Property Tax Appraisal of Conservation Easements in Utah

by

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I. INTRODUCTION

In December 1997, on the brink of financial ruin after their 1989 divorce, Doug and Heidi Redd were faced with the decision of either selling or developing their 5,200 acre Dugout Ranch near Canyonlands National Park, after owning and operating the ranch for over thirty years.[1] Many potential buyers approached the Redds to inquire about the ranch, including the likes of Ralph Lauren and Christie Brinkley.[2] Fortunately however, the Redds were able to strike a deal with the Nature Conservancy which will enable the Redd family to continue living and working the land for many years and accommodate their financial concerns, while preserving the rare scenic and wildlife characteristics of the area.[3]

The Redd Family's success was due in part to the creation of a conservation easement. The Nature Conservancy will record the conservation easement on the land, prohibiting future development of the property.[4] The conservation easement will also provide for Heidi Redd and her children to reside in the home on twenty-five acres of the ranch for the rest of her life and continue raising cattle on the entire property for at least ten years.[5] In addition, the conservation easement will provide for scientific studies of the property's rare plant, water, wildlife and archaeological resources.[6] Heidi Redd and the Nature Conservancy will continue to pay the property taxes to San Juan County.[7]

The Dugout Ranch was appraised at nearly $6.3 million.[8] The Nature Conservancy paid $4.6 million to the Redds for the ranch.[9] The difference, $1.7 million, is the value of the conservation easement,

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[1] *See* Brent Israelsen, *Ranch Has a Permanent Home on the Range*, SALT LAKE TRIB., Dec. 11, 1997, at A1.

[2] *See id.*

[3] *See id.*

[4] *See id.* at A17.

[5] *See id.*

[6] *See supra* note 1.

[7] *See id.*

[8] *See id.*

[9] *See id.*

which will become a tax deductible charitable contribution by the Redds and help defray the considerable capital gains tax they will pay.[10] The Dugout Ranch purchase has few critics and is supported by environmentalists, federal land agencies and elected officials, including Governor Mike Leavitt and Senator Bob Bennett.[11]

One issue that may remain, however, is whether future property tax assessments on the land will be adjusted by San Juan County to reflect the conservation easement. Property tax treatment of property subject to encumbrances such as conservation and preservation easements is a relatively new issue. Utah, like many other states throughout the United States may find themselves in an awkward position.

Property taxes may be assessed to the Redds and the Nature Conservancy based upon the pre-conservation easement appraisal of $6.3 million, even though, they have already foreclosed many of their rights, including the right to develop the property for commercial and potentially more profitable uses. Many states, including Utah, in providing a statutory framework to create and enforce conservation easements, failed to provide for the property tax treatment of the property encumbered by conservation easements. While most commentators agree that property tax appraisals should be adjusted downward to reflect the land's diminished permissible uses, property tax appraisals of land encumbered by conservation easements have been inconsistent.[12] In some states, a downward property assessment of land encumbered by conservation easements is mandated by law.[13] Most states, however, have not legislatively addressed whether conservation easements should be included in property tax assessments and if they are included, how they should be treated.

This Note examines how this property tax uncertainty may be alleviated. Section II of this Note will provide some background information relating to conservation easements. Section III addresses current property appraisal methods and how they have been used to value conservation easements. Section IV considers the way in which

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[10] *See id.*

[11] *See* Israelson, *supra* note 1, at A1.

[12] *See* Daniel C. Stockford, *Property Tax Assessments of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 826 (1990); Judith S.H. Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 80 (1985).

[13] For a complete listing of the states which include property tax provisions in their conservation statutes, see Appendix A, *infra*.

federal law ascertains the value of conservation easements for federal income tax and estate tax purposes. Section V examines how other jurisdictions have decided property tax issues and consider how other states have treated the appraisal of conservation easements for property tax purposes. Finally, section VI will specifically focus on Utah's appraisal methods and suggest remedial legislation.

II. BACKGROUND

A 1994 poll estimated that 740,000 acres of lands are subject to conservation easements held by land trusts throughout the United States.[14] In Utah alone, it is estimated that over 400,000 acres of land are subject to conservation easements.[15] A conservation easement or conservation restriction[16] is a mechanism for protecting open space. Essentially, it allows a landowner to voluntarily restrict certain uses on a piece of property for the purpose of protecting important characteristics including wildlife habitat, scenery or the reservation of land for particular uses.[17]

The conservation easement is a recorded land-use agreement in which the landowner conveys rights for public benefit.[18] Generally, these rights are conveyed, either by purchase or gift to a charitable land trust or a governmental entity.[19] The recipient of the conservation easement is generally granted limited entry to the property for inspection purposes thus insuring compliance with the terms of the agreement.[20] Once recorded, the agreement binds both the landowner and the recipient, their successors and assigns.[21] In essence, the charitable land trust or governmental entity has been granted the right to enforce the conservation easement against the landowner.

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[14] *See generally* LAND TRUST ALLIANCE, 1994 NATIONAL LAND TRUST SURVEY, (1995).

[15] *See id.*

[16] Many states use the term "conservation restriction" in lieu of the "conservation easement" in their conservation easement enabling legislation. *See* MASS. GEN. LAWS ANN. Ch. 184, § 31 (West Supp. 1989); S.C. CODE ANN. § 27-9-10 (Law. Co-op. 1977). This Note uses the more familiar term "conservation easement."

[17] Some states use the term "conservation restriction," since the purpose of a conservation easement is to place a restriction on uses of land. *See* Stockford, *supra* note 12, at 823 (citing e.g., MASS. GEN. LAWS ANN. Ch 184, § 31 (West Supp. 1989)); S.C. CODE ANN. § 27-9-10 (Law. Co-op. 1977).

[18] *See* LAND TRUST ALLIANCE, APPRAISING EASEMENTS 2 (2d ed., 1990).

[19] *See id.*

[20] *See id.*

[21] *See id.*

Additionally, the land owner, depending on the agreement, has foreclosed many future uses of the property.

A conservation easement, in and of itself, can be extremely flexible,[22] largely because it is the product of a negotiated agreement between the original landowner and the grantee.[23] Absent statutory regulation to the contrary, a conservation easement can be drafted to prohibit all future development, certain types of development, or expressly reserve the future right to develop a portion for either residential or commercial use.[24] In some situations, a conservation easement can be placed on already developed property (e.g., a family farm or scenic ranch), but the easement ensures that no further future development will take place and that the development will be protected.[25] Similarly, a landowner may expressly reserve the right to develop a few plots for their children's homes.[26] The goal of either of these arrangements is to prevent current or future owners from developing the land or parceling off the land for some unsavory commercial use.

In addition, many states have adopted historic preservation easement legislation enabling an owner of historically significant property and/or structures to place an historic preservation easement on property. In most states, historic preservation easements are similar in operation to conservation easements. The main difference is, generally, that a historic preservation easement is used to protect property which has already been developed and is historically significant. For tax purposes, however, historic preservation easements are treated similarly.[27]

A conservation easement can encumber as much, or as little, property as the landowner desires. As a practical matter, however, the recipient of the conservation easement will likely have a minimum acreage threshold.[28] In addition, a conservation easement can be drafted

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[22] *See* Atherton, *supra* note 12, at 68.

[23] *See id.* at 65. *See also* LAND TRUST ALLIANCE, *supra* note 18, at 2.

[24] Interview with Wendy Fisher, Executive Director Utah Open Lands, in Grantsville, U.T. (Nov. 20, 1997).

[25] *See id.*

[26] *See id.*

[27] While historic preservation easements are not the focus of this Note, some reference will be made to the tax treatment of land encumbered by them.

[28] Utah Open Lands, a charitable land trust, accepts conservation easements encumbering a minimum of forty acres of land. Interview with Wendy Fisher, Executive Director, in Utah Open Lands, Grantville, U.T. (Nov. 20, 1997).

so that it encumbers a piece of property for either a term of years or in perpetuity.[29] A conservation easement must be perpetual, however, in order for the landowner to take advantage of estate and income tax benefits and any potential property tax benefits.[30]

In order to qualify for tax benefits a conservation easement must be perpetual.[31] Therefore, when a conservation easement is placed on land otherwise suitable for development, the landowner is extinguishing certain rights on the land forever. The landowner has lowered the fair market value of the land because she no longer owns the entire "bundle of rights."[32] Because the landowner is relinquishing certain rights for a public benefit, landowners receive various income, estate and property tax benefits for their contributions.

Common law methods, such as easements, real covenants and servitudes proved to be inadequate and posed impediments for permanent conservation purposes because of the difficulties associated with enforcing and transferring them.[33] In addition, these methods of land conservation and others have been successfully challenged by parties claiming restraints on alienation,[34] violations of the Rule Against Perpetuities and adverse possession. The ineffectiveness and uncertainty of common law tools, insofar as conservation and preservation purposes are concerned, has increased the importance of conservation easements and conservation easement legislation, as well as increasing the need for a more uniform interpretation.

Because the federal government owns a considerable amount of land in western states, many people object to additional public land acquisitions.[35] As a general rule, property owned by charities or the government is exempt from property taxation.[36] If a tax exempt entity acquires land in fee simple, that land is removed from the tax rolls and

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[29] *See* Atherton, *supra* note 12, at 65.

[30] *See* I.R.C. § 170(h) and § 2703 (West 1998). *See also* STEPHEN J. SMALL, PRESERVING FAMILY LANDS: BOOK II 31 (1997).

[31] Interview with Wendy Fisher, Executive Director, Utah Open Lands, in Grantsville, U.T. (Nov. 20, 1997). *See also* I.R.C. § 170(h)(2)(C) (West 1998).

[32] *See* Stockford, *supra* note 12, at 830.

[33] *See* Atherton, *supra* note 12, at 56–57. For a more detailed discussion of the shortcomings associated with common law methods of conservation, see Atherton, *supra* note 12, at 56–62.

[34] *See* Horse Pond Fish & Game Club, Inc. v. Cormier, 581 A.2d 478, 481–82 (N.H. 1990). A deed restriction of a fish and game club which prohibited alienation without 100 percent vote of club members or dissolution of club was challenged because it was said to unreasonably restrain alienation. *See id.* at 478–79.

[35] *See* Atherton, *supra* note 12, at 55.

[36] *See* UTAH CODE ANN. §§ 59-2-1101 to -1103 (1996).

the tax liability falls on the surrounding community of taxpayers.[37] Therefore, states have sought to find ways of conserving and preserving open space short of public fee simple purchase.[38]

By contrast, when a conservation easement encumbers a piece of property, the landowner still owns the land in fee simple and the landowner still manages the land.[39] Any fees, costs or taxes associated with the land itself are paid by the landowner, rather than placing that responsibility on the state or charitable organization.[40]

Conservation easements have become fairly common. Over forty states have enacted conservation easement legislation.[41] State legislatures, recognizing the growing necessity for more conservation efforts aimed at protecting wildlife habitat and open lands, are providing a secure method to enable private parties and landowners to set aside open space.

The various state conservation easement statutes range from elaborate and precise provisions to simple and general provisions. For instance, New Jersey's statute provides for the acquisition, enforcement and condemnation of conservation and historic preservation easements.[42] Interestingly, the statute also gives New Jersey an interest in the creation of conservation easements,[43] providing for the eventual possibility that parties may wish to extinguish it. The provision requires both a public hearing and the approval of the Commissioner of Environmental Protection if the easement is to be destroyed.[44]

Utah's Legislature enacted its Land Conservation Easement Act[45] in 1985 in response to mounting demographic pressures that caused an explosion in development. In only six years, between 1990 and 1996, Utah's population increased from 1,729,000 to 2,002,000, representing an increase of approximately 15.8 percent or 274,000

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[37] *See* Atherton, *supra* note 12, at 68.

[38] Recently, however, both the U.S. Fish and Wildlife Service and the Utah Reclamation Mitigation and Conservation Commission have stepped up their conservation efforts by acquiring conservation easements. Telephone interview with Andrea Olson, Staff of Utah State Office of Planning and Budget (Dec. 1, 1997). *See also* Atherton, *supra* note 12, at 55.

[39] *See* Atherton, *supra* note 12, at 67–68.

[40] *See id.* at 68.

[41] *See* Appendix A, *infra*, for a list of states which have enacted conservation easement enabling legislation.

[42] *See* N.J. STAT. ANN. § 13:8B-3 (West 1991 & Supp. 1997).

[43] *See id.*

[44] See N.J. STAT. ANN. §§ 13:8B-5 (West 1991 & Supp. 1997).

[45] UTAH CODE ANN. §§ 57-18-1 to -7 (1994).

persons.[46] It is estimated that the number of housing units in Utah has increased by over 10 percent.[47] Between 1995 and 1996, Utah was ranked as having the third highest growth rate in the nation.[48] These staggering statistics prompted Governor Leavitt to make conservation a priority of his administration by creating a Utah Critical Land Conservation Committee for the purpose of fostering locally-initiated land conservation efforts.[49]

Most people place conservation easements on their land because they are truly concerned with the future of their communities, in light of increasing demographic demands.[50] As conservation easements have become more common, they have also become an invaluable tool for estate planning purposes. Once a conservation easement is created, the landowner can become eligible for various tax benefits, including income, estate and presumably property tax benefits.[51]

III. CONSERVATION EASEMENT APPRAISAL METHOD

Property tax is an instrument of state and local government.[52] It is generally based upon the fair market value of the highest and best use of property, essentially what a buyer is willing to pay for the potential value of the property.[53] The highest and best use of the property is generally the most probable, legal and profitable use of the property.[54] The appraisal of land encumbered by conservation easements is a process whereby the value of real property and its partial interests is based on its relationship to other properties, the sum of which are the potential market.[55] Because there is no established market for conservation easements, the partial interests which attach to real property are valued using the before and after method of appraisal.[56] The before and after method is used by courts

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[46] *See* UTAH CRITICAL LAND CONSERVATION COMMITTEE, LAND CONSERVATION IN UTAH: TOOLS, TECHNIQUES, AND INITIATIVES 1 (1997) (citing UTAH POPULATION ESTIMATES COMMITTEE (1997)).

[47] *See id.* (citing U.S. BUREAU OF CENSUS HOUSING ESTIMATES).

[48] *See id.*

[49] *See id.*

[50] *See* SMALL, *supra* note 30, at 40.

[51] *See id.* at 23–42.

[52] *See* Stockford, *supra* note 12, at 827.

[53] *See id.*

[54] *See id.* at 826.

[55] *See* LAND TRUST ALLIANCE, *supra* note 18, at 19.

[56] *See id.*

and appraisers in determining compensation in eminent domain proceedings.[57] The before and after method is also used to determine the value of charitable donations in the federal income tax arena.

A. The Before and After Method

The first step in the before and after analysis is determining the highest and best use of the property in its current condition—the before value.[58] The highest and best use accounts for current zoning and market conditions in determining the probability, absent the easement, of possible future and more profitable uses.[59] Any improvements to or limitations on the property are considered in the appraisal process.[60]

The after value must then be ascertained by determining the highest and best use after the creation of the easement.[61] The easement terms, covenants and restrictions and any potential limitations on future uses of the property which were restricted by the easement are analyzed both individually and collectively in the appraisal process.[62] In addition, they are compared to existing zoning regulations to determine the extent to which future and alternate uses may be affected.[63] The difference between the value attached to the property before the easement, and the value of the property after the easement is the actual value of the conservation easement.[64] As a practical matter, easements are often more valuable on properties experiencing a change in the highest and best use.[65] The fair market value of agricultural, recreational and residential properties which may be developed or are undergoing an upward change in highest and best use would be significantly more impacted by development restrictions than areas experiencing a decline in values.[66]

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[57] *See id.*
[58] *See id.*
[59] *See id.*
[60] *See* LAND TRUST ALLIANCE, *supra* note 18, at 19.
[61] *See id.*
[62] *See id.* at 21.
[63] *See id.*
[64] *See id.* at 19.
[65] *See* LAND TRUST ALLIANCE, *supra* note 18, at 21.
[66] *See id.* at 21–22.

1. Appraisal Techniques

The before and after values of property are derived by using one or a combination of three methods of property appraisal: comparable sales approach, cost approach and income approach.[67] First, is the comparable sales/market method which determines the fair market value through the use of comparing recent sales of similar property.[68] There are problems with using this method for appraising conservation easements. For example, more often than not, conservation easements are donated rather than sold, and thus, the property subject to a conservation easement is commercially less valuable. Conservation easements may restrict all uses or some uses; few conservation easements encumber similarly situated property located in the same county.[69] However, it is believed, that this type of assessment produces the most reliable standard for determining fair market value because it is based upon actual values.[70]

Second, the cost approach or the "cost new less depreciation" method is used almost exclusively on improved property.[71] The cost approach involves a mechanical application of replacement costs based on construction industry information and depreciation percentages based on the age of improvements.[72] This approach tends to avoid some of the subjective problems associated with the comparable sales approach. The cost approach, however, is limited in the evaluation of conservation easement to properties with improvements.[73] In arriving at a before and after value of property encumbered by a conservation easement, the cost approach is best used to test the other two approaches to value.[74]

Third, the income method involves the present value of expected future income to be generated from the property during its economic

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[67] Telephone interview with Perry Nielsen, Commercial Appraiser of Washington County Assessor's Office (Nov. 25, 1997). *See also* LAND TRUST ALLIANCE, *supra* note 18, at 19; ABA Section of Taxation, PROPERTY TAX DESKBOOK 1996–97 Edition 45-2 (1997).

[68] *See* LAND TRUST ALLIANCE, *supra* note 18, at 24.

[69] *See id.* at 25.

[70] *See id.* at 24.

[71] *See id.* at 25–26.

[72] *See id.* at 26–27.

[73] *See* LAND TRUST ALLIANCE, *supra* note 18, at 25–26.

[74] *See id.* at 26–27.

life.[75] Much like the comparable sales approach, this method is premised on reliable market data, such as rents, occupancy rates and expenses.[76] Accordingly, the value of the impact that the easement limitations would have on the potential gross income of the property must be ascertained.[77]

Except for specific uses,[78] the Utah Property Tax Act does not exact the valuation method assessors should use to value property without a conservation easement.[79] However, of the states which have enacted conservation easement legislation, many have provided for reductions in property tax assessments for land encumbered by a conservation easement.[80]

For instance, New Jersey's conservation easement statute states: "The existence of any conservation restriction or historical preservation restriction acquired pursuant to this act shall be considered by local assessors in establishing the full value of any lands subject to such a restriction."[81] Similarly, Montana's provision provides explicitly that property encumbered by a conservation easement shall be assessed "on the basis of the restricted purposes for which the property may be used."[82]

Accordingly, the before and after values of property encumbered by a conservation easement must be ascertained using one or a combination of the three appraisal methods. However, absent a statutory provision indicating the property tax treatment of conservation easements, it is unclear whether and to what extent they are a factor in property appraisals for property tax purposes.

IV. FEDERAL TAX APPRAISALS OF CONSERVATION EASEMENTS

In order to qualify for federal tax benefits related to the creation of a conservation easement on property, at least four requirements

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[75] *See id.* at 27–28.

[76] *See id.* at 28.

[77] *See id.* at 28.

[78] Property used for mining and railroads. *See* UTAH CODE ANN. §§ 59-2-203 and 59-2-205 (1996).

[79] *See also* ABA Section of Taxation, PROPERTY TAX DESKBOOK 1996–97 Edition 45-2 (1997).

[80] *See* Appendix A, *infra*, for a list of state statutes providing for the property tax treatment of land encumbered by a conservation easement.

[81] N.J. STAT. ANN. § 13:8B-7 (Supp. 1997).

[82] MONT. STAT. ANN. § 76-6-208 (1987).

must be met.[83] First, notwithstanding the fact that conservation easements can be for a term of years, in order to qualify for federal tax benefits, they must be granted in perpetuity.[84] Second, the easement must truly be aimed at protecting habitat, conserving open lands, preserving scenic views and historic property or some similar "public good."[85] If the taxpayer's goal is to take a deduction, but still develop her property, the Internal Revenue Service may not allow the deduction. Third, the easement must be donated to a "qualified conservation organization."[86] This usually means one of the many charitable land trusts or a unit of local, state or federal government. Lastly, a qualified appraisal must be conducted.[87] The qualified appraisal must be performed by a qualified expert who understands how to appraise land encumbered by a conservation easement.[88] The appraisal must include, a property description, the valuation method used, the appraiser's qualifications and the fee arrangement between the parties.[89]

A. Income Tax Treatment of Conservation Easements

Section 170(h) of the Internal Revenue Code states that a charitable deduction may be taken for the value of a conservation easement that is given to a qualified charitable organization.[90] The easement's value is the difference in the value of the property before and after it is restricted by the easement.[91] The deduction is limited to

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[83] *See* SMALL, *supra* note 30, at 31–32.

[84] *See id. See also* I.R.C. § 170(h)(2)(C) (West 1998).

[85] *See* SMALL, *supra* note 30, at 32–34. The Internal Revenue Code defines conservation purpose as:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield significant public benefit, or (iii) the preservation of an historically important land area or a certified historic structure.

I.R.C. § 170(h)(4) (1998).

[86] SMALL, *supra* note 30, at 32, 36–40. A qualified organization is a tax exempt organization, either a private foundation or governmental unit. *See* I.R.C. § 170(h)(3) (West 1998).

[87] *See* SMALL, *supra* note 30, at 39–40.

[88] *See id.* at 40–42.

[89] *See id.*

[90] *See* I.R.C. §§ 170 (f)(3)(B)(iii) and (h) (West 1998).

[91] *See* SMALL, *supra* note 30, at 27. *See also* S.K. Johnston, III v. Commissioner of

an amount up to 30 percent of the taxpayer's adjusted gross income and allows for a five-year carryforward.[92]

The before and after analysis has been repeatedly upheld in determining the negative effect the easement has on the value of the property.[93] The Treasury Regulations state, with regard to perpetual conservation restrictions, that:

> The value of the contribution under section 170 in the case of a charitable contribution of a perpetual conservation restriction is the fair market value of the perpetual conservation restriction at the time of the contribution. If there is a substantial record of sales of easements comparable to the donated easement (such as purchases pursuant to a governmental program), the fair market value of the donated easement is based on the sales prices of such comparable easements. If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction.[94]

In *S.K. Johnston, III v. Commissioner*,[95] the U.S. Tax Court spelled out the exact method for determining the "before and after" values of property. At the time of the hearing, S.K. Johnston, III, was the President and C.O.O. of Coca Cola Enterprises, Inc.[96] In addition, he and other family members operated several businesses at various locations throughout the United States.[97] One such business was a polo pony training operation conducted on a portion of the Flying H Ranch,

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Internal Revenue, 74 T.C.M. (CCH) 968 (1997). *See also* Akers v. Commissioner, 48 T.C.M. (CCH) 113, 118 (1984); Thayer v. Commissioner, 36 T.C.M. (CCH) 1504 (1977).

[92] *See* I.R.C. § 170(b)(1)(C) and (d) (West 1998).

[93] *See* Schwab v. Commissioner, T.C.M. (CCH) 3004, (U.S.T.C. 1994). *See also* Rev. Rul. 73-339, 1973-2 C.B. 38, as clarified by Rev. Rul. 76-376, 1976-2 C.B. 53, and endorsed by Congress in connection with the adoption of the Tax Treatment Extension Act of 1980, S. REP. 96-1007 (1980), 1980-2 C.B. 599, 606.

[94] Treas. Regs. § 1.170A-14(3) (West Supp. 1998).

[95] 74 T.C.M. (CCH) 968 (1997) [hereinafter *Johnston*].

[96] *See id.* at 970.

[97] *See id.* at 969–70.

located on the eastern slope of the Bighorn Mountains in Wyoming, near the Montana border.[98]

In December 1989, the Johnstons' donated a conservation easement encumbering 4,898 acres of the Flying H Ranch to the Nature Conservancy.[99] While the property the easement encumbers consists of rolling hills, many springs and flowing streams, it is also suitable for rural development and has already been the subject of exploratory oil and gas expeditions.[100]

The easement allows Flying H Ranch to graze and range horses, cattle and buffalo, continue using the three cabins already on the property, and the right to construct one additional cabin.[101] The easement, however, restricts the Johnstons' use of the property in many ways, including the prohibition of subdivision development, residential and commercial uses; furthermore, agricultural uses are limited: No crops or timber can be harvested.[102] The easement gives the Nature Conservancy the right to enter the property and remove vegetation and to conduct prescribed burns.[103] Outside of the rights granted to the Nature Conservancy, the Johnstons' enjoy exclusive access to the property.[104]

On their 1989 tax return, the Johnstons' claimed a $960,000 charitable contribution deduction for the easement grant to the Nature Conservancy.[105] The deduction was based upon an appraisal, in which the property was valued before the easement at $2,035,000 and after the easement at $1,075,000.[106] The Johnstons' contended that the actual value of the easement, the difference between the before and after values was $960,000.[107] The Service, using the same before and after method of appraising the easement, determined that the easement should be valued at $203,500.[108] The Service did not dispute that the easement was a "qualified conservation contribution" pursuant to section 170(f)(3)(B)(iii) and (h) of the Internal Revenue Code or that the

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[98] *See id.*
[99] *See id.* at 978.
[100] *See Johnston*, 74 T.C.M. (CCH) at 979.
[101] *See id.*
[102] *See id.*
[103] *See id.*
[104] *See id.*
[105] *See Johnston*, 74 T.C.M. (CCH) at 980.
[106] *See id.*
[107] *See id.*
[108] *See id.*

grant of the easement qualified as a deductible charitable contribution pursuant to section 170(a)(1) and (c).[109]

The central issue was whether the highest and best use of the property before the date of gift was predominantly rural development, as argued by the Johnstons, or whether it was primarily recreational, as argued by the Service.[110] In analyzing the issue of highest and best use, the court determined that the value of the easement granted is based upon the difference between the fair market value of the total property before the granting of the easement and the fair market value of the property after the grant.[111] Furthermore, the court noted that both the Johnstons' expert and the Service's expert agreed that the before and after method should be used, and that after the easement was granted the use of the property was restricted to primarily recreational uses.[112]

Fair market value of the property is the highest and best use for the property on its valuation date, including potential development, though it does not require that the owner ever actually put the property to its highest and best use.[113] Instead the court relied upon "the realistic, objective potential uses for the property" in determining the valuation of the highest and best use.[114] The *Johnston* court focused on the "highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."[115] Consequently, the value of the property after the creation of the conservation easement, must reflect its highest and best use by considering any new restrictions the easement places on the property.[116]

Expert testimony was introduced by both parties.[117] The Johnstons' expert determined the fair market value before and after the easement was granted and determined that the fair market value had

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[109] *See id.*

[110] *See Johnston*, 74 T.C.M. (CCH) at 980.

[111] *See id.* (citing Rev. Rul. 73-339, 1973-2 C.B. 68).

[112] *See id.* at 981.

[113] *See Johnston*, 74 T.C.M. (CCH) at 980 (citing Stanley Works v. Commissioner, 87 T.C. 389, 400 (1986); Hilborn v. Commissioner, 85 T.C. 677, 688 (1985); Treas. Regs. § 1.170A-14(h)(3)(ii) (1975)).

[114] *Johnston*, 74 T.C.M. (CCH) at 980 (quoting Symington v. Commissioner, 87 T.C. 892, 896 (1986)).

[115] *Johnston*, 74 T.C.M. (CCH) at 980 (citing Olson v. United States, 292 U.S. 246, 255–56 (1934)).

[116] *See Johnston*, 74 T.C.M.) at 980 (citing Losch v. Commissioner, 55 T.C.M. (CCH) 909 (1988)).

[117] *See id.*

been reduced by 55 percent.[118] The Service's expert found that the value had only been reduced by 20 percent.[119] The court noted that because most conservation easements are donated, few comparable statistics exist with regard to sales data of similarly situated property.[120] Accordingly, various features of the property were analyzed in reference to known data of other properties throughout the country and a percentage figure was adopted by the Johnstons' appraiser.[121] In adopting the Johnstons' expert's appraisal, the court noted that "as long as the highest and best use for which the property is adaptable and needed or likely to be needed in the near future is not prohibited by law, community opposition to such a use does not preclude us from valuing the property as if it were so used."[122]

Accordingly, the ordained method of ascertaining the value of a conservation easement, or in other words, the value of the rights donated to a qualified charitable organization for income tax purposes, is the before and after approach to valuing the highest and best use of a piece of property. The value of the conservation easement, therefore, is figured by first, determining the value of the property before the conservation easement is granted and second, determining the value of the property after the conservation easement has been created and ascertaining the difference. Because there are often few comparables for conservation easement valuation purposes, experts use a percentage of the total value to figure the value of the conservation easement.

B. Estate and Gift Tax

In addition to the income tax benefits available for the creation and donation of a conservation easement, there are estate and gift tax benefits in the forms of both an exclusion and a deduction, also associated with the creation of conservation easements. When a person dies, the value of real and personal property in the decedent's estate is taxed at a uniform rate.[123] Section 2031(c) of the Internal Revenue Code provides that a decedent's executor may exclude 40 percent of the fair

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[118] *See id.* at 981.
[119] *See id.*
[120] *See id.*
[121] *See Johnston*, 74 T.C.M. (CCH) at 980–81.
[122] *Johnston*, 74 T.C.M. (CCH) at 981 (quoting *Symington*, 87 T.C. at 896).
[123] *See* Atherton, *supra* note 12, at 79.

market value of land subject to a permanent conservation easement.[124] Also, section 2055(a) identifies conservation easements as property deductible from the value of the gross estate.[125] By lowering the value of the taxpayer's property, the estate tax bill is also lowered.[126] This can help avoid the problem of having to sell the "family farm" to pay the estate tax, while preserving the ownership of the land for future generations.

In addition, if an individual makes a gift of a conservation easement which qualifies as a gift exclusively for "conservation purposes," and if it meets the requirements imposed by section 170(h) of the Internal Revenue Code,[127] then it is not subject to federal gift taxes which might have been imposed.[128] The same method of appraisal that is used to ascertain the value of a conservation easement for income tax purposes is likely to be used to determine the value of an easement for estate tax purposes.

V. CASES

Early court decisions trying to ascertain the appropriate value of property encumbered by a conservation easement for property tax purposes struggled to define "highest and best use." In *Adirondack Mountain Reserve v. North Hudson*,[129] petitioner operated a private club which granted its dues-paying members the right to use a golf course, swimming pool and the rights to the use of approximately 5,000 acres of "reserve" lands for outdoor use.[130] In 1978, petitioner placed a conservation easement on the property prohibiting real estate development, construction, mining, hunting and farming.[131] The following year, the town of Keene reassessed the land and reassessed the property at a higher rate.[132] Petitioner disputed the assessment.[133] The court did not engage in a before and after analysis or a highest and best use analysis, but instead, held that the restrictions imposed did not

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[124] *See* I.R.C. § 2031(c) (as amended in 1997).
[125] *See* Atherton, *supra* note 12, at 79. *See also* I.R.C. § 2055 (West 1998).
[126] *See* SMALL, *supra* note 30, at 27.
[127] *See* Atherton, *supra* note 12, at 79 n.107.
[128] *See id.* at 79.
[129] 99 A.D.2d 600, 600 (N.Y. App. Div. 1984).
[130] *See id.*
[131] *See id.*
[132] *See id.*
[133] *See id.* at 600–01.

affect current recreational use and therefore, an abatement was not in order.[134] The court noted that "conservation easements seek to insure that the 'views and scenic vistas' of the properties are preserved for members of [the club]."[135]

In addition, the court in *Rainbow Springs Partnership v. Macon*,[136] refused a taxpayer a property tax abatement after a perpetual conservation easement was placed on a 1,838 acre tract of land.[137] The easement granted to the Nature Conservancy prohibited all construction, mining, excavating, destruction of trees and the hunting of bear or non-game animals.[138] The county contended and the court agreed that the highest and best use of the property, both before and after the granting of the easements, was "for hunting, fishing and other recreational activities."[139] The taxpayer contended that the highest and best use prior to the creation of the conservation easement was property held for investment and future development.[140] The commission noted, however, that "[t]here has been a reduction in value of most of the acreage under appeal as a result of the granting of the conservation easements, although there has been no change in the highest and best use of the property as a result of the easements."[141]

The more recent case of *Indian Garden Group v. Resort Township*,[142] seemed to adopt the rationale that persuaded the *Johnston* court's approach to determining highest and best use for income tax purposes. In *Indian Garden Group*, petitioner had granted a conservation easement encumbering approximately 100 acres of land to the Walloon Conservancy prohibiting any construction improvements and the like.[143] The court employed the before and after valuation principle as contemplated by I.R.S. revenue rulings.[144] The court noted that "ignor[ing] such a restriction constitutes a fraud on the taxpayer. . . ."[145] Accordingly, the petitioner was granted a 65 percent downward

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[134] *See Adirondak Mountain Reserve*, 99 A.D.2d at 601.

[135] *Id.*

[136] 339 S.E.2d 681 (N.C. Ct. App. 1986).

[137] *See id.* at 682.

[138] *See id.* at 682–83.

[139] *Id.* at 683.

[140] *See id.* at 685.

[141] *Id.* at 683.

[142] 1995 WL 901434; MTT Doc. No. 157543, 205036 (Mich. Tax Trib. Feb. 17, 1995).

[143] *See id.* at *2.

[144] *See* Rev. Rul. 73-339, 1973-2 C.B. 38, as clarified by Rev. Rul. 76-376, 1976-2 C.B. 53.

[145] *Indian Garden Group*, 1995 WL 901434 at *5 (quoting Lochmoor Club v. Grosse Pointe Woods, 10 Mich. App. Ct. 394, 394–98 (Mich. App. Ct. 1968)).

adjustment in land value as a result of the conservation easement, thereby significantly reducing the property tax assessment.

Decisions addressing the valuation of the highest and best uses of land encumbered by a conservation easement have varied considerably. Some states have employed the use of the before and after analysis propounded by federal law. Adopting the method used in assessing such property for income tax purposes would provide some element of consistency and assurance to taxpayers who are considering placing conservation easements on their property.

VI. UTAH

The Utah Legislature has passed legislation aimed to provide instruments for conservation and/or preservation, including Scenic Highway Easements[146] in 1966, Solar Easements [147] in 1979, the Historical Preservation Act[148] in 1975 and the Farmland Assessment Act[149] in 1969. Discussion of the Preservation Easement statute and the Farmland Assessment Act may be useful because of their potential affect on property tax treatment of conservation easements.

A. Preservation Easements

The Preservation Act provides for a preservation easement to be affixed to historically significant structures for their preservation and restoration.[150] The Preservation Act specifically states that the easement may be in gross or appurtenant[151] and that the Rule Against Perpetuities does not apply so that it cannot defeat a preservation

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[146] UTAH CODE ANN. §§ 27-12-109.1 to -109.2 (1995). The Department of Transportation is authorized to acquire an interest in land for its "restoration, preservation, and enhancement of scenic beauty within and adjacent to federal-aid highways of this state. . . ." UTAH CODE ANN. § 27-12-109.1 (1995).

[147] UTAH CODE ANN. § 57-13-1 to -2 (1994).

[148] UTAH CODE ANN. § 9-8-501 to -506 (1996). The Utah Statute authorizes any landowner to place a preservation easement on a historically significant piece of property. *See id.* Section 9-8-505 endows the preservation easement with the ability to be granted in perpetuity. *See* UTAH CODE ANN. § 9-8-505 (1996). In addition, section 9-8-506 provides for a charitable contribution for tax purposes if the preservation easement is conveyed. *See* UTAH CODE ANN. § 9-8-506 (1996).

[149] UTAH CODE ANN. § 59-2-501 to -514 (1994).

[150] *See* UTAH CODE ANN. § 9-8-502 (1996).

[151] This language may be interpreted to allow the enforcement of easements created at common law prior to the enactment of this provision in 1975. *See* UTAH CODE ANN. § 9-8-504 (1996).

easement.[152] The Preservation Act specifically states that a donation of a preservation easement may be considered a charitable contribution.[153]

Utah property tax assessors have been willing, thus far, to recognize preservation easements and their effect on fair market value of property.[154] The owners of Green Gate Village in St. George, Utah received a 10 percent property tax adjustment on the historically significant structures it uses on its property.[155] The Green Gate Village property is a tourist attraction and hotel listed on the Utah State Historical Registry. The preservation easement was donated to the Utah Heritage Foundation. The owners qualified for and took a federal income tax deduction for their donation.[156] The adjustment, however, was forthcoming only after the owners produced an appraisal by a commercial appraiser they had hired to assess the property encumbered by a preservation easement.[157]

The County Assessor's Office relied upon cases from other jurisdictions to determine whether an adjustment was necessary.[158] The value of the property was determined by first, considering whether the easement had a positive effect on value, that is to say, if the easement had a negative effect on the value of the property, no adjustment would be incumbent.[159] Second, the assessor employed the income approach, wherein actual income and expenses are considered along with the highest and best use.[160] In this case, the assessor determined that the property's highest and best use was that of lodging for tourists—it's current use.[161] Finally, the assessor made an assessment based upon a restriction that the property be limited to its current use (value-in-use).[162]

The question of future tax abatements for property subject to a preservation easement is far from clear. It is shocking that the County Assessor's Office initially did not offset the property tax assessment to

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[152] *See* UTAH CODE ANN. § 9-8-505 (1996).

[153] *See* UTAH CODE ANN. § 9-8-506 (1996).

[154] Telephone interview with Perry Nielsen, Commercial Appraiser of Washington County Assessor's Office in St. George, U.T. (Nov. 25, 1997).

[155] *See id.*

[156] *See id.*

[157] *See id.*

[158] *See id.*

[159] Telephone interview with Perry Nielsen, Commercial Appraiser of Washington County Assessor's Office in St. George, U.T. (Nov. 25, 1997).

[160] *See id.*

[161] *See id.*

[162] *See id.*

reflect the value of the preservation easement, in the face of a meticulously drafted Preservation Easement Act which affords easement holders maximum enforceability. Currently, the owners of Green Gate Village are considering whether to appeal to the Utah State Tax Commission for the precedential value alone.[163]

B. Farmland Assessment Act

The Farmland Assessment Act[164] was passed in 1969 to afford preferential property tax treatment to taxpayers who owned property in agricultural use. Prior to 1968, the Utah Constitution required a uniform rate of assessment and taxation of all property regardless of its use.[165] In 1968, the Utah Constitution was amended to allow property tax assessments of property in agricultural use to be based on their value for agricultural use, regardless of its value for other uses.[166]

Under the Farmland Assessment Act, landowners with five or more contiguous acres, who are willing to devote their land to agricultural use, are assessed a property tax based upon its agricultural land use value.[167] The land can be used for either grazing livestock or growing crops.[168] The assessment is based upon the value of the land's current use,[169] also known as a value-in-use tax. The value-in-use tax is used as an alternative to assessing the land at the highest and best use.[170] This method of assessment usually results in a significant decrease in the property tax assessed.[171] Property subject to the agricultural use assessment is known as "greenbelt."

As a method of preserving open-space, "greenbelt" works well as long as it is in "greenbelt." That is to say, that the landowner has an incentive to keep the land in agricultural use for as long as she owns the land. However, "greenbelt" does not insure that the agricultural use of the land will endure. The Farmland Assessment Act allows the landowner to remove the property from "greenbelt," although, a harsh

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[163] *See id.*
[164] UTAH CODE ANN. § 59-2-501 (1994).
[165] *See* Owen Olpin, *Preserving Utah's Open Spaces*, 2 UTAH L. REV. 164, 184 (1973).
[166] *See id.*
[167] *See* UTAH CODE ANN. § 59-2-503 (1994).
[168] *See* UTAH CODE ANN. § 59-2-502 (1994).
[169] *See* Olpin, *supra* note 165, at 184.
[170] *See id.*
[171] *See id.*

penalty is imposed for removal.[172] When land is removed from "greenbelt" and the land use has changed, sections 59-2-501 and 59-2-506 of the Utah Code authorize the collection of a "rollback tax" for the five years prior to removal.[173] Section 59-2-506(1)(b)(i)(A) provides for an exception to the "rollback tax." If land previously in "greenbelt" is converted so that it becomes encumbered by a conservation easement, the "rollback tax" does not apply.[174] In addition, land that is removed from "greenbelt" and simultaneously becomes subject to a conservation easement, must be valued at the fair market value subject to the conservation easement.[175] Generally, this means that there is no increase in the property tax assessment.[176]

Other jurisdictions have relied heavily on their respective Farmland Assessment Acts to employ the use of property tax abatement to encourage the use of preservation and conservation easements. The court in *Village of Ridgewood v. Bolger Foundation*,[177] found support in holding for the taxpayer/landowner by noting that New Jersey derived its policy of granting relief from property tax assessments to encourage open space conservation from its Farmland Assessment Act of 1964.

Reliance upon the methods employed in assessing property in "greenbelt" provides one more method for ascertaining appropriate property tax assessments for land encumbered by conservation easements. By and large, they embrace many of the same policy considerations and they serve largely the same end—conservation of open space. The Utah Constitution provides that:

> The Legislature shall provide by law a uniform and equal rate of assessment on all tangible property in the state, according to its value in money, except as otherwise provided in Section 2 of this Article. The Legislature shall prescribe by law such provisions as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property.[178]

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[172] *See* UTAH CODE ANN. § 59-2-506 (1996).

[173] *See* UTAH CODE ANN. §§ 59-2-506(1)(a) and 59-2-501 (1996).

[174] *See id. See also* Telephone interview with Barbara Kresser, County Assessor of Summit County, U.T. (Dec. 1, 1997).

[175] *See* UTAH CODE ANN. § 59-2-506(1)(b)(ii)(B) (1996).

[176] Telephone interview with Barbara Kresser, County Assessor of Summit County, U.T. (Dec. 1, 1997).

[177] 517 A.2d 135 (N.J. 1986).

[178] UTAH CONST., art. XIII, § 3, cl. 1 (1896).

The Property Tax Act mandates that each year, property shall be assessed at 100 percent of fair market value.[179] Utah law defines "fair market value" as meaning "the amount at which 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 the relevant facts, and includes the adjustment for intangible values under sections 59-2-304 and 59-2-201 for real property assessed by the county assessor or the commission."[180]

The Utah Supreme Court wrote in *United States Smelting, Refining & Mining Co. v. Haynes*:[181]

> It will be observed that these provisions [sections 2 and 3 of article XIII] require that all tangible property . . . shall be subjected to a uniform and equal rate of assessment according to its value in money. The method or yardstick by which the valuation in money is to be determined shall be prescribed by the legislature. It is not required that the same yardstick or method of determining value shall be used with respect to all kinds of property. But the different formulae that may be applied to different kinds of property must be such that they aim and tend to secure for assessment purposes a valuation fair and equitable in comparison with and commensurate with valuation of other kinds of property.[182]

Reported cases in Utah regarding the property tax valuation methods concerning conservation easements are sparse. It is generally believed, however, that a conservation easement will lower the fair market value of the property because the owner's uses of the property are restricted.[183] However, uncertainty arises because of the difficulty of placing a value on a restriction[184] and because there is no statutory provision mandating a property tax adjustment. The Utah Supreme

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[179] *See* UTAH CODE ANN. § 59-2-201 (1996).

[180] UTAH CODE ANN. § 59-2-102(8) (1996).

[181] 176 P.2d 622 (Utah 1947).

[182] *Id.* at 627. *See also Haynes*, 176 P.2d at 627; Board of Equalization of Salt Lake County v. Utah, 864 P.2d 882, 865 (Utah 1992).

[183] Telephone interview with Helen Hooper, Policy Director of Land Trust Alliance in Washington, D.C. (Dec. 2, 1997). *See also* Stockford, *supra* note 12, at 826 (citing Judith S.H. Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 80 (1985)); *see* John C. Partigan, Comment, *New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences*, 49 ALB. L. REV. 430, 476 (1985).

[184] *See* Atherton, *supra* note 12, at 80.

Court noted in *Hayes v. Gibbs*:[185] "To assess property without regard to a building restriction or an easement would be to assess it without regard to the nature and extent of the property interest which the assessed owner has in the land, in complete disregard of its fair cash value. . . ."[186]

Further, when the "old" Hotel Utah challenged the property tax assessment, the Utah State Tax Commission ruled on the issue of self-imposed waivable restrictions.[187] The owners of the hotel, the Church of Jesus Christ of Latter-day Saints, had waived its statutory ability to sell liquor at the Hotel Utah.[188] As a result, property appraisals performed using the income approach to value were slightly lower than they would have been had the Hotel Utah been able to sell liquor on its premises. The Utah Tax Commission found that where a self-imposed restriction exists, such as the sale of liquor, and the power to waive the restrictions is within the power of the owner, then the artificial restriction should be of no consequence or effect in the appraisal of the property.[189] Accordingly, the Utah Tax Commission gave little weight to the effect of the self-imposed and waivable restrictions on the income levels of the hotel. The Utah Tax Commission, noted, however, that "not considering actual income could in some cases work a severe hardship on the owner of property, especially if there are restrictions on the use of the property beyond the owner's control that make it impossible for the owner to collect the potential income."[190]

Though the Utah State Tax Commission has ruled on the issue of self-imposed waivable restrictions, it remains unclear how the Utah State Tax Commission would rule if faced with the issue of self-imposed non-waiveable restrictions on property.

VIII. RECOMMENDATIONS AND CONCLUSION

The conservation easement, unless specifically drafted otherwise, forecloses the landowners rights for certain uses forever and

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[185] 169 P.2d 781 (Utah 1946).

[186] *Id.* at 786. *See also* Atherton, *supra* note 12, at 80 (quoting Hayes v. Gibbs, 169 P.2d 781, 786, 110 Utah 54, 64 (1946)).

[187] *See* Utah Hotel Company v. County Board of Equalization, Dec. No. 350, 1984 Utah Tax LEXIS 25 (April 10, 1984).

[188] *See id.* at *13.

[189] *See id.* at *13.

[190] *Id.* at *14 (citing Congresshills Apartments v. Township of Ypsilanti, 302 N.W.2d 274 (Mich. App. Ct. 1981).

may reduce the ability of the landowner to sell her property. The landowner is voluntarily foreclosing her own rights for the public interest. In-so-doing, landowners should be afforded the certainty that they will be able to preserve open-space in Utah, while restricting the "profitability" of the land without facing an enormous property tax bill.

Many methods exist relating to the valuation of conservation easements.[191] Some of them are codified by state and federal law. One of these methods should be agreed upon and codified by Utah law. The federal government rewards these gifts to the public domain, along with approximately thirty other states. Since Utah is precariously situated, it should be at the forefront in protecting its natural and wildlife resources.

Landowners have been given a valuable tool to insure the preservation of the natural qualities that their land offers, while affording them maximum enforceability. The federal government has provided incentives for landowners who choose to donate their lands to the public interest. Utah should do the same for its residents who pay property taxes and its visitors who enjoy the open space.

JENNIFER RIGBY

[191] *See* Appendix B, *infra*, for samples of conservation easement property tax provisions from other states.

APPENDIX A

State Conservation Statutes

State	Statute	Property Tax Provision
Alabama	ALA. CODE §§ 35-18-1 to -6 (Supp. 1997)	
Alaska	ALASKA STAT. §§ 34.17.010 to -.060 (Michie 1996)	ALASKA STAT. § 29.45.062 (Michie 1996)
Arizona	ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (West 1990)	
Arkansas	ARK. CODE ANN. §§ 15-20-401 to -410 (Michie 1994)	
California	CAL. CIV. CODE §§ 815-16 (West 1982 & Supp. 1997)	CAL. REV. & TAX. CODE §§ 402.1 and 423 (West 1987 & Supp. 1998)
Colorado	COLO. REV. STAT. §§ 38-30.5-101 to -111 (1997)	COLO. REV. STAT. § 38-30.5-109 (1997)
Connecticut	CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1995)	CONN. GEN. STAT. ANN. § 7-131b (West 1989 & Supp. 1997)
Delaware	DEL. CODE ANN. tit. 7, §§ 6901 to 6905 (1991 & Supp. 1996)	
District of Columbia	D.C. CODE ANN. §§ 45-2601 to -2605 (1996)	
Florida	FLA. STAT. ANN. § 704.06 (West Supp. 1998)	FLA. STAT. ANN. § 193.501 (West 1989 & Supp. 1997)
Georgia	GA. CODE ANN. §§ 44-10-1 to -8 (Supp. 1998)	GA. CODE ANN. § 44-10-5 (1982 & Supp. 1997)
Hawaii	HAW. REV. STAT. ANN. §§ 198-1 to -6 (Michie 1997 & Supp. 1997)	

Idaho	IDAHO CODE §§ 55-2101 to -2109 (1994)	IDAHO CODE § 55-2109 (1994)[1]
Indiana	IND. CODE ANN. §§ 32-5-2.6-1 to -7 (Michie 1995)	IND. CODE ANN. § 32-5-2.6-7 (Michie 1995)
Iowa	IOWA CODE ANN. §§ 457A.1 to 457A.8 (West 1997)	
Kansas	KAN. STAT. ANN. §§ 58-3810 to -3817 (1994)	
Kentucky	KY. REV. STAT. ANN. §§ 382.800 to .860 (Michie Supp. 1996)	
Maine	ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-B (West 1988)	ME. REV. STAT. ANN. tit. 36, § 701-A (West 1990 & Supp. 1997)
Maryland	MD. CODE ANN., REAL PROP. § 2-118 (1996)	MD. CODE ANN., TAX-PROP. § 8-219 (1994)
Massachusetts	MASS. ANN. LAWS ch. 184, §§ 31–33 (1996)	MASS. ANN. LAWS ch. 59, § 11 (1990)
Michigan	MICH. STAT ANN. §§ 13A.36101 to .36117 (Law Co-op. 1997)	MICH. STAT. ANN. § 13A.36105 (Law Co-op. 1997)
Minnesota	MINN. STAT. ANN. §§ 84C.01 to 84C.05 (West 1995)	MINN. STAT. ANN. § 273.117 (West 1989)
Mississippi	MISS. CODE ANN. §§ 89-19-1 to -15 (1991)	
Missouri	MO. ANN. STAT. §§ 57.870 to .910 (West 1998)	MO. ANN. STAT. § 67.895 (West 1998)
Montana	MONT. CODE ANN. §§ 76-6-201 to -211 (1997)	MONT. CODE ANN. § 76-6-208 (1997)
Nebraska	NEB. REV. STAT. §§ 76-2,111 to -2,118 (1997)	NEB. REV. STAT. § 76-2,116 (1997)
Nevada	NEV. REV. STAT. §§ 111.390 to .440 (Michie 1993)	

[1] Idaho conservation easement legislation states that "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." IDAHO CODE § 55-2109 (1994).

New Hampshire	N.H. REV. STAT. ANN. §§ 477:45 to :47 (1992)	N.H. REV. STAT. ANN. §§ 79-A:1 to :26 (1991 & Supp. 1997)
New Jersey	N.J. STAT. ANN. §§ 13:8B-1 to -9 (West 1991 & Supp. 1997)	N.J. STAT. ANN. § 13:8B-7 (West 1991)
New Mexico	N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie Supp. 1995)	
New York	N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1997)	
North Carolina	N.C. GEN. STAT. §§ 121-34 to -42 (1997)	N.C. GEN. STAT. § 121-40 (1997)
Ohio	OHIO REV. CODE ANN. §§ 5301.67 to .70 (Anderson 1989 & Supp. 1997)	OHIO REV. CODE ANN. §§ 5713.01, 5713.04 (Anderson 1996 & Supp. 1998)
Oregon	OR. REV. STAT. ANN. §§ 271.710 to .795 (1997)	OR. REV. STAT. ANN. § 271.785 (1997)
Pennsylvania	PA. STAT. ANN. tit. 32, §§ 5001–5013 (West 1997)	PA. STAT. ANN. tit. 32, § 5009 (West 1997)
Rhode Island	R.I. GEN. LAWS §§ 39-34-1 to -5 (1995)	
South Carolina	S.C. CODE ANN. §§ 27-8-10 to -80 (Law Co-op. Supp. 1997)	S.C. CODE ANN. § 27-8-70 (Law Co-op. Supp. 1997)
Tennessee	TENN. CODE ANN. §§ 66-9-301 to -309 (1993)	TENN. CODE ANN. § 66-9-308 (1993)
Texas	TEX. NAT. RES. CODE ANN. §§ 183.001 to .005 (West 1993 & Supp. 1998)	
Utah	UTAH CODE ANN. §§ 57-18-1 to -7 (1994)	
Vermont	VT. STAT. ANN. tit. 10, §§ 821–823 (1984 & Supp. 1997)	

Virginia	VA. CODE ANN. §§ 10.1-1009 to -1016 (Michie 1993)	VA. CODE ANN. § 10.1-1011 (Michie 1993)
Washington	WASH. REV. CODE ANN. §§ 84.34.210 to .250 (West 1994)	WASH. REV. CODE ANN. § 84.34.230 (West 1994)
West Virginia	W. VA. CODE §§ 20-12-1- to -8 (1996)	
Wisconsin	WIS. STAT. ANN. § 700.40 (West Supp. 1997)	WIS. STAT. ANN. § 70.32 (West 1989 & Supp. 1997).

APPENDIX B

MONT. CODE ANN. § 76-6-208. Taxation of property subject to conservation easement.

(1) Assessments made for taxation on property subject to a conservation easement either in perpetuity or for a term of years, where a public body or a qualifying private organization holds the conservation easement, shall be determined on the basis of the restricted purposes for which the property may be used. The minimum assessed value for land subject to an easement conveyed under this chapter may not be less than the actual assessed value of such land in calendar year 1973. Any land subject to such easement may not be classified into a class affording a lesser assessed valuation solely by reason of the creation of the easement. The value of the interest held by a public body or qualifying private organization shall be exempt from property taxation.

(2) Expiration of an easement granted for a term of years shall not result in a reassessment of the land for property tax purposes if the easement is renewed and the granting instrument reflecting the renewed easement is executed and properly filed not later than 15 days after the date of expiration.

MONT. CODE ANN. § 76-6-208 (1997).

VA. CODE ANN. § 10.1-1011. Taxation.

Where the easement by its terms is perpetual, neither the interest of the holder of a conservation easement nor a third-party right of enforcement of such an easement shall be subject to state or local taxation nor shall the owner of the fee be taxed for the interest of the holder of the easement. Land which is (i) subject to a perpetual conservation easement held pursuant to this chapter or the Open Space Land Act (§ 10.1-1700 et seq.), (ii) devoted to open-space use as defined in § 58.1-3230, and (iii) in any county, city or town which has provided for land use assessment and taxation of any class of land within its jurisdiction pursuant to § 58.1-3231 or § 58.1-3232, shall be assessed and taxed at the use value for open space, if the land otherwise qualifies for such assessment at the time the easement is dedicated. If an easement is in existence at the time the locality enacts land use assessment, the easement shall qualify for such assessment. Once the

land with the easement qualifies for land use assessment, it shall continue to qualify so long as the locality has land use assessment.

VA. CODE ANN. § 10.1-1011 (Michie 1993).

MO. ANN. STAT. § 67.895. Tax assessments, how affected.

After transfer and acquisition of any such interest pursuant to sections 67.870 to 67.910, all county and municipal assessors and taxing authorities, in determining the assessed valuation placed on such open space or area for purposes of taxation of the private ownership therein, shall take due account of and assess private property interests with due regard to the limitation of future use of the land.

MO. ANN. STAT. § 67.895 (West 1998).

IND. CODE ANN. § 32-5-2.6-7. Taxation of conservation easements.

For the purposes of [Indiana Code section] 6-1.1, real property subject to a conservation easement shall be assessed and taxed on a basis that reflects the easement.

IND. CODE ANN. § 32-5-2.6-7 (Michie 1995).