ABA conference on environmental litigation.[7]

In this brief Article, we suggest that the skepticism with which environmental lawyers tend to view land trusts is unfounded and that environmental lawyers stand to gain much from engaging more actively with the land trust community. Under the assumption that lack of understanding is often an impediment to interaction, we begin with a brief description of the history of the development of the land trust community and their most common land protection tool—the conservation easement.[8] We then examine the usual criticisms levied against land trusts and their land protection activities by environmental lawyers and academics. Finally, we discuss why environmental lawyers should view land trusts as allies rather than possible opponents, and we argue that environmental lawyers should take an active role in coordinating regulatory measures for land protection with the voluntary, incentive-based tools employed by land trusts.

We are not suggesting that environmental litigators suddenly become conservation transaction lawyers, or that private landowners be compensated whenever governments exercise their well-established right to regulate the use of private land to protect the public welfare. Instead, our point is that the environmental community, as a whole, stands to gain tremendously from the synergies that can be derived from employing a diversity of approaches, and that environmental lawyers have a significant interest in ensuring that the various approaches to land protection are properly coordinated and do not inadvertently undermine one another.

II. Who Are These People and What Are They Doing?

The law undergirding the conservation transactions of land trusts—like many bodies of law governing transactions—is not the result of an identifiable statutory initiative. Rather, it developed by accretion. Accordingly, it makes sense to understand it historically. The history of the land trust movement is long, involved, and maddeningly diffuse. We offer only an outline.

The first identifiable private land trust in the United States was the Trustees of Reservations established in Massachusetts in 1891 by landscape architect Charles Norton Eliot.[9] Eliot, a disciple of Frederick Law Olmsted, advocated that the Trustees of Reservations work to create public parks and preserve scenery in and around the city of Boston. Eliot did not contemplate the use of conservation easements as we know them today.[10]

The term "conservation easement" did not emerge until one-half century after Eliot's death in 1897. In the late 1950s journalist William Whyte advocated using private land use controls to accomplish landscape preservation.[11] Whyte's plan centered upon comprehensive planning, land use controls, and private land conservation.[12] Whyte advocated coordinated, landscape-scale approaches to planning. He believed that zoning was a problematic tool, pronouncing that "[z]oning is a tool that always seems on the brink of better days."[13] He believed developers found it too easy to manipulate public land use regulations and that large-lot zoning encouraged what we now call "sprawl."

By the time Whyte coined the term "conservation easement," the property interest he described was already relatively well established. In the 1930s and 1940s, the National Park Service purchased easements encumbering almost 1,500 acres in North Carolina and Virginia to protect scenic vistas along the Blue Ridge Parkway, and easements encumbering another 4,500 acres in Alabama, Mississippi, and Tennessee to protect scenic vistas along the Natchez Trace Parkway.[14] Those early efforts were not a great success, and the federal government discontinued its practice of purchasing scenic easements to protect those parkways in the 1950s.[15] The concept, however, was not dead. As a result of federal support for the development of a scenic corridor along the Mississippi River, by 1959 six Mississippi River states had adopted legislation authorizing the acquisition of scenic easements along the "Great River Road."[16]

6. The Land Trust Alliance is the umbrella organization for the nation's local, state, and regional land trusts. *See* Land Trust Alliance, *Land Trust Alliance*, *at* http://www.lta.org/aboutlta/index.html (last visited Nov. 13, 2003) (noting that, since its foundation in 1982, the Land Trust Alliance has helped build a strong land trust movement in America that now includes more than 1,260 conservation organizations, and that the Land Trust Alliance supports land trusts through conferences, workshops, field services, grants, research, publications, and an Internet library). The annual Land Trust Rally is the nation's largest conference for land trusts, and more than 125 educational workshops, day-long seminars, and field trips are offered to attendees. *See* Land Trust Alliance, *Land Trust Alliance Programs*, *at* http://www.lta.org/aboutlta/programs.htm (last visited Nov. 13, 2003). Close to 1,700 individuals from 48 states, the District of Columbia, and 10 countries attended the 2003 rally, which was held in Sacramento, California. *See* Land Trust Alliance, *Newsroom*, *at* http://www.lta.org/newsroom/index.html (last visited Nov. 13, 2003).

7. A member of the Colorado land trust community attended a Sierra Club function in the late 1990s and made reference to the fact that his spouse worked for Great Outdoors Colorado (GOCO), Colorado's innovative public funding mechanism for open-space acquisition and, at the time, a dominant force in the Colorado land trust community. No one at the Sierra Club gathering had even heard of GOCO.

8. A conservation easement is a legally binding agreement between the owner of the land encumbered by the easement and the holder of the easement that restricts the development and use of the land to achieve certain conservation goals, such as the preservation of wildlife habitat, agricultural land, or an historic site.

9. *See* Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9, 17 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND].

10. Frederick Law Olmsted employed an antecedent to the conservation easement to protect land along parkways as early as the 1880s. Such interests were held by the government and were invalidated on technical grounds in the 1920s. POWELL ON REAL PROPERTY §34A.02 (Michael Allan Wolf ed., Matthew Bender 2003).

11. WILLIAM H. WHYTE, THE LAST LANDSCAPE 2-14 (1968).

12. Whyte's plan was abstracted in *Life Magazine* in 1959, elaborated upon in a 1959 report for the Urban Land Institute entitled *Securing Open Space for Urban America: Conservation Easements*, and fully worked out in his 1968 book, *The Last Landscape*.

13. WHYTE, *supra* note 11, at 36.

14. POWELL ON REAL PROPERTY, *supra* note 10 (citing Kathleen Schwartz, *The Federal Government's Use of Conservation Easements*, *in Report on 1985 National Survey of Government and Nonprofit Easement Programs*, 4 LAND TRUSTS' EXCHANGE J. LAND CONSERVATION 9 (1985)).

15. *See* Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 167 (1968) (discussing in detail the National Park Service's unfortunate experience with parkway easements); *see also* POWELL ON REAL PROPERTY, *supra* note 10.

16. POWELL ON REAL PROPERTY, *supra* note 10.

In 1965, the federal government provided all states with a significant incentive to enact legislation facilitating the use of scenic easements in the form of the Federal Highway Beautification Act.[17] That Act, which provided that 3% of the funds appropriated to a state during any fiscal year for the construction of highways had to be used for landscaping and scenic enhancement or such funds would lapse, stimulated numerous states to enact new or additional legislation facilitating the use of scenic highway easements.[18]

Coincident with the growth of scenic highway easement legislation, and in no small part due to Whyte's influential writings, states began enacting legislation authorizing the use of conservation easements to accomplish a broader range of land conservation goals (known as easement-enabling statutes).[19] Among the first states to enact easement-enabling statutes were California in 1959[20] and New York in 1960.[21] By 1979, 40 states had enacted easement-enabling statutes.[22] In 1981, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Conservation Easement Act (UCEA), which has since been adopted in 22 states.[23] As of 2000, only one state—Wyoming—lacked an easement-enabling statute.[24]

The easement-enabling statutes vary somewhat with respect to the purposes for which a conservation easement may be created.[25] However, the UCEA gives a feel for the types of general conservation and preservation purposes for which conservation easements may be created under state law. Under the UCEA, a conservation easement may be created to: (1) retain or protect natural, scenic, or open-space values of real property or assure its availability for agricultural, forest, recreational, or open-space use; (2) protect natural resources; (3) maintain or enhance air or water quality; or (4) preserve the historical, architectural, archaeological, or cultural aspects of real property.[26]

At the same time states were busy enacting easement-enabling legislation, the Internal Revenue Service (IRS) and the U.S. Congress were announcing that federal tax benefits are available to landowners who donate conservation easements. In 1964, the IRS published a Revenue Ruling authorizing a federal charitable income tax deduction for the donation of a conservation easement protecting scenic land adjacent to a federal highway.[27] In 1965, the IRS issued a news release advertising the availability of the charitable income tax deduction for the donation of scenic easements.[28] In the Conference Report to the Tax Reform Act of 1969, the conferees indicated that donors of "open space" easements are eligible for charitable income, gift, and estate tax deductions.[29] Then in 1976, Congress enacted an explicit statutory provision authorizing conservation easement donors to claim charitable income, gift, and estate deductions.[30]

There now are three federal tax incentives available to a landowner who donates a conservation easement during life: (1) a charitable income tax deduction generally equal to the value of the donated easement[31]; (2) the removal of the value of the easement from the landowner's estate free of gift or estate tax[32]; and (3) an additional exclusion of up to 40% of the value of land encumbered by the easement from the landowner's estate for estate tax purposes.[33]

To be eligible for the federal tax incentives, an easement donation must satisfy a myriad of requirements. Although a detailed description of those requirements is beyond the scope of this Article, in general the easement must be donated: (1) to a "qualified organization," which is defined to include charitable organizations that receive a substantial portion of their support from the public (publicly supported

17. *Id.*

18. *Id.*

19. *Id.* The enactment of state easement-enabling statutes was crucial to the use of conservation easements as a land protection tool in the United States. Conservation easements, which technically are "negative" easements "in gross," are subject to a variety of common-law impediments to their long-term enforceability. State easement-enabling statutes have greatly facilitated the use of conservation easements by removing those common-law impediments.

20. *Id.* (citing CAL. GOV'T CODE §6953 (West 1959)).

21. *Id.* (citing N.Y. GEN. MUN. LAW §247 (McKinney 1960)).

22. *Id.* (citing Schwartz, *supra* note 14, at 30.

23. *See* Uniform Law Commissioners, *Uniform Conservation Easement Act*, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Nov. 13, 2003).

24. POWELL ON REAL PROPERTY, *supra* note 10.

25. *See* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND, *supra* note 9, at 26, 27-31 (detailing the purposes for which easements may be created under the various enabling statutes).

26. UCEA §1(1) (1981).

27. Rev. Rul. 64-205, 1964-2 C.B. 62.

28. I.R.S. News Release No. 784 (Nov. 15, 1965).

29. Conf. Rep. 91-782, 1969-3 C.B. 644, at 654.

30. Internal Revenue Code (IRC), §170(f)(3)(B) (1976). The 1976 deduction provision was replaced in 1980 with §170(h) of the IRC, which is the current provision authorizing a charitable income tax deduction for the donation of a conservation easement. For a more detailed history of the development of the federal tax incentives available with respect to conservation easement donations, see Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. (forthcoming 2004) [hereinafter McLaughlin, *A Responsible Approach*].

31. I.R.C. §170(h). For federal tax purposes, the value of a conservation easement generally is equal to the difference between the fair market value of the land immediately before the donation of the easement and the fair market value of the land immediately after the donation of the easement (this valuation method generally is referred to as the "before and after" method). *See* Treas. Reg. §1.170A-14(h)(3)(i). The value of an easement must be substantiated by a "qualified appraisal" prepared by a "qualified appraiser." *See* Treas. Reg. §1.170A-13(c). A "qualified appraisal" prepared by a "qualified appraiser" generally means a fully supported appraisal prepared by an experienced, independent appraiser. *Id.*

32. The gratuitous transfer of a conservation easement during the landowner's lifetime is not subject to gift tax by virtue of the gift tax deduction under §2522(d) of the IRC. When the landowner dies, it is the fair market value of the land encumbered by the easement that is included in his estate for estate tax purposes. *See* Treas. Reg. §20.2031-1(a) & (b) (defining fair market value as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts").

33. I.R.C. §2031(c). The estate tax exclusion under §2031(c) was enacted as part of the Taxpayer Relief Act of 1997. Pub. L. No. 105-34, §508 (1997). To illustrate the operation of the three tax incentives, assume a landowner owns land with a fair market value of $1 million and donates a conservation easement that reduces the value of the land to $700,000. The difference between those two values—$300,000—is the value of the landowner's charitable income tax deduction (the claiming of which is subject to certain limitations). At the landowners death, assuming there has been no change in the value of the land since the donation, only $420,000 of the original $1 million value of the land will be included in the landowner's estate for estate tax purposes ($700,000, which is the fair market value of the land encumbered by the easement, less $280,000, which is the 40% of the fair market value of the land encumbered by the easement that may be excluded from the landowner's estate under §2031(c)).

charities) and governmental entities[34]; (2) in perpetuity, which means that the easement restrictions must run with the land and bind all future owners[35]; and (3) for one or more of the following four qualified conservation purposes:

> (a) the preservation of land areas for outdoor recreation by, or the education of, the general public;
> (b) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem;
> (c) the preservation of open space (including farmland and forest land), provided such preservation is either for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy and, in each case, will yield a significant public benefit; or
> (d) the preservation of an historically important land area or a certified historic structure.[36]

The vast majority of conservation easements are granted "in perpetuity" because most land trusts accept only perpetual easements and landowners donating easements are eligible for the federal tax incentives only if their easements are perpetual.[37] In addition, because most land trusts wish to attract easement donations, most land trusts take pains to retain their status as publicly supported charities (and, thus, as qualified organizations),[38] and to use one or more of the four qualified conservation purposes listed above as the basis for their easement selection criteria.[39]

In recent years, numerous states have enacted state tax incentives to supplement the existing federal tax incentives and further encourage the donation of easements within their borders.[40] In general, the state tax incentives are available with respect to easement donations that satisfy the requirements for the federal tax incentives noted above.

As state after state enacted easement-enabling legislation and the availability of federal and state tax incentives for easement donations became more widely known and understood, the number of land trusts increased dramatically. In 1950, there were only 53 land trusts extant, most of which operated in the northeast.[41] In 1985, there were 479 local, state, and regional land trusts operating in the United States.[42] By 1990, that number had grown to 887, and by the end of 2000, there were 1,263 local, state, and regional land trusts operating nationwide.[43]

While the state easement-enabling statutes and the requirements for the federal tax incentives exert significant influence over the character of conservation easements and the land trusts that acquire them, they also leave room for considerable flexibility. Land trusts operate on the local, state, regional, national, and even international level. They have diverse conservation missions, which, in the case of local, state, and regional land trusts, are specific to their locations.[44] They also range in size from the relatively vast and well-endowed national organizations,[45] to extremely small organizations with minimal budgets and no paid staff.[46]

Although land trusts can and do employ a variety of techniques to accomplish their land protection goals, including acquiring fee title to land and offering environmental education programs, they most commonly work to protect land through the acquisition of conservation easements by gift,

34. I.R.C. §170(h)(3). Private foundations are not eligible to receive tax-deductible conservation easement donations. The U.S. Treasury believed that because private foundations are not accountable to the general public for their ongoing support, they could not be counted upon to accept easements that provide the appropriate quantum of public benefit. *See* McLaughlin, *A Responsible Approach*, *supra* note 30.

35. I.R.C. §170(h)(5)(A).

36. *Id.* §170(h)(4). *See also* Treas. Reg. §1.170A-14 for the Treasury's detailed interpretation of I.R.C. §170(h).

37. Janet Diehl & Thomas S. Barrett, The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs 7 (1988). In fact, federal tax law actually discourages the donation of nonperpetual or "term" easements because a landowner donating a term easement would not be eligible for the charitable gift tax deduction and, thus, might incur gift tax liability as a result of the donation.

38. *See* William T. Hutton, *Mathematical Prescriptions for Relief of the Public Charity Status Blues*, *in* The Back Forty Anthology 1.17 (William T. Hutton ed., 1995) (noting that if a land trust fails to meet the publicly supported test, it is, for all practical purposes, out of business since it no longer will qualify to receive tax-deductible conservation easement donations).

39. *See, e.g.*, Diehl & Barrett, *supra* note 37, at 12 (noting that both the IRS and easement program administrators invested many months of effort to develop the Treasury Regulations governing conservation easement donations, and "even those who buy easements at fair market value, where tax deductibility is irrelevant, may find IRS regulatory criteria a useful and logical starting point for the development of their own program's criteria").

40. For example, Colorado allows a landowner to claim a credit against Colorado income tax equal to 100% of the first $100,000 of the value of a perpetual easement donated with respect to land located in Colorado, and 40% of the value of such easement in excess of $100,000, subject to a cap of $260,000. Colo. Rev. Stat. Ann. §39-22-522 (West 2002). Unused credit may be carried forward for up to 20 years, sold or otherwise transferred to another Colorado taxpayer who can use the credit, or, if there are sufficient state revenues, refunded in an amount not exceeding $50,000 per year. *Id. See also* McLaughlin, *A Responsible Approach, supra* note 30 (describing the Virginia income tax credit available to landowners who donate easements encumbering land in Virginia); Philip Tabas, *Making the Case for State Tax Incentives for Private Land Conservation*, 18 Exchange J. Land Trust Alliance 5 (1999) (describing the state tax incentives available for the donation of easements in various states).

41. *See* Land Trust Alliance, *National Land Trust Census*, *at* http://www.lta.org/aboutlt/census.html (last visited Nov. 24, 2003) [hereinafter LTA Census 2000] (detailing the results of the Land Trust Alliance's National Land Trust Census 2000). The Land Trust Alliance collects periodic census data with respect to the local, state, and regional land trusts operating in the United States (including government and quasi-governmental agencies that operate in a manner similar to land trusts, such as the Maryland Environmental Trust). Telephone Interview with Martha Nudel, Director of Communications, Land Trust Alliance (Feb. 12, 2002). The Land Trust Alliance does not collect data with respect to land trusts that operate on a national scale, such as The Nature Conservancy, the American Farmland Trust, the Trust for Public Lands, and the Conservation Fund.

42. LTA Census 2000, *supra* note 41.

43. *Id.*

44. The Jackson Hole Land Trust, which focuses on preserving the open space, scenic, ranching, and wildlife values of Jackson Hole, Wyoming, is an example of a local land trust. *See* http://www.jhlandtrust.org (last visited Nov. 13, 2003). The Montana Land Reliance, which focuses on protecting land in Montana that supports agriculture, fish, and wildlife resources, is an example of a state land trust. *See* http://www.mtlandreliance.org (last visited Nov. 13, 2003). The Teton Regional Land Trust, which focuses on conserving the agricultural and natural resources of the Upper Snake River Valley in Idaho, Montana, and Wyoming, is an example of a regional land trust. *See* http://www.tetonlandtrust.org (last visited Nov. 13, 2003). The Nature Conservancy, which focuses on biodiversity conservation, is an example of a land trust that operates on the national and international level. *See* http://www.tnc.org (last visited Nov. 13, 2003).

45. As of 2001, The Nature Conservancy reported almost $3 billion of assets. *See* http://www.guidestar.org (last visited July 11, 2003).

46. *See* Martha Nudel, *Land Trusts Grow Stronger With More Staff, Larger Budgets*, 21 Exchange J. Land Trust Alliance 5 (2002) (noting that the 2000 U.S. Census found that approximately one-half of the nation's local, state, and regional land trusts are run entirely by volunteers).

purchase, or bargain purchase.[47] The preeminent status of the conservation easement in the land trust world is not surprising, given the strong symbiotic relationship between land trusts and conservation easements. Under most state easement-enabling statutes, only government agencies and charitable conservation organizations such as land trusts are authorized to hold conservation easements.[48] Moreover, conservation easements are uniquely well suited to the voluntary, grass-roots nature of the land protection engaged in by land trusts.

Private landowners find conservation easements nonthreatening because: (1) the sale or donation of an easement is a voluntary transaction[49]; (2) the restrictions placed on the development and use of land in an easement can be tailored to the particular characteristics of the land and the particular desires of the landowner; (3) the landowner can continue to farm, ranch, and otherwise use the land in ways not inconsistent with the conservation purposes of the easement; and (4) there is no requirement that the public be granted access to land encumbered by a conservation easement. In addition, because of the broad conservation purposes for which conservation easements may be granted under state easement-enabling statutes, land trusts, collectively, are able to cast a much wider net of land protection than is found in more targeted governmental land conservation programs, protecting lands as diverse as habitat for threatened or endangered species, working farms and ranches, civil war battlefields, and urban gardens. Finally, conservation easements can be an efficient and cost effective land protection tool for the nation's often underfunded and understaffed land trusts because they carry a lower initial price tag than would fee title to the land (and, in many cases, are donated to land trusts as a charitable gift), and land trusts generally are obligated only to periodically monitor and, if necessary, enforce the easement restrictions rather than actively manage the encumbered land.

III. The Usual Criticisms

A. Undermining Regulatory Measures

The tension between the land trust community and more traditional environmental lawyers broke the surface, briefly, just after the *Washington Post* completed its three-part exposé on The Nature Conservancy.[50] In a letter to the editor, the Executive Director of the Georgetown Environmental Law and Policy Institute and a public interest environmental lawyer, Prof. John D. Echeverria, questioned an assumption underlying much of what land trusts do: that protecting land reduces its economic value.[51] Echeverria stated that "numerous studies show that land use restrictions can have a neutral or positive effect on per-acre land values."[52] He went on to argue that

> The Nature Conservancy has an obvious incentive to stress the potentially adverse effects of restrictions to maximize the tax value of conservation donations by its allies and supporters. But this approach contradicts and undermines the efforts of state and local officials to explain that reasonable land use restrictions can be economically fair to landowners.[53]

In making that argument, Echeverria expressed a common perception among traditional environmental lawyers that providing financial incentives to private landowners to encourage them to protect their land for conservation purposes is sapping the will of governments—federal, state, and local—to regulate the development and use of land for the public good, and may even undermine the very legitimacy of the regulatory process.

Echeverria's assertion that land use restrictions can have a neutral or even positive effect on per-acre land values may be true in some contexts, but it is rarely (if ever) true in the context of a conservation easement grant. Placing permanent restrictions on the development and use of land through the grant of a conservation easement almost always will reduce the value of the land, and such reduction often will be significant.[54] In the 17 reported cases in which the IRS challenged the taxpayer's valuation of a conservation easement encumbering land for purposes of the federal charitable income tax deduction, the courts determined that the conservation easements reduced the value of the land they encumbered by as much as $4.970 million and by as little as $20,800.[55] In terms of percentage diminution in value, the easements involved in those cases reduced the value of the land they encumber by as much as 91% and as little as 2%, with an average diminution in value of approximately 43%.[56] It is also worth noting that, although the IRS argued in 7 of the 17 cases that the donation of the easement had no effect on the value of the encumbered land, the courts never adopted that position.[57]

47. *See* Gustanski, *supra* note 9, at 9 (noting that conservation easements have earned the position of being the most widely used private sector land conservation tool across the nation).

48. *See* Mayo, *supra* note 25, at 35.

49. While land conservation transactions are always voluntary, governments can and do provide both positive and negative incentives to encourage them. *See* 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, 1087-92 (1996).

50. *See supra* note 5 and accompanying text.

51. John D. Echeverria, Editorial, *Construction Bans and Land Value*, WASH. POST, May 17, 2003, at A24.

52. *Id.*

53. *Id.*

54. In his brief letter, Echeverria did not provide cites to the "numerous studies" supporting his assertion that land use restrictions can have a neutral or positive effect on per-acre land values. It is quite possible that those studies analyzed the effect on per-acre land values of down zoning entire areas or regions, which can be expected to be markedly different from the effect on per-acre land values of the grant of a conservation easement, which restricts the development and use of only one parcel of land.

55. *See* McLaughlin, *A Responsible Approach, supra* note 30, app. A. *See also supra* note 31, describing the "before and after" method generally employed in valuing a conservation easement.

56. *See* McLaughlin, *A Responsible Approach, supra* note 30. The extent to which a conservation easement reduces the value of the land it encumbers will vary according to the particular restrictions on development and use contained in the easement (landowners often retain development and use rights that are not inconsistent with the conservation purposes of the easement), the particular characteristics of the land (such as its topography), and external influences (such as the amount of development pressure to which the land is subject).

57. *See id.* app. A. The restrictions on development and use contained in a perpetual easement become a part of the land records and prevent the landowner and all successor owners from developing or otherwise using the land in manners prohibited by the easement. In addition, most easements grant the agency or organization holding the easement the right to enter the property at reasonable times to monitor compliance with the easement. Thus, every easement involves a

Concerned that readers of Echeverria's letter to the editor (and the *Washington Post*'s series chastising The Nature Conservancy) might conclude that conservation easement grantors routinely receive compensation or valuable tax savings even though the easements they convey involve no economic sacrifice on their part, we emphasize another fundamental point. Absent abuse, a landowner who sells or donates a conservation easement is eligible for compensation or tax savings only to the extent the easement actually reduces the value of the encumbered land. The reduction in the value of the land is the measure of the "value" of the easement for purposes of its purchase by a land trust or government agency, or for purposes of calculating the tax savings awarded to the donor, and such value is virtually always substantiated by an appraisal that conforms to certain standards.[58]

The second argument alluded to by Echeverria—that providing financial incentives to private landowners to encourage them to protect their land saps the will and ability of governments to regulate land use—is more troubling. There clearly is a danger that paying landowners full fair market value for conservation easements, or even paying them only a modest percentage of such value in the form of tax incentives for donated easements, will reinforce the prevailing view that private property ownership consists primarily of compensable rights. That view can and does undermine regulatory efforts. However, a coordinated approach by environmental lawyers and the land trust community could help to ensure that voluntary, incentive-based land protection transactions serve to complement, rather than undermine, regulatory efforts.

In the appropriate circumstances, the acquisition of conservation easements from private landowners through voluntary purchase and donation transactions can enhance regulatory efforts. For example, the successful technology-based regulatory structures that have been the core of the Clean Water Act (CWA) for three decades deal relatively effectively with "point sources" of pollution, but leave erosion from forestry and agriculture, runoff from parking lots, and other "nonpoint sources" of pollution largely unchecked.[59] As the CWA's technology-based structures have slowly lowered the quantity of pollution from point sources, the prominence of nonpoint source pollution has grown. The permitting structures that are at the heart of the CWA are not well suited to regulating the diffuse nonpoint sources of pollution. However, land trusts can protect water quality from nonpoint source degradation by acquiring conservation easements that limit development on private lands adjacent to waterways. Even if land trusts preserve only a small portion of the land adjacent to a polluted water body, the limits imposed on that land will make the job of meeting water quality standards more feasible, and the controls that must be imposed on other landowners whose activities affect water quality less stringent.

Similarly, conservation easements acquired by land trusts in rural areas, when coupled with traditional public lands and agricultural zoning, can limit the amount of development that takes place in such areas and may inspire the political will to prevent extensive variances. In northern Douglas County, Colorado, just south of the sprawling Denver metropolitan area, local governments, state agencies, and private land trusts are using a combination of restrictive zoning and voluntary land conservation transactions to stem, or at least shape, the flow of urban development.[60] The combined efforts of such groups may also make it easier to achieve Clean Air Act standards by reducing the extent to which development sprawls away from cities and, thus, the number of vehicle miles traveled.

As one of the authors has previously argued, the acquisition of conservation easements from private landowners through voluntary purchase and donation transactions may actually facilitate a transition from a rights-oriented view of private property ownership to a more responsibilities-oriented view.[61] Whenever a private landowner sells or donates a perpetual conservation easement to a government agency or a land trust, the public acquires an interest in the encumbered land similar to the interest it would have under a private property rights regime that contemplates stewardship obligations as well as ownership rights.[62] Accordingly, one acquisition at a time, and without the baggage of perceived unfairness that plagues regulation,[63] conservation ease-

permanent loss of some autonomy with respect to the use and management of the encumbered land. Accordingly, even where development pressure is low, when given the opportunity to purchase two parcels of land substantially identical in all respects except that one such parcel is encumbered by a conservation easement, an economically rational individual will demand some discount in the price of the encumbered parcel.

58. Land trusts and government agencies that purchase conservation easements with limited funds obviously have an incentive to obtain accurate and fully supported appraisals of the value of the purchased easements. Landowners who donate conservation easements and wish to benefit from the various tax incentives are required to substantiate the value of their easements with fully supported appraisals prepared by experienced, independent appraisers. *See supra* note 31. Although valuation abuse in the context of conservation easement donations appears to be growing, both the land trust community and policymakers are aware of, and attempting to respond to the problem. *See* McLaughlin, *Responsible Approach, supra* note 30 (discussing valuation abuse in the context of conservation easement donations); Stephen J. Small, *"Local Land Trust Signed a Fraudulent Tax Form!"* 22 EXCHANGE J. LAND TRUST ALLIANCE 5 (2003) (discussing the problem of valuation abuse and recommending that land trusts take steps to avoid questionable conservation easement transactions); Joe Stephens & David B. Ottaway, *Senate Panel Intensifies Its Conservancy Probe*, WASH. POST, Nov. 10, 2003, at A1 (noting that the Senate Finance Committee's six-month inquiry into The Nature Conservancy's activities has raised new questions, that investigators are particularly interested in the valuation of land donations and the conservation-buyer program, and that reforms to existing law may have to accompany any new tax incentives).

59. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, NONPOINT SOURCE POLLUTION: THE NATION'S LARGEST WATER QUALITY PROBLEM (2003) (EPA 841-F-96-004A), *available at* http://www.epa.gov/OWOW/nps/facts/point1.htm (last visited Oct. 30, 2003).

60. *See* Douglas County, Colorado, *Parks, Trails, and Recreation*, *at* http://www.douglas.co.us/Recreation.htm (last visited Oct. 30, 2003).

61. Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 467 (2002) [hereinafter McLaughlin, *The Role of Land Trusts*].

62. *Id.* at 469. An easement typically obligates the owner of the encumbered land to refrain from certain activities, such as development and industrial uses, that are inconsistent with the conservation purposes of the easement, and to engage in certain activities, such as the procurement of a forest stewardship plan, that are consistent with such conservation purposes. An easement also entitles the holder of the easement to enforce the terms of the easement in perpetuity for the benefit of the public. *Id.*

63. Easement purchases and donations avoid all charges of unfairness because they are voluntary. On the importance of fairness, see J.B. Ruhl, *The Endangered Species Act and Private Property: A Matter of Timing and Location*, 8 CORNELL J.L. & PUB. POL'Y 37, 43 n.18 (1998) (noting that a number of prominent "environmentalist" legal commentators are beginning to confront the unfairness issue in environmental law honestly, directly, and with a sobering message to all

ments are altering the traditional form of private property ownership in this country.[64] As such easements become increasingly commonplace, and the public benefits they produce become more visible and better understood, people may become more comfortable with, and accepting of, a view of private property ownership that contemplates responsibilities as well as rights.[65]

It is imperative, however, that both environmental lawyers and the land trust community recognize the continuing need for *both* regulatory measures and voluntary land protection tools. Financial incentives cannot replace regulatory efforts because we simply do not have sufficient public funds to purchase our way to a more socially desirable level of land protection.[66] By the same token, regulation cannot replace financial incentives because we simply do not have the political will to regulate our way to a more socially desirable level of land protection. Rather than continuing to view one another somewhat suspiciously across an illusory ideological divide, environmental lawyers and members of the land trust community should acknowledge that they have shared goals[67] and begin to work together to capitalize on the tremendous synergies that can be achieved by combining their efforts.

B. Elitism

In his letter to the editor of the *Washington Post*, Professor Echeverria also expressed a common belief that land trusts only undertake land conservation transactions with their "allies and supporters." That criticism is fair if one interprets it as a charge of elitism. The land trust movement has always suffered from a lack of diversity and a lack of focus on land protection activities that benefit inner-city and other low-income populations. However, the "elitist" nature of the land trust movement is largely the result of its heavy reliance on charitable gifts of easements to achieve its land protection goals. The easement donations that have shaped the land protection activities of land trusts have largely been the purview of relatively affluent landowners who can afford to make a sizable charitable gift of the development and use value of their land in exchange for modest tax savings.[68]

As the land trust community has grown in size and influence, its members have become increasingly aware of the need to move beyond their traditional land protection activities and relatively affluent support base, and to pursue involvement with more diverse communities through such things as community planning and outreach programs. While it remains to be seen how quickly and successfully the land trust movement will be able to meet these challenges, it is heartening that the pressing need to address such issues was emphasized at the plenary session on *The Ethics of Land Conservation* at the 2003 Land Trust Rally,[69] and that the Trust for Public Land, a land trust that operates on a national scale, appears to be taking the lead in addressing such issues.[70]

C. Patchwork Protection

Some environmental lawyers—habituated to thinking in terms of categorical regulatory mandates—criticize the "patchwork" nature of the conservation easements acquired by land trusts. They argue that because easement sales and

environmentalists that continuing to ignore or write around the unfairness issue risks allowing environmental laws like the Endangered Species Act to lose all their moral force).

64. McLaughlin, *The Role of Land Trusts, supra* note 61, at 471.

65. *Id.*

66. *See* Sally K. Fairfax, *Past as Prologue*, Workshop Handout, Land Trust Alliance Rally (Oct. 2003) (on file with author) (noting that "[w]e cannot buy our way to an ecologically sane or sustainable future. Land acquisition is now and always will be a very small part of land conservation . . . . We will therefore continue to rely on regulation for a significant portion of land conservation in both good times and bad.").

67. By and large, land trusts are doing the same things environmental regulators want to do. In a 1994 survey conducted by the Land Trust Alliance, 80% of local, state, and regional land trusts indicated that they protected "wildlife habitat," 73% indicated that they protected "wetlands," and 69% indicated that they protected "forests." 1995 National Directory of Conservation Land Trusts (Land Trust Alliance 1995) (on file with author). In a more recent survey conducted by the Land Trust Alliance, as of the end of 2000 roughly 50% of local, state, and regional land trusts indicated that protecting "wetlands," "river corridors," and "watersheds/water quality" was a primary focus, 46% indicated that protecting "farmland/ranchland" was a primary focus, 45% indicated that protecting "nature preserves" was a primary focus, 43% indicated that protecting "open space" was a primary focus, and 42% indicated that protecting "endangered species habitat" was a primary focus. *See* LTA Census 2000, *supra* note 41. Only 34% of local, state, and regional land trusts indicated that protection of "scenic views" was a primary focus. *Id.*

68. The donation of an easement generally reduces the value of the land it encumbers by thousands, if not hundreds of thousands, or even millions of dollars. *See supra* notes 54-57 and accompanying text. In addition, in most cases, the combined federal income and estate tax savings generated by an easement donation, when computed on a present value basis, will reimburse the landowner for substantially less than the amount by which the easement reduced the fair market value of the land. *See* McLaughlin, *A Responsible Approach, supra* note 30. Moreover, because of the structure of the federal tax incentives, the tax savings generated by an easement donation decline precipitously as the donor moves down the income and wealth scale, making it very difficult for landowners who do not have significant annual income and for whom their land represents their most valuable asset (typically referred to as "land rich, cash poor" landowners) to donate easements. *See id.*

69. See Darby Bradley, The Ethical Responsibilities of Land Trusts, Address Before the Land Trust Alliance Rally 2003 (Oct. 19, 2003) (on file with author), emphasizing that

> a land trust's primary responsibility is to the "Community at Large" . . . "Community" includes people of different social and economic classes, people of different ages, and people of different racial and ethnic backgrounds. . . . It is no longer ethical . . . to say that the job of a land trust is to conserve land, and that meeting all the other needs of the community is somebody else's job . . . . The face of America changing. If we don't find ways to work with other ethnic and racial groups, if we don't reach out to assist people who are less advantaged economically, they won't value what we've accomplished, and what we've accomplished won't endure.

See also Land Trust Alliance Strategic Plan 2004-2008, Exec. Summ. at 5 (2003) (on file with author) (noting that the Land Trust Alliance will provide leadership on critical emerging issues such as the ethics of conservation practices and racial diversity in the conservation movement).

70. The Trust for Public Land (TPL) has created the Center for Land and People Advisory Council (Advisory Council), which "convenes twice a year to help develop a philosophy and strategy that will support TPL and the larger conservation community in expanding the role of land conservation in the context of broader cultural and social issues." *See* TPL, *Center for Land and People Advisory Council*, *at* http://www.tpl.org/tier3_cd.cfm?content_item_id=5660&folder_id=831 (last visited Oct. 21, 2003). The members of the Advisory Council include: Eric T. Freyfogle, Max L. Rowe Professor of Law at the University of Illinois-Urbana-Champaign; David W. Orr, Chair of the Environmental Studies Program and Professor of Environmental Studies and Politics, Oberlin College; and Scott Russell Sanders, author.

donations are entirely voluntary, they cannot be relied upon to protect entire categories of critical lands such as wetlands, stream buffers, or wildlife habitat.[71] They assert that the "feel good" nature of the land conservation transactions engaged in by land trusts creates the dangerous illusion of effective preservation without the substance.

It is true that land trusts often have been forced to acquire conservation easements in a reactive manner, letting landowner requests and imminent threats of development determine the easements they acquire.[72] The sheer number of land trusts pursuing diverse conservation objectives makes it difficult to incorporate their efforts into any unified coordinated land conservation initiative.[73] However, as the land trust movement has matured, it has begun to focus its efforts on protecting larger, contiguous blocks of land—a process often referred to as "landscape preservation."[74] In addition, as individual land trusts have developed greater organizational capabilities and financial strength, they have become far more proactive regarding their easement acquisitions.[75]

The land protection activities of land trusts do not take place in isolation. As discussed above, the conservation easements acquired by land trusts often complement regulatory efforts. In addition, such easements play an important role in enhancing the viability of wildlife habitat on public lands by protecting the buffers and wildlife migration corridors that we now understand are necessary to sustain biodiversity.[76] Across the American West, the federal government drew the borders between public and private lands without considering the needs of migrating wildlife. Conservation easements on private lands acquired by land trusts and the U.S. Fish and Wildlife Service (FWS) protect essential migration habitat for endangered whooping cranes between their publicly owned summer range in Wood Buffalo National Park in Canada's Northwest Territories and their publicly owned winter range in Aransas National Wildlife Refuge in Texas.[77] Conservation easements acquired by the Montana Land Reliance on 115,000 acres of lower elevation private lands in the valleys surrounding Yellowstone National Park protect critical habitat for elk, deer, moose, bison, grizzly bear, wolves, and migrating waterfowl, and create corridors of wildlife habitat that link private ranchlands with public federal national parks, forests, and wilderness areas, as well as state wildlife management sites.[78] And conservation easements acquired by land trusts on private lands near Jackson, Wyoming, protect essential winter range for elk that spend the summer in the high country of Yellowstone National Park.[79]

Collaboration between government agencies and land trusts on landscape preservation projects also is becoming increasingly commonplace. Government officials recognize that land trusts often have unique access to and credibility with private landowners, superior knowledge of local landscapes, and the ability to respond quickly and creatively to land protection challenges.[80] Although instances of collaboration abound, one particularly compelling example involved the formation of a task force consisting of private landowners, the FWS, the South Carolina Department of Natural Resources, Ducks Unlimited, The Nature Conservancy, and a number of local land trusts to coordinate protection efforts within the "ACE Basin," a 350,000-acre region 35 miles southwest of Charleston, South Carolina, that lies within the coastal watersheds of Ashepoo, Combahee, and Edisto Rivers (hence the acronym "ACE").[81] The ACE Basin includes one of the largest remaining undeveloped forest and wetland ecosystems along the Atlantic Coast and contains exceptional habitat diversity.[82] As of 2000, the collective efforts of the task force members had achieved permanent protection of over 130,000 acres in the basin (or 37% of the basin), and approximately 50,000 of those acres are protected by conservation easements held by Ducks Unlimited, The Nature Conservancy, and a number of local land trusts.[83] The land trusts involved in the project provided, among other advantages, access to and credibility with landowners.[84] The task force model used to protect

71. This same criticism can, of course, be directed at regulatory measures for different reasons.

72. *See* McLaughlin, *The Role of Land Trusts, supra* note 61, at 462-63 (citing Becky Thornton, *A Land Preservation Methodology—How One Organization Is Achieving Its Goals*, 20 EXCHANGE J. LAND TRUST ALLIANCE 9 (2001)).

73. *See* David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 346 (1995).

74. *See, e.g.*, Andrew Zepp, *Moving to Landscape-Scale Protection*, 21 EXCHANGE J. LAND TRUST ALLIANCE 3 (2002).

75. *See id.* (noting that land trusts "are more clearly defining open space priorities. Rather than waiting for landowners to come to them, more land trusts are implementing systematic outreach programs and, in many cases, purchasing land and conservation easements."). *See also* Janet Hurley, *Vermont's Conserved Lands*, VT. ENVTL. REP., Summer 2000, at 26 (describing how the University of Vermont, in conjunction with a number of government agencies and land trusts, created a geographic information systems database of all land parcels protected from development in Vermont, and that the database reveals a bias of land protection at higher elevations and suggests to the agencies and organizations working to protect land in Vermont that they focus their efforts on lower elevation lands where many of the state's unique biological resources are found).

76. REED F. NOSS & ALLEN Y. COPPERRIDER, SAVING NATURE'S LEGACY 149 (1994) (noting that, in most regions, a system of core reserves will be necessary but not sufficient to maintain biodiversity, and that such core reserves must be complemented by multiple use lands that provide an opportunity to integrate certain compatible human activities with conservation).

77. *See generally* Whooping Crane Eastern Partnership, *Crane Information*, *at* http://www.bringbackthecranes.org/crane-info/recv2003.htm (last visited Dec. 11, 2003).

78. *See* John B. Wright, *The Power of Conservation Easements: Protecting Agricultural Land in Montana*, *in* PROTECTING THE LAND, *supra* note 9, at 392, 395.

79. See the Jackson Hole Land Trust's website at http://www.jhlandtrust.org (last visited Nov. 24, 2003).

80. *See* McLaughlin, *A Responsible Approach, supra* note 30.

81. *See* Sharon E. Richardson, *Applicability of South Carolina's Conservation Easement Legislation to Implementation of Landscape Conservation in the ACE Basin*, *in* PROTECTING THE LAND, *supra* note 9, at 209.

82. *Id.* at 210. The ACE Basin supports over 1,500 species of plants and animals, including the American alligator and the Atlantic loggerhead turtle, which are threatened species, and the Finback whale, the shortnose sturgeon, the southern bald eagle, the West Indian manatee, and the wood stork, all of which are endangered species. *Id.* at 211.

83. *Id*. at 215-17. Ted Turner donated the first conservation easement in the ACE Basin in 1991, and that donation helped to create a domino effect with surrounding landowners. *Id.* at 215.

84. *Id*. at 218 (noting that often landowners who are private about their family and land affairs seek out the Lowcountry Open Land Trust, one of the local land trusts that was a member of the task force, because its board of trustees is composed of local landowners, many of whom have donated conservation easements).

land in the ACE Basin has since been replicated in four other coastal focus areas of South Carolina.[85]

D. Dead Hand Control

Environmental lawyers (and others) habituated to the political ebb and flow of statutory mandates and their enforcement are sometimes uncomfortable with the "perpetual" nature of conservation easements. The primary concern is, of course, that allowing perpetual restrictions to be placed on the development and use of land is directly contrary to the longstanding policy against "dead hand" control.[86] A related worry is that even if perpetual conservation easements can be modified or terminated to respond to changed circumstances, the process is likely to be exceedingly difficult and costly.[87]

The architects of conservation easement law understood that the conservation purposes of some perpetual easements will eventually fail as a result of changed circumstances, and that such easements will have to be modified or terminated to accommodate the needs of future generations. Accordingly, the laws undergirding conservation easements are designed to permit the creation of rights and obligations with respect to land that will last as long as (but no longer than) the conservation values they were designed to protect.[88]

The UCEA provides that conservation easements may be modified or terminated "in the same manner as other easements," and that a court may "modify or terminate a conservation easement in accordance with the principles of law and equity."[89] Rather than mandating a single approach to the modification or termination of conservation easements, the UCEA drafters opted to leave "intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts."[90] A majority of the 49 easement-enabling statutes either contain the same language as the UCEA regarding modification and termination or are silent with respect to modification and termination, thus implicitly leaving resolution of those issues to existing state law.[91] Relying on the vagaries of state law to resolve disputes regarding the modification and termination of perpetual easements may well prove to be difficult and costly. However, state legislators have overwhelmingly determined that the public benefits derived from allowing long-term restrictions to be placed on the development and use of land for certain statutorily enumerated conservation purposes outweigh the potential difficulties and costs that may be associated with modifying or extinguishing some of those restrictions in the future to respond to changed conditions.

In crafting the regulations interpreting the charitable income tax deduction available with respect to conservation easement donations (Regulations), the U.S. Treasury Department (Treasury) took the issue of the possible termination of perpetual easements one step further. Pursuant to the Regulations, a donated easement will qualify for the charitable income tax deduction only if the parties to the easement agree that, if the easement is later extinguished due to changed conditions, the donee will receive a portion of the proceeds from the sale or exchange of the unburdened property roughly equal to the value of the easement, and the donee will use such proceeds in a manner consistent with the conservation purposes of the original donation.[92] Accordingly, not only did the Treasury contemplate that some ostensibly perpetual easements would be extinguished due to changed conditions, it took steps to ensure that the public's investment in such easements in the form of foregone tax revenue would not be lost.

Finally, lamentations about "dead hand" control in the context of perpetual conservation easements are ironic given that development has a much greater likelihood of reducing the choices available to future generations.[93] The degradation and destruction of wildlife habitat and ecosystems, of scenic and historic sites and landscapes, and of rural, agricultural communities as a result of development is almost always substantially irreversible, at least on any time scale that seems relevant to human beings.[94] Even the purely legal process of subdivision and sale of land, whereby a single contiguous parcel becomes fragmented into many parcels with many owners, can be extremely difficult to reverse. Conservation easements, on the other hand, hold more options open for future generations because they do not involve physical changes to or fragmentation of ownership of the encumbered land, and they can be modified or terminated to respond to changed conditions.[95]

IV. What Is in It for Environmental Lawyers?

A. Advantages of Voluntary Transactions

The sale or donation of a conservation easement is an entirely voluntary transaction in which the cost of protecting private land for the public good is borne, in whole or in part, by the public rather than by the individual landowner, as in the case of regulation. The voluntary nature of easement transactions, coupled with participation by the public in the cost of the land protection regularly results in a level of land use control that private landowners would never tolerate through regulation. In fact, conservation easement transactions have become exceedingly popular with both private landowners and policymakers precisely because they are not perceived as "unfairly" infringing on private property rights.

In most cases landowners either donate conservation easements in exchange for modest tax savings or sell easements in "bargain-sale" transactions where they are paid some percentage of the reduction in the value of their land. Landowners essentially volunteer their land for permanent privatized regulation[96] and agree to bear a percentage (and,

85. *Id.* at 217.

86. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 440-41 (1984).

87. *See* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 744 (2002).

88. Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 Idaho L. Rev. 431, 445-49 (2002).

89. UCEA §§2(a) & 3(b).

90. *Id*. §3, cmt. The drafters of the UCEA acknowledged that perpetual restrictions burdening real property can fail to achieve their purposes due to changed conditions and noted that a variety of doctrines, including the doctrines of changed conditions and cy pres, have been developed to respond to such situations. *Id.*

91. *See* Mayo, *supra* note 25, at 42-45.

92. *See* Treas. Reg. §1.170A-14(g)(6).

93. Farrier, *supra* note 73, at 344.

94. *See id.*

95. *See id.*

96. *See* Cheever, *supra* note 49, at 1093.

in the case of a donated easement, generally a significant percentage) of the cost of that commitment. The apparent reason landowners are willing to enter into such unfavorable economic bargains in the public interest is simple: they love their land, they don't intend to develop it, and they are concerned about its long-term stewardship.[97]

If a large number of private landowners happen to own land with significant environmental values (as seems to be the case), it makes good sense for the public to implement legal structures enabling those landowners to voluntarily commit their land to appropriate permanent regulation in exchange for relatively modest economic incentives. In a political climate that is hostile to regulation, and in a period in which public funds devoted to conservation efforts are declining, the ability to institute customized, shared-cost, long-term stewardship partnerships between the public and willing private landowners should not be ignored by even the most skeptical of environmental lawyers.[98]

The customized nature of conservation easement transactions deserves further discussion. The restrictions on the development and use of land in a conservation easement are site-specific, adding significantly to the appeal of easements to both private landowners and the public. The parties to an easement can tailor the easement terms to protect the particular environmental values of the land and at the same time permit the landowner to continue to engage in desired uses of the land. If an accord can be reached between environmental protection and permitted uses, the transaction goes forward. That flexibility is in direct contrast to the "one-size-fits-all" quality of environmental regulations, which are almost invariably resisted by users of the regulated land, and often must be diluted to the point of ineffectiveness to survive politically.

Many of the most expensive and time-consuming environmental disputes are inspired not by the facts presented at the time of the dispute but by "the next case" in which the precedent might be applied. In specific disputes in which the regulator and the regulated might be able to find a mutually acceptable solution, they are precluded from doing so by the fact that their concessions might be used against them in the next regulatory situation. The site-specific nature of conservation easement transactions dramatically reduces the effect they can have on the hypothetical future case.

Finally, private landowners find conservation easement sale and donation transactions appealing because they are "private" in the sense that they are negotiated by the landowner with the land trust at the proverbial kitchen table. While the government supports such transactions through tax incentives and the enforcing power of the courts, the level of control exercised by the government—through the restrictions and requirements in the easement-enabling statutes and the tax laws—is very general when compared to the controls imposed by traditional environmental regulations. Whether we like it or not, Americans have a lengthy tradition of distrusting government. Conservation easements and the land trusts that acquire them are attractive to individuals and communities who are suspicious of, or even actively resist other, more obviously governmental attempts to protect the conservation values of their land.[99]

B. Permanence of Protection

Unlike regulations, perpetual conservation easement restrictions are not subject to change with the political winds. Indeed, the potential difficulties and costs associated with modifying or terminating perpetual conservation easement restrictions (the much maligned "dead hand control") are precisely why such restrictions offer greater protection than their regulatory cousins.

For example, CWA §404—the primary national law for the protection of wetlands—protects "navigable waters" from "discharges" of "dredge and fill material" by requiring discharge permits.[100] The fundamentally counterintuitive nature of the protection—protecting wetlands through a permit systems on discharge of "dredge and fill material" into the "waters of the United States"—(try explaining it at a cocktail party) has cost us millions of acres of wetlands. The program's ability to protect ecologically essential wetlands also ebbs and flows with the whim of the U.S. Supreme Court[101] and the political orientation of the executive branch.[102] In contrast, a conservation easement can protect a

97. See McLaughlin, *A Responsible Approach, supra* note 30, noting that

> more affluent landowners who do not intend to develop or otherwise use their land in ways inimical to its conservation values may view an easement donation as an enticing opportunity to liquidate some of the equity in their land without interfering with their current use and enjoyment of that land, albeit at generally disadvantageous terms.

98. See McLaughlin, *The Role of Land Trusts*, *supra* note 61, at 468-69, noting that

> the significant charitable impulse that often is required for the donation of an easement does smack of an incipient recognition on the part of some easement donors that land may be more than simply a marketable commodity, and that private landowners owe some land stewardship obligations to the larger human and natural community. While we might hope that someday private landowners will neither expect nor be entitled to monetary compensation for fulfilling their land stewardship obligations, under our current system of private property rights landowners who voluntarily undertake such obligations do forego some of their investment expectations. The tax incentives provided for easement donations help to create a reasonable transitional phase, wherein the public offers partial compensation to private landowners for their lost investment value but also requires such landowners to share, sometimes significantly, in the cost of choosing a stewardship approach to their land.

99. *See*, *e.g.*, Jean W. Hocker, *Patience, Problem-Solving, and Private Initiative: Local Groups Chart a New Course for Land Conservation*, *in* LAND USE IN AMERICA 245, 250-51 (Henry L. Diamond & Patrick F. Noonan eds., 1996) (noting that landowners are usually comfortable working with land trusts because land trust leaders are typically their neighbors or at least residents of the same region, and that because land trusts have no governmental powers, they are not particularly threatening and they have credibility with, and access to, the very landowners who may hesitate to deal directly with the government); see also Farrier, *supra* note 73, at 350, noting that

> [a] private organization such as the [Nature] Conservancy has the unique advantage of being able to negotiate with private landowners against the backdrop of government regulation, while still remaining committed to a philosophy of voluntariness and cooperation. . . . By contrast, government will never be able to escape completely from being perceived in terms of its regulatory persona, even where it approaches with offerings rather than threats.

100. 33 U.S.C. §1344, ELR STAT. CWA §404.

101. Solid Waste Agency of N. Cook County v. Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001) (holding that EPA's long-established "migratory bird rule" could not be used to determine what "isolated" wetlands were subject to CWA jurisdiction).

102. *See* Advanced Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003).

wetland directly by transferring the right to prevent anyone from disturbing it to a land trust committed to its preservation, and the easement's perpetual nature preserves it from the vagaries of a changing political landscape.

C. Innovation

Land trusts promote a level of innovation and experimentation in private land conservation efforts that typically is not found in government controlled land conservation programs.[103] Perhaps one of the most visible examples of such innovation was the creation by The Nature Conservancy, beginning in 1974, of biodiversity inventories for each state, which are known as the state natural heritage programs.[104] The heritage programs generally have represented the single best source of information on biodiversity in each state, particularly with respect to rare species and communities, and most of those programs have been incorporated within state governmental agencies.[105]

Many environmental laws rely on "mitigation" to strike a balance between development and protection. Often the "currency" employed in the mitigation negotiations is distressingly "soft."[106] Regulators may allow development to go forward in exchange for promises of future mitigation or hold up projects because well meaning developers cannot provide evidence of mitigation.[107] The land conservation transactions engaged in by land trusts provide a "hard" currency for mitigation. With an established array of restricted lands and established legal devices for restricting lands, regulators now have alternatives that enable them to require more than mere promises of future mitigation.

In addition, the options routinely employed by land trusts can create a level of assurance of future action often lacking in the typical mitigation negotiation. An "option" is a contractual "continuing offer" by a landowner to sell a real property interest for a fixed price within a certain time. Options can be used to structure the tax aspects of land conservation transactions.[108] Options can also be used to ensure that preservation property rights will be available to mitigate an environmentally damaging project before a permitting agency allows that project to go forward. Land use agencies—local, state, and federal—can demand a much higher level of certainty in mitigation before a project is approved once they understand that the party proposing the mitigation need not purchase the preservation property rights before the final decision on the project is made, but can, instead, acquire an "option" to purchase them in the future.

D. Synergies and the Opportunity to Influence Relations

Finally, we want to highlight two particularly compelling reasons for environmental lawyers to actively engage with the land trust community. The first, already discussed, is the tremendous synergy that can be achieved by combining regulatory efforts with voluntary, incentive-based transactions. The second is more subtle. Financial incentives now play a major role in land protection efforts in this country, and all signs indicate that they will continue to grow in popularity. However, as Professor Echeverria intimated, if financial incentives are used in lieu of (rather than as a complement to) regulation, they may undermine regulatory efforts and the legitimacy of the regulatory process itself. Given that we can never expect to reach a socially desirable level of land protection through the use of financial incentives alone, it is imperative that some carefully considered boundaries be placed on the use of such incentives. The exact contours of those boundaries are beyond the scope of this Article.[109] However, environmental lawyers, who are intimately familiar with the circumstances in which regulatory efforts operate most effectively, are in the best position to help establish useful protocols for the use of the two approaches.

V. Conclusion

The cultures of traditional environmental lawyers and the land trust community will always be different. Land trusts avoid controversy. Many types of environmental lawyers feed on controversy. Still, cultural differences should not prevent positive interaction. Accepting voluntary land conservation transactions as a useful tool for environmental preservation does not require rejecting the public's right to regulate for a clean and healthy environment. Accomplishing environmental preservation goals, particularly in the current political and economic climate, requires creativity and a diversity of approaches. The bottom-up, voluntary, incentive-based approach of land trusts to private land conservation provides a much needed and, in many respects, necessary adjunct to traditional forms of environmental and land use regulation.

We call upon environmental lawyers to actively engage with the land trust community. On the one hand, important synergies can be gained by combining voluntary, incentive-based measures with traditional regulatory approaches. On the other hand, a real risk exists that the unchecked use of financial incentives may undermine traditional regulatory approaches. Environmental lawyers have a significant interest in ensuring that the two approaches to environmental protection are properly coordinated.

103. *See* Barton H. Thompson Jr., *Providing Biodiversity Through Policy Diversity*, 38 IDAHO L. REV. 355, 376 (2002) (noting that leveraging through the use of tax incentives harnesses the approaches and ideas of nonprofit land trusts, furnishing valuable competition to government agencies).

104. *See* NOSS & COPPERRIDER, *supra* note 76, at 111.

105. *See id.* The Nature Conservancy's newly adopted approach to land conservation, "Conservation by Design," may well have a similar impact on both public- and private-sector biodiversity conservation efforts. Conservation by Design focuses on protecting land within ecological regions, which are relatively large geographic areas of land and water delineated by climate, vegetation, geology, and other ecological and environmental patterns rather than political boundaries. *See* THE NATURE CONSERVANCY, CONSERVATION BY DESIGN (2000).

106. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000) ("most commodities exchanged in current and proposed ETMs, such as wetlands and endangered species habitat, exhibit nonfungibilities across the dimensions of type, time, and space").

107. Edwardson v. Department of the Interior, 268 F.3d 731 (9th Cir. 2001).

108. C. Timothy Lindstrom, *The Use of Options in Conservation Transactions*, 22 EXCHANGE J. LAND TRUST ALLIANCE 8 (2003).

109. One example may illuminate. Voluntary, compensated easement (or fee) purchase transactions arguably should not be employed in response to acute and significant threats to the public interest. Environmental regulation should be politically feasible and practically effective in such situations, and employment of the land trust-style approach in such situations, in addition to being expensive, likely would create an impression that private landowners have the right to create such public detriment.