

Chapter 22  
CONSERVATION EASEMENTS: WHY AND HOW?

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#### § 22.01 Introduction

According to the census data collected by the Land Trust Alliance (LTA), over the past two decades there has been a dramatic increase in the number of local, state, and regional land trusts operating in the United States,<sup>1</sup> and in the number of acres encumbered by conservation easements<sup>2</sup> held by such land trusts.<sup>3</sup> In 1980, only 431 local, state, and regional land trusts were operating in the United States, and they held conservation easements encumbering only 128,001 acres.<sup>4</sup> As of 2003, the number of local, state, and regional land trusts operating in the United States had jumped to 1,526, and those land trusts held conservation easements encumbering more than 5 million acres.<sup>5</sup>

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<sup>1</sup>The term “land trust” as used in this paper refers to: (1) private, nonprofit charitable organizations that operate to protect land for conservation purposes through a variety of means, including the acquisition of conservation easements, and (2) certain governmental agencies that operate in a manner similar to land trusts, such as the Maryland Environmental Trust.

<sup>2</sup>The term “conservation easement” or “easement” as used in this paper refers to an agreement between the owner of land encumbered by an 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 open space.

<sup>3</sup>The Land Trust Alliance (LTA) is the umbrella organization for the nation’s local, state, and regional land trusts. See [www.lta.org](http://www.lta.org) (last visited June 1, 2005). The LTA periodically collects census data with respect to such land trusts. See, e.g., [www.lta.org/about/lt/census.shtml](http://www.lta.org/about/lt/census.shtml) (last visited June 1, 2005) (discussing the results of the 2003 census). The LTA does not collect census data with respect to land trusts that operate on a national or international level, such as The Nature Conservancy, or governmental units that do not operate as land trusts, such as the U.S. Forest Service or state and local governments. See Nancy A. McLaughlin, “Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach,” 31 *Ecology L.Q.* 1, 5 (2004), available at [www.law.utah.edu/faculty/bios/mclaughlinn.html](http://www.law.utah.edu/faculty/bios/mclaughlinn.html) (last visited June 27, 2005) (noting that such land trusts and governmental units also have been active in acquiring conservation easements).

<sup>4</sup>See McLaughlin, *supra* note 3, at 4-5.

<sup>5</sup>See 2003 Land Trust Alliance Census Addendum, available at [www.lta.org/census/lta\\_census\\_addendum.doc](http://www.lta.org/census/lta_census_addendum.doc) (last visited June 1, 2005). See also National Land Trust Census Press Release (Nov. 18, 2004), available at [www.lta.org/about/lt/census.shtml](http://www.lta.org/about/lt/census.shtml) (last visited

The dramatic growth in the number of land trusts and the use of conservation easements can be attributed to a variety of factors, including increasing development pressures;<sup>6</sup> a growing disillusionment with the government's ability to adequately protect land from development through regulatory measures;<sup>7</sup> the enactment in 49 states and the District of Columbia of legislation that removes common law impediments to the long-term validity of conservation easements (the "easement enabling statutes");<sup>8</sup> and a variety of generous federal and state tax incentives offered to landowners who donate conservation easements.<sup>9</sup> In addition, conservation easement sale and donation transactions are popular with landowners because they are voluntary and the terms of an easement can be tailored to the specific characteristics of the encumbered land and the specific conservation purposes of the easement.

## § 22.02 State Easement Enabling Statutes

### [1] Uniform Conservation Easement Act

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Conservation Easement Act (UCEA) in 1981.<sup>10</sup> The UCEA has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine the validity of a conservation easement.<sup>11</sup> The

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June 27, 2005) (noting that new land trusts are being formed at the rate of two per week and the fastest growing region is the West).

<sup>6</sup> See McLaughlin, *supra* note 3, at 22.

<sup>7</sup> See *id.*

<sup>8</sup> See Richard R. Powell, *Powell on Real Property* § 34A.01 n.1 (Michael Allan Wolf ed., 2003) (noting that only Wyoming lacks a special statute on the subject). Wyoming enacted an easement enabling statute in February 2005, to take effect on July 1, 2005. See Act of Feb. 25, 2005, 2005 Wyo. Sess. Laws 127.

<sup>9</sup> See *infra* § 22.08. See generally McLaughlin, *supra* note 3.

<sup>10</sup> See Uniform Conservation Easement Act (UCEA) (1981), available at [www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm](http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm) (last visited June 27, 2005).

<sup>11</sup> *Id.*, *Prefatory Note*. Traditional servitudes doctrines raised potential difficulties for the long-term validity of conservation easements because such easements are generally held "in gross," meaning that the holder of the easement does not own a parcel of land that is appurtenant to and benefited by the land encumbered by the easement. See *Restatement (Third) of Property (Servitudes)* § 1.6, cmt. a (2000). But see *United States v. Blackman*, 613 S.E.2d 442 (Va. 2005) (in which the Supreme Court of Virginia held that an easement in gross conveyed for conservation and historic preservation purposes

drafters of the UCEA intentionally left issues considered extraneous to that narrow purpose to be addressed by the adopting states on an individual basis.<sup>12</sup> Issues left to be addressed individually by the adopting states include: the formalities and effects of the recordation of a conservation easement; the impact of a state's marketable title laws on the duration of a conservation easement; the effect of a conservation easement on local real property assessment and taxation practices; the effect of a conservation easement on a state's power to exercise eminent domain; and the application of the property law doctrine of changed conditions or the charitable trust doctrine of *cy pres* to modify or terminate a conservation easement.<sup>13</sup>

Set forth below is a chart summarizing selected provisions of the UCEA.

<b>Uniform Conservation Easement Act</b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	<p>(1) Retaining or protecting natural, scenic, or open-space values of real property, or assuring its availability for agricultural, forest, recreational, or open-space use;</p> <p>(2) Protecting natural resources;</p> <p>(3) Maintaining or enhancing air or water quality; or</p> <p>(4) Preserving the historical, architectural, archaeological, or cultural aspects of real property.<sup>14</sup></p>
<b>Eligible Holders</b>	<p>(1) A governmental body; or</p> <p>(2) A charitable corporation, association, or trust, the purposes of which include a purpose for which a conservation easement may be created (a "charitable conservation organization").<sup>15</sup></p>

<sup>15</sup> years before the enactment of the Virginia Conservation Easement Act was nonetheless valid).

<sup>12</sup>UCEA, *supra* note 10, Prefatory Note.

<sup>13</sup>*Id.*; *id.* § 3, cmt.

<sup>14</sup>*Id.* § 1(1).

<sup>15</sup>*Id.* § 1(2).

<i>Uniform Conservation Easement Act, continued</i>	
<b>Duration</b>	Unlimited unless the instrument creating it otherwise provides. <sup>16</sup>
<b>Persons Granted Standing</b>	An action affecting a conservation easement may be brought by: <ol style="list-style-type: none"> <li>(1) An owner of an interest in the encumbered land;<sup>17</sup></li> <li>(2) A holder of the easement;<sup>18</sup></li> <li>(3) A person eligible to hold an easement who is granted a third-party right of enforcement in the easement deed;<sup>19</sup> and</li> <li>(4) A person authorized by other law.<sup>20</sup></li> </ol>
<b>Modification or Termination</b>	<ol style="list-style-type: none"> <li>(1) Except as otherwise provided in the UCEA, a conservation easement may be released, modified, terminated, or otherwise altered or affected in the same manner as other easements.<sup>21</sup></li> <li>(2) The UCEA does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.<sup>22</sup></li> </ol>

## [2] Easement Enabling Statutes in Western States

The following charts summarize selected provisions of the easement enabling statutes in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. A reference to the UCEA indicates that the state has adopted the UCEA provision. Only selected provisions of each easement enabling statute are summarized, and a reader inter-

<sup>16</sup> *Id.* § 2(c).

<sup>17</sup> *Id.* § 3(a)(1).

<sup>18</sup> *Id.* § 3(a)(2).

<sup>19</sup> *Id.* §§ 1(3), 3(a)(3).

<sup>20</sup> *Id.* § 3(a)(4). *See also id.* § 3, cmt. (noting that the UCEA recognizes that a state's other applicable law may create standing in other persons, such as the state attorney general who could have standing in his or her capacity as supervisor of charitable trusts).

<sup>21</sup> *Id.* § 2(a).

<sup>22</sup> *Id.* § 3(b). *See also id.* § 3, cmt. ("The Act leaves 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.").

ested in a particular state should refer to that state's easement enabling statute for a complete understanding of its provisions. Readers also should be aware that some states address issues relating to conservation easements in sections of the state code other than the easement enabling statute, and those sections are not discussed in the following charts.<sup>23</sup>

<b>Arizona</b> <sup>24</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	(1) Outdoor recreation or education of the general public; (2) Habitat protection; (3) Open-space protection, including farmland and forest land, if it is for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy; or (4) Preservation of the historical, architectural, archaeological, or cultural aspects of real property. <sup>25</sup>
<b>Eligible Holders</b>	UCEA <sup>26</sup>
<b>Duration</b>	UCEA <sup>27</sup>
<b>Persons Granted Standing</b>	(1) UCEA <sup>28</sup> and (2) A governmental body if the holder of the easement is no longer in existence and there is no third party right of enforcement. <sup>29</sup>
<b>Modification or Termination</b>	UCEA <sup>30</sup>

<sup>23</sup> See, e.g., Utah Code Ann. § 59-2-301.1 (elec. 2005) (providing, in the Revenue and Taxation section of the Utah Code, that in assessing the fair market value of property subject to a conservation easement, a county assessor shall include as part of the assessment any effects the easement may have on the fair market value of the property).

<sup>24</sup> Ariz. Rev. Stat. Ann. §§ 33-271 to 33-276 (elec. 2005).

<sup>25</sup> *Id.* § 33-271(1), (2).

<sup>26</sup> *Id.* § 33-271(3). The Arizona statute lists only charitable corporations and charitable trusts as eligible holders, not charitable associations. *Id.*

<sup>27</sup> *Id.* § 33-272(C).

<sup>28</sup> *Id.* § 33-273(A)(1)-(4).

<sup>29</sup> *Id.* § 33-273(A)(5).

<sup>30</sup> *Id.* §§ 33-272(A), 33-273(B) (providing also that in determining whether to modify or terminate a conservation easement, a court shall consider the public interest to be served).

<i>Arizona, continued</i>	
<b>Eminent Domain</b>	A conservation easement is subject to the laws of the state governing eminent domain, except that the existence of a conservation easement shall not be considered an interest in real property for which compensation or damages may be awarded under the laws pertaining to eminent domain. <sup>31</sup>

<b>California<sup>32</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition. <sup>33</sup>
<b>Eligible Holders</b>	(1) A § 501(c)(3) organization that is qualified to do business in California and has as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use; (2) A state or local governmental entity; and (3) A California Native American tribe. <sup>34</sup>
<b>Duration</b>	A conservation easement must be perpetual in duration. <sup>35</sup>
<b>Persons Granted Standing</b>	The grantor or the owner of a conservation easement may initiate a proceeding for injunctive relief to prohibit or restrain the actual or threatened injury to or impairment of the easement or the actual or threatened violation of its terms, or to enforce the interest intended for protection by the easement. <sup>36</sup>

<sup>31</sup> *Id.* § 33-275(3).

<sup>32</sup> Cal. Civ. Code §§ 815 - 816 (elec. 2005).

<sup>33</sup> *Id.* § 815.1.

<sup>34</sup> *Id.* § 815(3). A “§ 501(c)(3) organization” is a tax-exempt nonprofit organization that is qualified under § 501(c)(3) of the Internal Revenue Code. *Id.*

<sup>35</sup> *Id.* § 815.2(b).

<sup>36</sup> *Id.* § 815.7(b).

<i>California, continued</i>	
<b>Modification or Termination</b>	Silent
<b>Local Property Tax Assessment</b>	The assessor shall consider the effect the restrictions in a conservation easement have upon the value of the encumbered land. <sup>37</sup>

<b>Colorado<sup>38</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To retain or maintain a land or water area, airspace above a land or water area, or water rights beneficially used upon such land or water area, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, wetlands, recreational, forest, or other use or condition consistent with the protection of open land, environmental quality, or life-sustaining ecological diversity; or to conserve or preserve buildings, sites, or structures having historical, architectural, or cultural interest or value. <sup>39</sup>
<b>Eligible Holders</b>	(1) A governmental entity; or (2) A § 501(c)(3) organization that was created at least two years prior to receipt of the conservation easement. <sup>40</sup>
<b>Duration</b>	Perpetual unless otherwise stated in the instrument creating it. <sup>41</sup>
<b>Persons Granted Standing</b>	The grantor or the owner of a conservation easement may initiate a proceeding for injunctive relief to prohibit or restrain the actual or threatened injury to or impairment of the easement or the interest intended for protection by the easement. <sup>42</sup>

<sup>37</sup> *Id.* § 815.10.

<sup>38</sup> Colo. Rev. Stat. Ann. §§ 38-30.5-101 to 38-30.5-111 (elec. 2005).

<sup>39</sup> *Id.* § 38-30.5-102.

<sup>40</sup> *Id.* § 38-30.5-104(2). See *supra* note 34 for the definition of a “§ 501(c)(3) organization.”

<sup>41</sup> Colo. Rev. Stat. Ann. § 38-30.5-103(3) (elec. 2005).

<sup>42</sup> *Id.* § 38-30.5-108(2).



<i>Colorado, continued</i>	
<b>Modification or Termination</b>	Conservation easements may be terminated, in whole or in part, in any manner in which easements may be lawfully terminated. <sup>42.1</sup>
<b>Local Property Tax Assessment</b>	Real property subject to one or more conservation easements must be assessed with due regard to the restricted uses to which the property may be devoted. <sup>43</sup>
<b>Water Rights</b>	A water right may be tied to the land or water area encumbered by a conservation easement if the water right is "beneficially used upon the land or water area" for one or more of the conservation purposes for which a conservation easement may be created. <sup>44</sup> A conservation easement may not be created with respect to water rights alone. <sup>45</sup>

<b>Idaho</b> <sup>46</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>47</sup>
<b>Eligible Holders</b>	UCEA <sup>48</sup>
<b>Duration</b>	UCEA <sup>49</sup>
<b>Persons Granted Standing</b>	UCEA <sup>50</sup>

<sup>42.1</sup> *Id.* § 38-30.5-107.

<sup>43</sup> *Id.* § 38-30.5-109.

<sup>44</sup> See *supra* note 39 and accompanying text.

<sup>45</sup> See letter dated October 2003 to Friends and Clients from Isaacson, Rosenbaum, Woods & Levy, P.C. (on file with author) (noting that the Colorado easement enabling statute was amended in 2003 to clarify that a conservation easement may tie water rights to the encumbered land in certain circumstances). See also Peter D. Nichols, Michael F. Browning, Kenneth R. Wright & Mark S. Weston, *Water Rights Handbook for Colorado Conservation Easements*, available from the Colorado Water Trust, www.coloradowatertrust.org [*Water Rights Handbook*].

<sup>46</sup> Idaho Code §§ 55-2101 to 55-2109, 67-4613 (elec. 2005).

<sup>47</sup> *Id.* § 55-2101(1).

<sup>48</sup> *Id.* § 55-2101(2).

<sup>49</sup> *Id.* § 55-2102(3).

<sup>50</sup> *Id.* § 55-2103(1).

<i>Idaho, continued</i>	
<b>Modification or Termination</b>	UCEA <sup>51</sup>
<b>Eminent Domain</b>	Nothing in the statute shall be construed so as to impair the rights of any entity with eminent domain authority with respect to rights-of-way, easements, or other property rights upon which facilities, plants, highway systems, or other systems of that entity are located or are to be located. <sup>52</sup>
<b>Local Property Tax Assessment</b>	The granting of a conservation easement across a piece of property shall not have an effect on the market value of property for ad valorem tax purposes, and when the property is assessed for ad valorem tax purposes, the market value shall be computed as if the conservation easement did not exist. <sup>53</sup>

Kansas <sup>54</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>55</sup>
<b>Eligible Holders</b>	UCEA <sup>56</sup>
<b>Duration</b>	Unless the instrument creating it otherwise provides, a conservation easement shall be limited in duration to the lifetime of the grantor and may be revoked at grantor's request. <sup>57</sup>
<b>Persons Granted Standing</b>	UCEA <sup>58</sup>

<sup>51</sup> *Id.* §§ 55-2102(1), 55-2103(2).

<sup>52</sup> *Id.* § 55-2108.

<sup>53</sup> *Id.* § 55-2109.

<sup>54</sup> Kan. Stat. Ann. §§ 58-3810 to 58-3817 (elec. 2005).

<sup>55</sup> *Id.* § 58-3810(a).

<sup>56</sup> *Id.* § 58-3810(b).

<sup>57</sup> *Id.* § 58-3811(d).

<sup>58</sup> *Id.* § 58-3812(a).

<i>Kansas, continued</i>	
<b>Modification or Termination</b>	UCEA <sup>59</sup>
<b>Eminent Domain</b>	Nothing in the statute shall be construed so as to impair the rights of a public utility or city with respect to the acquisition of rights-of-way, easements, or other property rights, whether through voluntary conveyance or eminent domain, or so as to impair the rights of a watershed district with respect to rights-of-way, easements, or other property rights upon which watershed structures are located or are to be located. <sup>60</sup>

<b>Montana<sup>61</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To preserve significant open-space land and/or native plants or animals, biotic communities, or geological or geographical formations of scientific, aesthetic, or educational interest. <sup>62</sup>
<b>Eligible Holders</b>	(1) The state, counties, cities, towns, and other municipalities (Public Bodies); and (2) Private organizations that qualify under § 501(c) of the Internal Revenue Code and whose organizational purposes are designed to further the purposes of the statute. <sup>63</sup>
<b>Duration</b>	Conservation easements may be granted either in perpetuity or for a term of not less than 15 years. <sup>64</sup>

<sup>59</sup> *Id.* §§ 58-3811(b), 58-3812(b).

<sup>60</sup> *Id.* § 58-3816. *See also* Attorney General Opinion No. 93-76, 1993 Kan. AG Lexis 73 (June 1, 1993) (opining that a watershed district has authority under the Kansas easement enabling statute to substantially interfere with or destroy the existing public use of a conservation easement held by another state agency over property upon which watershed structures are to be located).

<sup>61</sup> Mont. Code Ann. §§ 76-6-101 to 76-6-211 (elec. 2005).

<sup>62</sup> *Id.* §§ 76-6-106(1), 76-6-204.

<sup>63</sup> *Id.* §§ 76-6-104(4), 76-6-106(1), 76-6-204.

<sup>64</sup> *Id.* § 76-6-202.

<i>Montana, continued</i>	
<b>Persons Granted Standing</b>	(1) The owner of any estate in a dominant tenement or the occupant of such tenement may maintain an action for the enforcement of an easement attached thereto.  (2) Public Bodies holding conservation easements shall enforce the provisions of such easements. <sup>65</sup>
<b>Modification or Termination</b>	(1) Open space land, the title to or interest or right in which has been acquired under the statute, may not be converted or diverted from open-space land use unless the conversion or diversion is necessary to the public interest, not in conflict with the program of comprehensive planning for the area, and permitted by the conditions imposed at the time of the creation of the conservation easement.  (2) Other real property of at least equal fair market value and of as nearly as feasible equivalent usefulness and location for use as open-space land must be substituted within a reasonable period not exceeding three years for any real property converted or diverted from open-space land use. <sup>66</sup>
<b>Eminent Domain</b>	The statute does not diminish the powers granted by any law to acquire land by eminent domain for public purposes. <sup>67</sup>
<b>Review by Local Planning Authority</b>	All conservation easements are subject to review prior to recording by the appropriate local planning authority for the county within which the land lies. Comments from the local planning authority are not binding on the proposed grantor or grantee and are merely advisory in nature. <sup>68</sup>
<b>Local Property Tax Assessment</b>	Assessments made for taxation on property subject to a conservation easement shall be determined on the basis of the restricted purposes for which the property may be used, but the minimum assessed value for land subject to an easement may not be less than the actual assessed value of such land in calendar year 1973. <sup>69</sup>

<sup>65</sup> *Id.* § 76-6-211.

<sup>66</sup> *Id.* § 76-6-107.

<sup>67</sup> *Id.* § 76-6-105(2).

<sup>68</sup> *Id.* § 76-6-206.

<sup>69</sup> *Id.* § 76-6-208(1).

<b>Nebraska<sup>70</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To retain or protect property in its natural, scenic, or open condition or assure its availability for agricultural, horticultural, forest, recreational, wildlife habitat, or open space use; to protect air quality, water quality, or other natural resources; to preserve the historical, architectural, archaeological, or cultural aspects of real property; or such other conservation or historic preservation purposes as may qualify for a charitable deduction under the Internal Revenue Code. <sup>71</sup>
<b>Eligible Holders</b>	(1) Any governmental body having among its purposes the subject matter of the easement; and (2) Any charitable corporation or trust, the purposes of which include the purposes for which a conservation easement may be created. <sup>72</sup>
<b>Duration</b>	An easement is perpetual unless otherwise stated in the instrument creating it. <sup>73</sup>
<b>Persons Granted Standing</b>	See "Modification and Termination."
<b>Modification or Termination</b>	(1) An easement may be released by the holder to the owner of the servient estate only with the approval of the governing body that approved the easement upon a finding by such body that the easement no longer substantially achieves the purpose for which it was created. <sup>74</sup> (2) Unless otherwise modified or terminated according to its terms or the statute, the owner of the subject real property or the holder of the easement may petition the district court in which the greater part of the servient estate is located for modification or termination of the easement. <sup>75</sup>

<sup>70</sup> Neb. Rev. Stat. §§ 76-2,111 to 76-2,118 (elec. 2005).

<sup>71</sup> *Id.* § 76-2,111(1), (2).

<sup>72</sup> *Id.* § 76-2,111(3).

<sup>73</sup> *Id.* § 76-2,115.

<sup>74</sup> *Id.* § 76-2,113(1).

<sup>75</sup> *Id.* §§ 76-2,114.

<i>Nebraska, continued</i>	
<b>Review by Appropriate Governing Body</b>	Each easement must be approved by the appropriate governing body, which shall refer the proposed acquisition to and receive comments from the local planning commission with jurisdiction over the property. Approval of a proposed acquisition may be denied upon a finding that the acquisition is not in the public interest when the easement is inconsistent with a comprehensive plan for the area; any national, state, regional, or local program furthering conservation or preservation; or any known proposal by a governmental body for use of the land. <sup>76</sup>
<b>Local Property Tax Assessment</b>	Property subject to an easement must be assessed with due regard to the restricted uses to which it may be devoted. <sup>77</sup>
<b>Eminent Domain</b>	The statute does not diminish the powers granted by law to acquire interests in real property by eminent domain for public purposes. If the easement was obtained by gift or devise the owner shall be entitled to such compensation for the taking as if the property had not been subject to the easement, and if the easement was obtained by purchase or exchange, the holder shall be entitled to just compensation for the taking of the easement. <sup>78</sup>

<b>Nevada<sup>79</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>80</sup>
<b>Eligible Holders</b>	UCEA <sup>81</sup>
<b>Duration</b>	UCEA <sup>82</sup>

<sup>76</sup> *Id.* § 76-2,112(3), (4).

<sup>77</sup> *Id.* § 76-2,116.

<sup>78</sup> *Id.* § 76-2,117(2) - (4).

<sup>79</sup> Nev. Rev. Stat. §§ 111.390 to 111.440 (elec. 2005).

<sup>80</sup> *Id.* § 111.410(1).

<sup>81</sup> *Id.* § 111.410(2).

<sup>82</sup> *Id.* § 111.420(3).

<i>Nevada, continued</i>	
<b>Persons Granted Standing</b>	UCEA <sup>83</sup>
<b>Modification or Termination</b>	UCEA <sup>84</sup>

<b>New Mexico<sup>85</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To retain or protect natural or open space values of real property; assure the availability of real property for agricultural, forest, recreational, or open space use; or protect natural resources. <sup>86</sup>
<b>Eligible Holders</b>	A nonprofit corporation, nonprofit association, or nonprofit trust, the purposes of which include the purposes for which a conservation easement may be created. <sup>87</sup>
<b>Duration</b>	The term of an easement is the term stated in the easement. <sup>88</sup>
<b>Persons Granted Standing</b>	An action affecting a conservation easement may be brought by: (1) An owner of an interest in the encumbered land; (2) A holder of the easement; or (3) A nonprofit corporation, nonprofit association, or nonprofit trust granted a third-party right of enforcement in the easement deed. <sup>89</sup>
<b>Modification or Termination</b>	UCEA <sup>90</sup>

<sup>83</sup> *Id.* § 111.430(1).

<sup>84</sup> *Id.* §§ 111.420(1), 111.430(2).

<sup>85</sup> N.M. Stat. Ann. §§ 47-12-1 to 47-12-6 (elec. 2005).

<sup>86</sup> *Id.* § 47-12-2(B).

<sup>87</sup> *Id.* § 47-12-2(A). *See also* Attorney General Op. No. 01-02, 2001 N.M. AG Lexis 2 (Oct. 17, 2001) (opining that counties may acquire and hold conservation easements assuming they do so consistent with other laws applicable to public purchases of real property and not by eminent domain).

<sup>88</sup> N.M. Stat. Ann. § 47-12-3(D) (elec. 2005).

<sup>89</sup> *Id.* § 47-12-4(A).

<sup>90</sup> *Id.* §§ 47-12-3(A), 47-12-4(B).

<i>New Mexico, continued</i>	
<b>Eminent Domain</b>	Nothing in the statute shall be construed to diminish or impair the rights of any person authorized by the laws of New Mexico to acquire rights-of-way, easements, or other property rights through the exercise of eminent domain. <sup>91</sup>

<b>North Dakota</b> <sup>92</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To preserve privately owned state historic sites, or property listed in the national register of historic places, and buildings and structures thereon when restored, reconstructed, or improved in accordance with plans approved by the director of the state historical society <sup>93</sup>
<b>Eligible Holders</b>	The state or a political subdivision. <sup>94</sup>
<b>Duration</b>	A historic easement is limited to a term of years as provided in the statute. <sup>95</sup>
<b>Persons Granted Standing</b>	A historic easement is specifically enforceable by the grantee or, if so provided by the grant, by the state or a political subdivision. <sup>96</sup>
<b>Modification or Termination</b>	A historic easement is capable of being modified or terminated in the same manner as other easements. <sup>97</sup>

<sup>91</sup> *Id.* § 47-12-6(C).

<sup>92</sup> N.D. Cent. Code § 55-10-08 (elec. 2005). North Dakota's easement enabling statute applies only to historic preservation easements. Although the creation of a nonstatutory easement encumbering land for other conservation purposes is presumably permissible under North Dakota law, the term of any such easement is limited to 99 years (with lesser terms for certain easements acquired by the federal government). *See id.* § 47-05-02.1(2).

<sup>93</sup> *Id.* § 55-10-08(3).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* § 55-10-08(3)(f) & (g).

<sup>96</sup> *Id.* § 55-10-08(3)(d).

<sup>97</sup> *Id.* § 55-10-08(3)(b).



<b>Oklahoma<sup>98</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	The purposes include, but are not limited to, those specified in the UCEA. <sup>99</sup>
<b>Eligible holders</b>	UCEA <sup>100</sup>
<b>Duration</b>	The term of a conservation easement shall be the term stated in the instrument creating it. <sup>101</sup>
<b>Persons Granted Standing</b>	An action affecting a conservation easement may be brought by: (1) An owner of an interest in the encumbered land; (2) A holder of the easement; and (3) A person authorized by other law. <sup>102</sup>
<b>Modification or Termination</b>	UCEA <sup>103</sup>
<b>Eminent Domain</b>	Unless the grantor of a conservation easement elects otherwise at the time of and in the same manner as the grant of the easement, nothing in the statute shall be construed to impair the rights of a party with respect to the acquisition of rights-of-way, easements, or other property rights, whether through voluntary conveyance or eminent domain, upon or under which facilities, plant, system, or other improvements are to be constructed. <sup>104</sup>

<sup>98</sup> Okla. Stat. Ann. tit. 60, §§ 49.1 to 49.8 (elec. 2005).

<sup>99</sup> *Id.* § 49.2(1).

<sup>100</sup> *Id.* § 49.2(2).

<sup>101</sup> *Id.* § 49.3(C).

<sup>102</sup> *Id.* § 49.4(A).

<sup>103</sup> *Id.* §§ 49.3(A), 49.4(B).

<sup>104</sup> *Id.* § 49.8.

<b>Oregon</b> <sup>105</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>106</sup>
<b>Eligible Holders</b>	(1) The state or any county, metropolitan service district, soil and water conservation district, city, or park and recreation district (Public Body) acting alone or in cooperation with any federal or state agency, public corporation, or political subdivision; (2) A charitable corporation, association, or trust, the purposes of which include the purposes for which a conservation easement may be created; or (3) An Indian tribe. <sup>107</sup>
<b>Duration</b>	UCEA <sup>108</sup>
<b>Persons Granted Standing</b>	UCEA <sup>109</sup>
<b>Modification or Termination</b>	UCEA <sup>110</sup>
<b>Local Property Tax Assessment</b>	For the purpose of taxation, real property subject to a conservation easement shall be assessed on the basis of the real market value of the property less any reduction in value caused by the easement. <sup>111</sup>
<b>Public Hearing</b>	Before the acquisition of a conservation easement, the Public Body considering the acquisition must hold one or more public hearings on the proposal and the reasons therefor in the community where the easement would be located, and all interested persons shall have the right to appear and a reasonable opportunity to be heard. <sup>112</sup>

<sup>105</sup> Or. Rev. Stat. §§ 271.715 to 271.795 (elec. 2005).

<sup>106</sup> *Id.* § 271.715(1).

<sup>107</sup> *Id.* § 271.715(3).

<sup>108</sup> *Id.* § 271.725(5).

<sup>109</sup> *Id.* § 271.755(1).

<sup>110</sup> *Id.* §§ 271.725(2), 271.755(2).

<sup>111</sup> *Id.* § 271.785.

<sup>112</sup> *Id.* § 271.735.

<b>South Dakota</b> <sup>113</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To retain or protect natural or open-space values of real property; assure its availability for agricultural, forest, recreational, or open-space use; protect natural resources; maintain or enhance air or water quality; or preserve the historical, architectural, archaeological, paleontological, or cultural aspects of real property. <sup>114</sup>
<b>Eligible Holders</b>	UCEA <sup>115</sup>
<b>Duration</b>	The term of a conservation easement shall be established by the parties to the easement. <sup>116</sup>
<b>Persons Granted Standing</b>	An action affecting a conservation easement may be brought by: <ol style="list-style-type: none"> <li>(1) An owner of an interest in the encumbered land;</li> <li>(2) A holder of the easement; and</li> <li>(3) A person eligible to hold an easement that is granted a third-party right of enforcement in the easement deed.<sup>117</sup></li> </ol>
<b>Modification or Termination</b>	UCEA <sup>118</sup>

<b>Texas</b> <sup>119</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>120</sup>
<b>Eligible Holders</b>	UCEA <sup>121</sup>

<sup>113</sup> S.D. Codified Laws §§ 1-19B-16, 1-19B-56 to 1-19B-60 (elec. 2005).

<sup>114</sup> *Id.* § 1-19B-56(1). *See also id.* § 1-19B-16 (providing that any county or municipality can acquire historic easements).

<sup>115</sup> *Id.* § 1-19B-56(2).

<sup>116</sup> *Id.* § 1-19B-57.

<sup>117</sup> *Id.* § 1-19B-58.

<sup>118</sup> *Id.* §§ 1-19B-57, 1-19B-58.

<sup>119</sup> Tex. Nat. Res. Code Ann. §§ 183.001 to 183.005 (elec. 2005).

<sup>120</sup> *Id.* § 183.001(1).

<sup>121</sup> *Id.* § 183.001(2).

<i>Texas, continued</i>	
<b>Duration</b>	UCEA <sup>122</sup>
<b>Persons Granted Standing</b>	UCEA <sup>123</sup>
<b>Modification or Termination</b>	UCEA <sup>124</sup>

<b>Utah<sup>125</sup></b>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To preserve and maintain land or water areas predominantly in a natural, scenic, or open condition, or for recreational, agricultural, cultural, wildlife habitat, or other use or condition consistent with the protection of open land. <sup>126</sup>
<b>Eligible Holders</b>	(1) A governmental entity; or (2) A § 501(c)(3) organization. <sup>127</sup>
<b>Duration</b>	The instrument that creates a conservation easement shall include a termination date <sup>128</sup> or a statement that the easement continue in perpetuity.
<b>Persons Granted Standing</b>	A conservation easement may be enforced or protected by injunctive relief granted by a court in a proceeding initiated by the grantor or holder of the easement. <sup>129</sup>
<b>Modification or Termination</b>	A conservation easement may be terminated, in whole or in part, by release, abandonment, merger, nonrenewal, conditions set forth in the instrument creating the conservation easement, or in any other lawful manner in which easements may be terminated. <sup>130</sup>

<sup>122</sup>*Id.* § 183.002(c).

<sup>123</sup>*Id.* § 183.003(a).

<sup>124</sup>*Id.* §§ 183.002(a), 183.003(a).

<sup>125</sup>Utah Code Ann. §§ 57-18-1 to 57-18-7 (elec. 2005).

<sup>126</sup>*Id.* § 57-18-2(1).

<sup>127</sup>*Id.* § 57-18-3. See *supra* note 34 for a definition of a “§ 501(c)(3) organization.”

<sup>128</sup>Utah Code Ann. § 57-18-4(3) (elec. 2005).

<sup>129</sup>*Id.* § 57-18-6(1).

<sup>130</sup>*Id.* § 57-18-5.

<i>Utah, continued</i>	
<b>Eminent Domain</b>	The existence of a conservation easement may not defeat or interfere with the otherwise proper exercise of eminent domain. <sup>131</sup>

<b>Washington</b> <sup>132</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	To protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve selected open space land, farm and agricultural land, and timberland for public use or enjoyment. <sup>133</sup>
<b>Eligible Holders</b>	Any county, city, town, metropolitan park district, metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation or association. <sup>134</sup>
<b>Duration</b>	Silent
<b>Persons Granted Standing</b>	Silent
<b>Modification or Termination</b>	Silent

<b>Wyoming</b> <sup>135</sup>	
<b>Purposes for Which a Conservation Easement May Be Created</b>	UCEA <sup>136</sup>
<b>Eligible Holders</b>	UCEA <sup>137</sup>

<sup>131</sup> *Id.* § 57-18-7(2).

<sup>132</sup> Wash. Rev. Code §§ 64.04.130, 84.34.200 to 84.34.250 (elec. 2005).

<sup>133</sup> *Id.* § 84.34.210.

<sup>134</sup> *Id.*

<sup>135</sup> Wyo. Stat. §§ 34-1-201 to 34-1-207 (elec. 2005).

<sup>136</sup> *Id.* § 34-1-201(b)(i).

<sup>137</sup> *Id.* § 34-1-201(b)(ii). Under the Wyoming easement enabling legislation, a charitable corporation, association, or trust is eligible to hold an easement if a *primary* pur-

<i>Wyoming, continued</i>	
<b>Duration</b>	UCEA <sup>138</sup>
<b>Persons Granted Standing</b>	An action affecting a conservation easement may be brought by: (1) An owner of an interest in the encumbered land; (2) A holder of the easement; and (3) A person eligible to hold an easement that is granted a third-party right of enforcement in the easement deed. <sup>139</sup>
<b>Modification or Termination</b>	UCEA <sup>140</sup>
<b>Primacy of Mineral Estate</b>	The statute does not alter the law of Wyoming regarding the primacy of the mineral estate, and any easement created under the statute will not limit the right of a mineral owner or his lessee to reasonable use of the surface for the purpose of mineral exploration and production unless the owners and lessees of the entire mineral estate are a party or consent to the easement. <sup>141</sup>
<b>Eminent Domain</b>	Conservation easements shall be subject to the state's power of eminent domain in the same manner as any other real property interest. <sup>142</sup>
<b>Local Property Tax Assessment</b>	The real property tax imposed upon real property subject to a conservation easement shall not be less than the amount of the ad valorem tax for the property had it been levied and assessed based upon the taxable value <sup>143</sup> of agricultural land of similar productive use and value.

### § 22.03 Easement Terms

The terms of conservation easements vary widely, although virtually every conservation easement contains a detailed description of the encumbered land, a statement of the conservation pur-

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pose of such organization includes a purpose for which a conservation easement may be created. *Id.*

<sup>138</sup> *Id.* § 34-1-202(c).

<sup>139</sup> *Id.* § 34-1-203(a).

<sup>140</sup> *Id.* §§ 34-1-202(a), 34-1-203(b).

<sup>141</sup> *Id.* § 34-1-202(e).

<sup>142</sup> *Id.* § 34-1-207(a).

<sup>143</sup> *Id.* § 34-1-207(b).

pose or purposes of the easement, and a description of the permitted and prohibited uses of the encumbered land. The most recent and comprehensive guide to the terms of a conservation easement can be found in *The Conservation Easement Handbook* published by the LTA.<sup>144</sup>

#### § 22.04 Water Rights

In many western states water rights are distinct real property interests that may be conveyed or encumbered separately from the land upon which they historically have been used.<sup>145</sup> In many cases, tying water rights to the land encumbered by a conservation easement will be necessary to accomplish the conservation purposes of the easement and ensure that the conveyance qualifies for federal and state tax benefits.<sup>146</sup> State laws pertaining to water rights vary, and attorneys assisting easement grantors and grantees must understand how such laws affect their options for securing and applying water rights for conservation purposes.<sup>147</sup>

#### § 22.05 Eminent Domain

If a conservation easement restricts the development of land needed for a school, hospital, or other public purpose, the easement may be terminated by eminent domain.<sup>148</sup> Determining the

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<sup>144</sup> Elizabeth Byers & Karin Marchetti Ponte, *The Conservation Easement Handbook* (Land Trust Alliance, 2d ed. 2005) [*Conservation Easement Handbook*]. LTA publications are available at [www.lta.org/publications/index.html](http://www.lta.org/publications/index.html) (last visited June 27, 2005).

<sup>145</sup> See *Water Rights Handbook*, *supra* note 45, § 2.2.1; Brenda Lind, *Protecting Surface Water Quality with Conservation Easements* 10, 13-14 (Land Trust Alliance 2004), available at [www.lta.org/publications/easement\\_lib.html#swq](http://www.lta.org/publications/easement_lib.html#swq).

<sup>146</sup> See *Water Rights Handbook*, *supra* note 45, §§ 2.1.1, 2.2.3; Lind, *supra* note 145, at 19.

<sup>147</sup> See Lind, *supra* note 145, at 48; *id.* at 68 (noting that each state has its own laws and regulations addressing the permissibility and conditions surrounding the transfer of a water right and a change in its use, such as from a diversionary use to an instream flow use for environmental protection purposes). Although written with a focus on Colorado water law, the *Water Rights Handbook* provides a detailed and comprehensive explanation of the issues associated with incorporating water rights into conservation easements and should be helpful to easement grantors and grantees in all western states. See *Water Rights Handbook*, *supra* note 45.

<sup>148</sup> See *Conservation Easement Handbook*, *supra* note 144, at 191; Powell, *supra* note 8, § 34A.07[2]. The easement enabling statutes in Arizona, Idaho, Kansas, Montana, Nebraska, New Mexico, Utah, and Wyoming specifically provide that a conservation easement is subject to the laws of the state governing eminent domain. See *supra* § 22.02[2].

value attributable to the easement and to whom compensation for the easement should be paid are complex issues and likely to depend upon the particularities of state law.<sup>149</sup> In most states, however, the condemnation of a conservation easement would be treated as the taking of an interest in property, and compensation would be paid to the holder of the easement.<sup>150</sup>

## § 22.06 Easement Enforcement Case Law

### [1] Standing

The owner of land encumbered by a conservation easement and the holder of the easement should be granted standing as a matter of right to initiate or intervene in any proceeding involving the easement.<sup>151</sup> Whether additional parties (such as the state attorney general, neighboring landowners, other members or representatives of the general public, or conservation organizations other than the holder of the easement) would be granted standing as a matter of right to initiate or intervene in any such proceeding would depend, *inter alia*, on the terms of the easement, the terms of the applicable easement enabling statute, and whether the easement is deemed to be a restricted charitable gift or charitable trust under state law.<sup>152</sup>

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<sup>149</sup> See *Conservation Easement Handbook*, *supra* note 144, at 191; Powell, *supra* note 8, § 34A.07[2]. See also the eminent domain provisions of the Arizona and Nebraska easement enabling statutes, summarized in § 22.02[2] *supra*.

<sup>150</sup> See Powell, *supra* note 8, § 34A.07[2] (noting that this is the “better view”). See also *Conservation Easement Handbook*, *supra* note 144, at 465-66 (discussing the payment of compensation to the holder of a conservation easement upon the exercise of eminent domain).

<sup>151</sup> The UCEA and the easement enabling statutes in Arizona, Idaho, Kansas, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, and Wyoming expressly grant standing to the owner of land encumbered by an easement and the holder of the easement. See *supra* § 22.02.

<sup>152</sup> The UCEA and the easement enabling statutes in Arizona, Idaho, Kansas, Nevada, New Mexico, Oregon, South Dakota, Texas, and Wyoming grant standing to persons eligible to hold conservation easements if they are expressly granted third-party rights of enforcement in an easement deed. See *supra* § 22.02. The UCEA and the easement enabling statutes in Arizona, Idaho, Kansas, Nevada, Oklahoma, Oregon, and Texas grant standing to any “person authorized by other law,” which may include the state attorney general as supervisor of charitable trusts. *Id.* For a discussion of standing in a broad range of cases involving conservation and preservation tools, see Melissa K. Thompson & Jessica E. Jay, “An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and other Conservation and Preservation Tools: Themes and Approaches to Date,” 78 *Den. U.L. Rev.* 373, 376-79 (2001);



## [2] Interpretation and Enforcement of Easements

In cases involving the interpretation and enforcement of easements, courts generally first attempt to ascertain the intent of the parties by looking to the plain language of the deed of conveyance and giving the words their ordinary and usual meaning as judged by a reasonable person.<sup>153</sup> If an ambiguity is found, the courts attempt to ascertain the intent of the parties by examining the deed of conveyance in light of the circumstances attending its execution.<sup>154</sup> If neither the language of the deed of conveyance nor the circumstances attending its execution are illuminating, the courts will turn to traditional rules of construction.<sup>155</sup>

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Robert H. Levin, "Partial Compilation of Land-Conservation-Related Litigation" (June 2005), available at [www.roblevin.net](http://www.roblevin.net) and periodically updated. If a conservation easement is treated as a restricted charitable gift or charitable trust under state law, the state attorney general and any party with a special interest in the performance of the easement should have standing to enforce the easement even if not granted such right in the easement enabling statute. See Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* § 348.1, at 9 (4th ed. 1989) (noting that the attorney general can maintain a suit to prevent the diversion of property to purposes other than those for which it was given in the case of both charitable trusts and gifts to charitable corporations); *id.* § 391, at 366 (noting that "a person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement," but he "must show that he is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled"). See generally Nancy A. McLaughlin, "Rethinking the Perpetual Nature of Conservation Easements," 29 *Harv. Envtl. L. Rev.* 421 (Fall 2005), available at [www.law.utah.edu/faculty/bios/mclaughlinn.html](http://www.law.utah.edu/faculty/bios/mclaughlinn.html) (last visited June 27, 2005) (arguing that donated conservation easements should be treated as restricted charitable gifts or charitable trusts).

<sup>153</sup> See Andrew C. Dana, "The Silent Partner in Conservation Easements: Drafting for the Courts," 8/1 *The Back Forty*, Jan./Feb. 1999, at 1, 5, excerpts available at [environment.alachua.fl.us/Land\\_Conservation/Download\\_Files/the\\_back\\_40.htm](http://environment.alachua.fl.us/Land_Conservation/Download_Files/the_back_40.htm). See also, e.g., *Racine v. United States*, 858 F.2d 506, 507 (9th Cir. 1988) (holding that dude ranch facilities such as barns and corrals could be constructed on land encumbered by a scenic easement in the Sawtooth National Recreation Area because the plain language of the easement deed, which incorporated by reference a federal regulation permitting structures "necessary for . . . dude ranching," allowed the construction of such structures); *Lamb v. Wyo. Game & Fish Comm'n*, 985 P.2d 433 (Wyo. 1999) (in which the Supreme Court of Wyoming held, in part, that the terms of easements acquired by the Wyoming Game and Fish Commission to provide public fishing access to two rivers were unambiguous and, thus, the court did not have license to resort to extrinsic evidence to interpret such terms).

<sup>154</sup> See Dana, *supra* note 153, at 6 (noting that a term is ambiguous if it "is reasonably susceptible of different interpretations").

<sup>155</sup> See *id.* at 6-7 (noting that the rules of construction are varied, but generally include the following: deeds must be interpreted as a whole and all terms given an inte-

The following is a brief synopsis of recent conservation easement interpretation and enforcement cases.<sup>156</sup>

**[a] *Conrad v. Mattis***<sup>157</sup>

The Superior Court of Connecticut held that resort to extrinsic evidence in interpreting the conservation easement at issue was unnecessary because “the language of the Easement speaks for itself and contains no ambiguity,” and that the clearing of trees and maintenance of a vegetable garden was not in violation of the easement, which prohibited “clear-cutting” but permitted “gardening,” because, *inter alia*, the selective clearing of trees for a reasonably sized garden in a large lot does not constitute clear-cutting; the owner of the encumbered land received approval from the holder of the easement to create the garden; a garden was specifically permitted by the terms of the easement; and photographs of the garden taken from several views showed that the garden did not detract from the predominance of the remaining property in its natural and scenic condition.

**[b] *Chatham Conservation Foundation, Inc. v. Farber***<sup>158</sup>

With regard to a conservation easement encumbering marshland that prohibited buildings or “other structures” but did not “affect the right of the grantors and their respective successors in title . . . to pass and repass over the premises,” the Appeals Court

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grated interpretation; specific terms are given greater weight than general statements; the parties’ actual conduct may be relevant evidence as to how they intended ambiguous provisions to be interpreted; separately negotiated terms are given greater weight than “boilerplate” terms; ambiguously worded land use restrictions are generally resolved in favor of the free use of land; and ambiguous terms are generally construed against the primary drafter of the instrument). *See also* Foundation for the Preservation of Historic Georgetown v. Arnold, 651 A.2d 794, 796 (D.C. 1994) (“Deeds, like contracts, are ‘construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument.’ . . . If a deed is unambiguous, the court’s role is limited to applying the meaning of the words . . . but if it is ambiguous, the parties’ intention is to be ascertained by examining the document in light of the circumstances surrounding its execution and, as a final resort, by applying rules of construction.”).

<sup>156</sup> For a more extensive discussion of cases involving the interpretation and enforcement of conservation and preservation restrictions, see Thompson & Jay, *supra* note 152, at 376-79; Levin, *supra* note 152.

<sup>157</sup> No. CV 0005959545 (Conn. Super. LEXIS 3594, Dec. 20, 2000).

<sup>158</sup> 779 N.E.2d 134, 136 (Mass. Ct. App. 2002).

of Massachusetts held that the right to pass and repass included all rights reasonably incidental to the enjoyment of that right, including the right to make reasonable improvements to the existing plank walkway, but remanded the issues of: (1) whether the existing plank walkway was inadequate to effectuate the landowner's right to pass and repass because it was unsafe, and (2) whether the elevated walkway that the landowners proposed to construct, which was more environmentally friendly but less aesthetically pleasing than the existing walkway, was a "reasonable improvement" and therefore consistent with the prohibition on structures in the easement, or so different from the existing walkway as to be an unreasonable improvement.

[c] *United States v. Ponte*<sup>159</sup>

With regard to a conservation easement held by the government that prohibited unessential structures in "the area between . . . [the] mean high water mark and a line parallel to, and set back 100 feet from, said high water mark," the U.S. District Court for the District of Maine: (1) determined that the restricted area was to be measured "horizontally" (that is, by extending lines vertically from two points on the ground and measuring along a horizontal straight line perpendicular to the two lines), rather than over the face of the sloping earth; (2) ordered the defendants to remove, within three months of the date of the judgment, a platform they had constructed within the restricted area; (3) authorized the government to remove the offending platform if the defendants did not do so in a timely manner; (4) ordered the defendants to restore the area where the platform sits to its condition before construction; and (5) permanently enjoined and restrained the defendants from further trespassing on the conservation easement.

[d] *Weston Forest and Trail Association, Inc. v. Fishman*<sup>160</sup>

The Massachusetts Land Court held that a conservation easement unambiguously prohibited the construction of any buildings in a restricted area and issued an injunction: (1) ordering the owner of the encumbered land to remove, within six months of the

<sup>159</sup> 246 F. Supp. 2d 74, 79 (D. Maine 2003).

<sup>160</sup> Case No. 301928, 2005 WL 1313605 (Mass. Land Ct., June 3, 2005).

court's decree, a barn that the owner had constructed in the restricted area; (2) requiring the owner to restore the restricted area to its prior condition; and (3) prohibiting the owner from further violating the easement.

### § 22.07 Modification and Termination of Easements

The donor of a perpetual conservation easement may grant to the donee, either expressly (through an amendment provision included in the deed of conveyance) or implicitly (through the general terms of the deed of conveyance), the right to simply agree with the owner of the encumbered land to amend the easement in a manner consistent with its conservation purposes.<sup>161</sup> Such a grant of discretion should give the holder of the easement substantial flexibility to simply agree with the owner of the encumbered land, for example, to clarify vague language, correct a drafting error, or delete restrictions that advances in ecological science have shown to be detrimental to the conservation purposes of the easement (such as a no-burn provision relating to a forested area).<sup>162</sup> Questions remain, however, regarding whether, when, and how a perpetual conservation easement can be either amended in a manner *not consistent* with its conservation purposes (such as by deleting the restrictions on subdivision and development in the easement) or extinguished.<sup>163</sup>

No decision has been reported in which a court has authorized the extinguishment of a conservation easement encumbering *land* due to changed conditions. However, in a reported decision involv-

<sup>161</sup> See McLaughlin, *supra* note 152, at 444. See also *Conservation Easement Handbook*, *supra* note 144, at 377 (providing a sample amendment provision).

<sup>162</sup> See McLaughlin, *supra* note 152, at 444-45.

<sup>163</sup> See, e.g., *id.* at 428 (arguing that a donated conservation easement should be treated as a restricted charitable gift or a charitable trust and, except to the extent granted the discretion in the deed of conveyance, the holder of the easement should not be permitted to deviate from the administrative terms or charitable purpose of the easement without receiving court approval therefor under the doctrine of administrative deviation or *cy pres*); *Restatement (Third) of Property (Servitudes)* 420, § 7.11, cmts. a, b (2000) (recommending that the modification or termination of conservation easements conveyed to government agencies and charitable organizations be governed by a special set of rules based, in part, on the doctrine of *cy pres*, and noting that such easements should be afforded more stringent protection than privately held conservation servitudes because of the public interest involved); Powell, *supra* note 8, § 34A.07 (noting that there are several traditional methods for terminating land restrictions that *may* apply to conservation easements).

ing a donated conservation easement encumbering an historic structure in Pennsylvania's Germantown, the court assumed without discussion that the easement constituted a "charitable interest," and applied the charitable trust doctrine of *cy pres* to authorize the extinguishment of the easement, demolition of the historic structure (which had become dilapidated), and replacement of the easement with covenants designed to permanently preserve the site of the structure as a park.<sup>164</sup>

## § 22.08 Tax Incentives Offered to Easement Donors

### [1] Federal Tax Incentives

Three federal tax incentives are available to a landowner who donates a conservation easement during his lifetime: (1) a charitable income tax deduction generally equal to the value of the donated easement,<sup>165</sup> (2) the removal of the value of the easement from the landowner's estate free of gift or estate tax,<sup>166</sup> and (3) an additional exclusion of up to 40% of the value of the land encumbered by the easement from the landowner's estate for estate tax purposes.<sup>167</sup> To be eligible for the federal tax incentives, the ease-

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<sup>164</sup> See McLaughlin, *supra* note 152, at 450-51 (describing the case in more detail). The Myrtle Grove Controversy, which involved an easement encumbering an historic 160-acre former tobacco plantation located on Maryland's eastern shore, is also described. *Id.* at 451-52. The easement had been donated to the National Trust for Historic Preservation (National Trust) in 1975 and it prohibited subdivision of the encumbered land except for one lot for the donor's heirs. *Id.* at 452-53. Nineteen years after the donation, the National Trust agreed with a subsequent owner of encumbered land to amend the easement to confine its terms to a 47-acre "Historic Core" and permit an eight-lot subdivision on the remaining land. *Id.* at 453. The Maryland attorney general filed suit, arguing that the easement constituted a charitable trust and could not be amended without court approval under the doctrine of administrative deviation or *cy pres*. *Id.* at 454-57. The case was eventually settled, with the National Trust agreeing to pay the landowner \$225,000, and the parties agreeing that no action would be taken to amend, release, or extinguish the easement without the express written consent of the Maryland attorney general, except consent of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms. *Id.* at 455.

<sup>165</sup> I.R.C. § 170(h) (elec. 2005).

<sup>166</sup> The gratuitous transfer of a conservation easement during a landowner's lifetime is not subject to gift tax by virtue of the gift tax deduction under § 2522(d) of the Internal Revenue Code. When the landowner dies, the fair market value of the land encumbered by the easement is included in his estate for estate tax purposes. See Treas. Reg. § 20.2031-1(a) & (b) (elec. 2005).

<sup>167</sup> I.R.C. § 2031(c) (elec. 2005).

ment generally must be donated: (1) to a “qualified organization,” which is defined to include publicly-supported charities and governmental entities;<sup>168</sup> (2) in perpetuity;<sup>169</sup> and (3) for one or more of the qualified conservation purposes enumerated in § 170(h) of the Internal Revenue Code.<sup>170</sup>

## [2] State Tax Incentives

A few western states have enacted state tax incentives to further encourage the donation of conservation easements encumbering land within their borders.<sup>171</sup>

## [3] Local Property Tax Incentives

If a conservation easement reduces the assessed value of the land it encumbers, the owner of the land may receive local property tax savings. However: (1) in some jurisdictions local government officials (who generally are reluctant to reduce the tax base) may refuse to consider easements when making assessments; (2) some landowners decline to seek a property tax reduction after granting an easement for fear the assessor will reassess the value of their property in its entirety at a higher amount even if the easement is taken into account; (3) many jurisdictions already assess certain types of land (such as agricultural or forested land) at a value lower than the land’s fair market value, so a landowner may not receive any additional property tax benefit as a result of donating an easement; and (4) some easement enabling statutes provide that the existence of a conservation easement will not be taken into account in assessing the value of property for local

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<sup>168</sup> *Id.* § 170(h)(3).

<sup>169</sup> *Id.* § 170(h)(5)(A).

<sup>170</sup> *Id.* § 170(h)(4) (listing four qualified conservation purposes). A detailed discussion of the operation of and eligibility requirements for the federal tax incentives is beyond the scope of this paper. For such a detailed discussion, see generally Treas. Reg. § 1.170A-14 (elec. 2005); Stephen J. Small, *Federal Tax Law of Conservation Easements* (Land Trust Alliance 1997) [Small, *Federal Tax Law*]; Stephen J. Small, “Understanding the Conservation Easement Estate Tax Provisions,” 87 *Tax Notes* 435 (2000); McLaughlin, *supra* note 3.

<sup>171</sup> See Colo. Rev. Stat. Ann. § 39-22-522 (elec. 2005) (offering transferable and potentially refundable Colorado income tax credits to donors of conservation easements encumbering land in Colorado); Cal. Pub. Res. Code §§ 37000 to 37025 (elec. 2005) (offering California income tax credits to donors of conservation easements encumbering land in California); N.M. Stat. Ann. §§ 75-9-1 to 75-9-6 (elec. 2005) (offering New Mexico income tax credits to donors of conservation easements encumbering land in New Mexico).

property tax purposes, or that the assessed value of the land may not be less than its assessed value in a particular year or its assessed value as agricultural land.<sup>172</sup>

### § 22.09 Valuation of a Conservation Easement

Because no real market exists in which perpetual conservation easements are bought and sold, the value of a conservation easement for tax incentive and other purposes is generally determined using the “before and after” method.<sup>173</sup> Under the before and after method, the value of a conservation easement is equal to the difference between: (1) the fair market value of the land immediately before it is encumbered by the easement and (2) the fair market value of the land immediately after it is encumbered by the easement.<sup>174</sup> For purposes of the federal and, in many cases, state tax incentives, the value of an easement must be substantiated by a “qualified appraisal” prepared by a “qualified appraiser,” and the appraisal must satisfy certain other requirements set forth in the Treasury Regulations.<sup>175</sup>

The before and after method has been subject to abuse in the easement donation context. An easement donor employing the method can inflate the value of his or her easement (and, thus, the federal charitable income tax deduction and other tax benefits) by: (1) exaggerating the fair market value of the land imme-

<sup>172</sup> See McLaughlin, *supra* note 3, at 39-40. See also the provisions addressing tax assessments in the easement enabling statutes in Idaho, Montana, and Wyoming, discussed in § 22.02[2] *supra*.

<sup>173</sup> See McLaughlin, *supra* note 3, at 68-71; Treas. Reg. § 1.170A-14(h)(3)(i) (elec. 2005).

<sup>174</sup> See McLaughlin, *supra* note 3, at 69. “Fair market value” is generally defined 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 sell and both having reasonable knowledge of relevant facts.” Treas. Reg. § 1.170A-1(c)(2) (elec. 2005). See also Treas. Reg. § 1.170A-14(h)(3)(i) (elec. 2005).

<sup>175</sup> See Treas. Reg. § 1.170A-14(h)(3), (4) (elec. 2005). For a detailed discussion of the appraisal requirements, see Small, *Federal Tax Law*, *supra* note 170, at 17-1 through 19-5; McLaughlin, *supra* note 3, at 68-83; A *Conservation Easement Appraisal Guide* (Colo. Coalition of Land Trusts, June 25, 2004), available at [www.cclt.org](http://www.cclt.org) (last visited June 19, 2005); Land Trust Alliance & National Trust for Historic Preservation, *Appraising Easements, Guideline For Valuation of Land Conservation and Historic Preservation Easements* (Land Trust Alliance, 3d ed. 1999), available at [www.lta.org/publications/apprea.htm](http://www.lta.org/publications/apprea.htm). An appraisal of a conservation easement acquired by an agency of the federal government or with federal funding generally must meet the more stringent requirements set forth in U.S. Dep’t of Justice, *Uniform Appraisal Standards for Federal Land Acquisitions* (Appraisal Inst., 2000), available at [www.usdoj.gov/enrd/land-ack/yb2001.pdf](http://www.usdoj.gov/enrd/land-ack/yb2001.pdf).

diately before the donation of the easement, which would produce an unreasonably high “before-easement” value, (2) exaggerating the extent to which the easement restrictions reduce the fair market value of the land, which would produce an unreasonably low “after-easement” value, or (3) employing a combination of the foregoing techniques.<sup>176</sup>

One of the more prevalent forms of easement valuation abuse is the use of a complex land appraisal method, generally referred to as the subdivision development analysis (SDA), to exaggerate the before-easement value of land.<sup>177</sup> Determining the before-easement value of land should be no different from any run-of-the-mill appraisal of land—that is, the appraiser should be determining the price at which the donor could realistically sell the land in its current state in the open market, and that price should generally be determined by reference to recent sales of comparable properties.<sup>178</sup> Appraisers, however, are increasingly employing the SDA to estimate the before-easement value of land.<sup>179</sup> The SDA is intended to mimic the valuation process that a prospective purchaser interested in acquiring the land for development would employ, and because of the highly speculative assumptions that must be made, the SDA can be used to obtain grossly exaggerated before-easement values for land that have no rational relation to the price at which the easement donors could realistically sell the land in the open market.<sup>180</sup> As discussed in § 22.10 *infra*, valuation abuse in the easement donation context has raised the ire of Congress and the Internal Revenue Service (IRS), and proposals to both punish and curb such abuse are being considered.

### § 22.10 Recent Developments

Public enthusiasm for both the use of conservation easements as a private land protection tool and the land trusts that acquire conservation easements has been tempered recently by reports of

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<sup>176</sup> See Nancy A. McLaughlin, “Questionable Conservation Easement Donations,” 18 *Probate & Property* 40 (2004), available at [www.law.utah.edu/faculty/bios/mclaughlinn.html](http://www.law.utah.edu/faculty/bios/mclaughlinn.html) (last visited June 27, 2005).

<sup>177</sup> See *id.* at 44.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 44-45.



abuse. In May 2003, the *Washington Post* published a three-part series criticizing The Nature Conservancy on a variety of grounds, including its alleged involvement in abusive conservation easement transactions.<sup>181</sup> In December 2003, the *Washington Post* published a follow-up article describing allegedly abusive conservation easement donation transactions involving “wildly exaggerated” easement appraisals and developers that reaped “shocking” tax deductions for donating conservation easements on golf course fairways and otherwise undevelopable land.<sup>182</sup> The *Washington Post* articles prompted the Senate Finance Committee to investigate The Nature Conservancy and to scrutinize both the federal tax incentives offered to easement donors and the land trusts accepting easement donations.<sup>183</sup>

On June 30, 2004, the IRS issued a Notice warning that it is aware some taxpayers are improperly claiming charitable income tax deductions for conservation easement conveyances, and that it intends to disallow such deductions and impose penalties and excise taxes where appropriate.<sup>184</sup> In January 2005, the Joint Com-

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<sup>181</sup> See 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. The Nature Conservancy is one of the largest and best-funded land trusts in the nation. See [www.nature.org](http://www.nature.org) (last visited June 1, 2005).

<sup>182</sup> See Joe Stephens & David B. Ottaway, “Developers Find Payoff in Preservation,” *Wash. Post*, Dec. 21, 2003, at A1. For a discussion of abusive conservation easement donation transactions, see McLaughlin, *supra* note 176; Stephen J. Small, “Proper—And Improper—Deductions for Conservation Easement Donations, Including Developer Donations,” 105 *Tax Notes* 217 (2004); Stephen J. Small, “Conservation Easements Today: The Good and the Not-So-Good,” 22/2 *Exchange, The Journal of the Land Trust Alliance* 32 (2003); Stephen J. Small, “Local Land Trust Signed A Fraudulent Tax Form!—The Daily News, July 31, 2004,” 22/3 *Exchange, The Journal of the Land Trust Alliance* 5 (Fall 2003).

<sup>183</sup> See Joe Stephens & David B. Ottaway, “IRS Toughens Scrutiny of Land Gifts,” *Wash. Post*, July 1, 2004, at A1 (noting that the Senate Finance Committee began investigating easement transactions involving The Nature Conservancy and other charities in 2003). See the committee report, available at [finance.senate.gov/sitepages/TIVC%20Report.htm](http://finance.senate.gov/sitepages/TIVC%20Report.htm).

<sup>184</sup> I.R.S. Notice 2004-41 (June 30, 2004), available at [www.irs.gov/pub/irs-drop/n-04-41.pdf](http://www.irs.gov/pub/irs-drop/n-04-41.pdf). See also Albert B. Crenshaw, “Tax Abuse Rampant in Nonprofits, IRS Says,” *Wash. Post*, Apr. 5, 2005, at E1 (quoting the Commissioner of the Internal Revenue Service as stating that the IRS is auditing 50 donors of conservation easements and several exempt organizations that receive such easements and is doing a “pre-audit

mittee on Taxation issued a report to Congress recommending, *inter alia*, that the federal charitable income tax deduction offered to conservation easement donors be substantially reduced and that new standards be imposed on appraisers that value conservation easements for purposes of the deduction.<sup>185</sup> On June 8, 2005, the Senate Finance Committee held a hearing entitled “The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform.” In connection with the hearing, the Senate Finance Committee issued a report recommending numerous reforms, including: (1) revoking the tax-exempt status (or suspending the ability to accept tax-deductible contributions) of conservation organizations that regularly and continuously fail to monitor the conservation easements they hold, (2) implementing an accreditation program for conservation organizations, (3) limiting charitable contribution deductions for certain small easement donations and providing the IRS with the authority to pre-approve deductions for such donations, and (4) restricting or barring the use of the SDA in valuing certain conservation easements.<sup>186</sup>

The LTA has responded to the criticism and scrutiny of land trusts and conservation easement transactions by, *inter alia*, revising the standards and practices that must be adopted by all of

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review” of 400 open-space easement donations “to be followed by a similar review of 700 facade easements”).

<sup>185</sup> See Staff of the Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures* (JCS-2-05 281, Jan. 27, 2005), available at [www.house.gov/jct/s-2-05.pdf](http://www.house.gov/jct/s-2-05.pdf) (last visited June 1, 2005).

<sup>186</sup> See *Finance Committee Report on The Nature Conservancy, Executive Summary*, available at [finance.senate.gov/sitepages/TNC%20Report.htm](http://finance.senate.gov/sitepages/TNC%20Report.htm) (last visited June 19, 2005). With regard to The Nature Conservancy (TNC), the Report Introduction states

The Committee’s investigation confirms that TNC’s reputation as a leading and innovative conservation organization is well deserved. TNC has grown to become a worldwide conservation organization that, through a variety of creative approaches and strategies, attempts to preserve many of the world’s most valuable lands and resources.... Given the ongoing IRS audit of TNC, the Staff has made no specific determination whether any particular TNC activity did or did not comply with the relevant technical requirements of the Internal Revenue Code (“Code”). However, the Staff questions whether some of the activities TNC conducted in the past, and continues to pursue in limited cases, are potentially inconsistent with the tax policy considerations behind the rules governing tax-exempt status under section 501(c)(3) and charitable contribution deduction rules of the Code.

its members and working to develop an accreditation program for the nation's land trusts.<sup>187</sup>

Changes to existing law are very likely, and practitioners assisting conservation easement grantors and grantees are advised to keep abreast of new developments and ensure that all relevant state and federal requirements are satisfied.

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<sup>187</sup> See, e.g., Land Trust Alliance, *Land Trust Standards and Practices* (Rev. 2004) and *Background to the 2004 Revisions of Land Trust Standards and Practices*, available at [www.lta.org/sp/index.html](http://www.lta.org/sp/index.html) (last visited June 1, 2005); Joe Stephens, "Alliance Starts Plan to Improve Land Trusts; Association Moves to Train and Accredite Conservation Organizations," *Wash. Post*, Apr. 20, 2005, at A8 (noting that the LTA is launching a \$3 million program to improve the ethics and governance of the nation's land trusts, and that the effort is being bankrolled, in large part, through a \$1 million challenge grant from the Doris Duke Charitable Foundation).

