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An Agricultural Law Research Article

Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief

by

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LEGAL AUTHORITY FOR FEDERAL ACQUISITION OF CONSERVATION EASEMENTS TO PROVIDE AGRICULTURAL CREDIT RELIEF

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I. Introduction and Scope of the ALT Legal Study

The current economic crisis in American agriculture has created extensive pressures on the nation's two primary agricultural resources, its farmers and the land, as well as on other segments of the economy and society integrally tied to agriculture.[1] The present situation challenges policy makers, leaders and agriculturalists to develop and implement realistic and workable programs to address declining land values, dwindling numbers of farmers,

1. The effects of the agricultural crisis have been the subject of numerous studies and various articles. See, for example, the recent economic study conducted for the National Corn Growers Association predicting loan losses of $25 billion and federal costs of $21 billion over the next four years reported in Des Moines Register, July 23, 1985, at 1.

and a deteriorating and jeopardized farmland resource base.[2] Perhaps no more innovative proposal to this situation can be found than the Agricultural Land Trust[3] proposed by the Iowa Natural Heritage Foundation.[4] The goal of the proposal is straightforward: "To enable the federal government to purchase conservation easements as a means to restructure debt for financially endangered farmers and otherwise stabilize the agricultural economy."[5] In essence, the proposal envisions a program of federal acquisition of conservation easements from farmers who are experiencing financial difficulty. The money or credit relief offered by the federal government for the easement would be used by the farmer to restructure debt in such a way that the farm operation could remain viable. At the same time, this infusion of money would aid the general farm economy by reducing downward pressure on land markets and relieving financial difficulties in the agricultural finance sector. The conservation easement obtained by the government would inure to the public benefit and insure the promotion of various conservation goals, such as enhancement of soil conservation and reduction of erosion, preservation of prime agricultural land, and protection of fish and wildlife habitat and open spaces.[6]

Proponents of the proposal believe it is a realistic recognition that federal financial involvement in the current agricultural situation is inevitable in some form, either through direct credit relief or in after-the-fact costs associated with loan losses, FDIC bank closings, and other costs of social and economic disruption. The political choice offered by the proposal is therefore whether to use federal dollars with foresight in a directed manner to obtain agricultural credit relief *and* public conservation benefits, or whether to forego federal involvement in crafting a response to the problem and instead opt to deal with the aftermath of the crisis.

The ALT proposal is not a simple one, as it may require legislating new federal authority and redirecting federal funds along with active federal participation in the acquisition of real property interests. Matters such as these present significant yet solvable administrative challenges which will require dedicated efforts. In addition, the implementation of the ALT proposal

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2. Congress is presently debating the contents of the 1985 Farm Bill, which will be a major effort in attempting to improve farm economics. The debate has covered a number of ideas and approaches. *See generally* Hamilton, *The 1985 Farm Bill Debate and the Potential Impact on Federal Agricultural Programs*, 2 AG. L. UPDATE 3 (Apr. 85). The current crisis has led to a number of interesting proposals such as the one for a Federal Farm Credit Refinance Corporation.

3. Hereinafter cited as ALT.

4. *See* Sand, *Conservation Easements: A Credit Crisis Compromise*, 40 J. OF SOIL & WATER CON. 217 (Mar.-Apr. 1985) [hereinafter cited as Sand]; Des Moines Register, July 9, 1985, at 5s, col. 1.

5. *See* Iowa Natural Heritage Foundation position paper "Proposed Agricultural Land Trust," July 1, 1985, a copy of which is on file in the *Drake Law Review* office.

6. For a discussion of the concept of a conservation easement, see *infra* section II (D).

raises a number of significant legal questions that must be identified and resolved. Questions such as the legal authority for federal adoption of such a program; how to resolve possible conflicts with state law over the legal nature of the property interests obtained; how to implement the proposal; how to decide eligibility; as well as the taxation of program interests; must all be considered.

The purpose of this study is to identify and analyze in a thorough and concise manner the major legal issues suggested by consideration of the ALT proposal. It is hoped that this study can be used by policymakers who are considering the proposal and by those parties involved in drafting the legislation, to guide them in their decision-making process. The study begins with a discussion of the ALT proposal and how it would function to integrate agricultural credit relief with conservation goals. The extensive body of existing authority for federal involvement in acquisition of less than fee interests in real property is examined to determine any important precedents such experience offers for the ALT. From this review a theory is advanced that it may be possible to implement ALT under existing legislation. The study then moves to a discussion of the major legal issues presented by the ALT, such as those previously outlined. The issues and answers identified in this analysis are then utilized in the final section of the report in the form of considerations for how the ALT can best be drafted and implemented to build on existing legal precedent and avoid or minimize any possible legal questions.

II. The Agricultural Land Trust Proposal

To better understand the nature of the legal issues presented by the ALT idea it is first necessary to have a thorough understanding of the ALT proposal. While the ALT concept and the thinking of those parties responsible for it are still somewhat flexible, at this stage the basic premises of the program are established. The main elements to consider are: the general premise of usage of the conservation easement; the administration of program implementation as this relates to land selection, drafting and negotiation of easements; the operational measures for funding and enforcement; and the integration of conservation and credit relief regarding eligibility of individuals and land.

A. *The Premise of Conservation Easement Acquisition As a Form of Credit Relief*

The ALT is designed to be a voluntary program whereby both the federal government and individual farmers decide whether participation is warranted. The government's concerns would basically be twofold. One is the financial plight of the operator; for example, what is the amount of debt and nature of the debt obligation? A question determinative of such matters as who qualifies, or "deserves," relief under program goals. The second concern

is the land; is it of such a type, as to quality, location, usage and other factors, to render it suitable for a conservation easement which will yield substantial public benefits? From the farmer's perspective the major considerations are also twofold. The first, the economic aspect, is the current financial situation, which is such that the option of selling off a partial interest in the property is realistic; second, there is the practical concern of whether the farm can be operated economically within constraints of a conservation easement once it is granted. Perhaps the central factor that will determine the resolution of the main issues for both parties is the question of how much money is involved. The more money the farmer can obtain for the conservation easement, the more likely successful debt restructuring becomes, and the more palatable are the restrictions of the easement sale. The more the conservation easement costs the federal government, the less likely the acquisition becomes, and the more restrictive the easement is likely to be. Further, how much the government must spend for easements affects how extensive the total program can be.

From this it is clear that the central issues within the administration of the program will be selection of eligible parcels and negotiation of the terms of the conservation easement sale. As a result, the rules, regulations, and program guidelines for negotiation and valuation of transactions will be very important. But while this process may be involved, it clearly is feasible, as can be seen in the experiences of the several hundred state, local and private groups who currently are involved in the acquisition of conservation easements.[7] This illustrates a very significant feature of the ALT program that must be kept in mind, for both legal and practical reasons: the program is voluntary on the part of the landowner and the government. The decision to sell an easement to the government in exchange for money or credit relief is left up to the individual, just as the decision whether to buy an easement on a particular tract of land from a given farmer is left up to the government. The ALT is not a land use regulatory program structured under the guise of the police power, whereby the conduct of a landowner is restricted without any compensation and which as a result may be fraught with the political and legal problems such a program would entail. Instead it is a voluntary land acquisition program, much like those the government has undertaken for other conservation-like purposes, though perhaps more expansive, whereby landowners who want to and who are eligible can sell property interests to the federal government.

The parties who proposed the ALT clearly view federal involvement in terms of an investment. The investment is in natural resources which are protected pursuant to the conservation easements. The use of easements balances private and public interests in the agricultural sector: such use permits the property to remain privately owned, with private management and

7. *See* Sand, *supra* note 4, at 218.

appropriate agricultural production; at the same time, the conservation easement, which would be negotiated according to the characteristics of the land and the willingness of the owners to sell some of their rights, would provide potentially significant public benefits. The public benefits may include:

- protecting prime farmland for continuous production;
- purchasing cropping rights on marginal land for erosion control;
- protecting natural areas, wetlands and wildlife habitat;
- conserving water or protecting water quality; and
- acquiring public access for open space recreation.

The ALT also envisions an investment in human resources in that the main function of the program is to allow financially endangered farmers to remain on their land. The capital from the sale of easements would be used to bring loan payments up to date or to restructure debt for those farmers facing foreclosure. Participation by a farmer would require knowing approval and participation of the lender, if sale of the conservation easement involved mortgaged property. Participation of lenders would help to ensure that the positive effects of the program, such as stabilized land prices and decreased loan losses, can be dispersed within the agricultural sector. In addition, in many situations, for example with Farmers Home Administration borrowers, the government may be the party holding all or a substantial portion of the farm debt to be restructured, thereby expediting the participation process and allowing credit relief through obligation transfers rather than cash outlays.

B. *Administration of the ALT Program*

The unique nature of the program means that effective administration will be especially crucial in securing not only the smooth functioning of the program but also its success, both in the short term, regarding implementation of credit relief, and in the long term, regarding protection of public benefits inherent in conservation easements. The proposal calls for the program to be implemented using the existing structure and staff of the Agricultural Conservation Program. Under this cooperative USDA program the Soil Conservation Service (SCS) provides technical assistance to landowners, and the Agricultural Stabilization and Conservation Service (ASCS) administers funds for cost-sharing projects. Within the context of the ALT these two agencies could cooperatively share the responsibility for program implementation. For example, the negotiation and drafting of the conservation easement could be performed by the professional conservationists of the SCS, while the purchase, recording, and enforcement of the conservation easements could be handled by the ASCS. Appraisals could be made by professionals hired by either agency, or by independent appraisers. In addition, input and advice could be obtained from other federal agencies, such as FmHA as to debt restructuring, and from agencies such as the United States

Fish and Wildlife Service, the Army Corp of Engineers, the United States Forest Service, and the National Park Service, which are experienced in acquisition of less than fee interests, on subjects such as land selection, negotiation, and enforcement.

By using existing agencies which have good reputations among farmers with whom they deal, the implementation of ALT can be expedited. By utilizing other resources of the federal government for such matters as credit counseling and conservation easement selection and management, the ALT can benefit from the experience of these agencies and officials. In addition, the program can be drafted with a cooperative spirit so that the federal government can benefit by the efforts and experience of state, local and private groups involved in conservation easements.

A major element of implementing the ALT proposal will involve developing various administrative processes which would be entailed. A detailed discussion of these processes is beyond the scope of this paper, but the following listing of the primary steps demonstrates the magnitude of the proposal.

The Main Steps in ALT Administrative Process are:

1. Implementation and publication of program availability;
2. Contact from interested landowner;
3. Determination of landowner eligibility (a function of financial situation, size of loans, sources, lender participation, legal status);
4. Determination of land suitability for conservation easement;
5. Drafting of easement terms and valuation of property interest;
6. Negotiation of easement terms and price;
7. Formal agreement to easement transfer;
8. Recordation of easement;
9. Payment or other credit relief;
10. Supervision of compliance with easement terms and management;
11. Enforcement of easement requirements;
12. Modification, amendment, or repurchase of easement by landowner, if originally provided for.

The funding for the ALT acquisitions could come from a variety of sources, including new authorizations and appropriations, existing soil conservation funding, FmHA credit authorization, Commodity Credit Corporation funds, the resale of ALT easements to original grantors, or a combination of these sources, as well as others. The source of ALT funding will depend on a number of items, including the manner in which the program is drafted with regard to orientation, i.e., whether it emphasizes conservation or credit relief, and who is given responsibility for administrating the program. Ultimately, of course, the nature and source of funding will be a congressional determination based on the perceived need and priority for such a program.

C. *Integration of Conservation and Credit Relief*

The ALT attempts to combine two very important natural goals, agricultural conservation and credit relief for financially distressed farmers. While each objective can stand on its own merits, the marriage of the two offers an opportunity to maximize public benefits that may result from the expenditure of public money. At the same time this unique combination places a premium on devising sound procedures for integrating conservation and credit relief. As a result, the standards and guidelines used for the selection of both qualified land and qualified farmers will be crucial in determining the workability and success of the program. Of these two determinatives, the land eligibility process may be the easier in that the land represents an objective resource for which physical characteristics can be evaluated and for which the impact of various physical and cultural influences can largely be determined. In contrast, though it is possible to obtain a current picture of the financial health of a farm operation, variable economic, political and social forces, such as interest rates, the strength of the dollar, weather, commodity prices, lender attitudes, and land values, which directly determine the economic success of the farm operation, make characterization of the status of the farm operation much more transient. This means that the guidelines established concerning the various determinants, such as amount of indebtedness, sources of loans, underlying asset values, current legal status, and potentially successful debt restructuring, that would be considered in assessing the eligibility of a borrower to participate in ALT would become the very essence of the program. As such, the resolution of the basic questions as to who is eligible to participate, why, and for how much, or otherwise, just how credit relief is to be integrated with conservation will be central to the congressional consideration of the ALT.

D. *The Concept of the Conservation Easement and Its Suitability for the ALT*

To fully understand the concept of the ALT it is first necessary to have a comfortable understanding of what is meant by a "conservation easement," the operative provision of the proposal. Stated most simply, a conservation easement is an attempt to use the traditional common law property interest of an easement in a manner so as to forward conservation goals. In the case of ALT, these goals include the promotion of such things as soil conservation, preservation of soil resources and fertility, preservation of prime agricultural land and protection of wildlife habitat and open spaces. A common law easement is defined, in part, as "an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists."[8] Easements generally

8. RESTATEMENT OF PROPERTY § 450 (1944).

result from an agreement between a landowner (grantor) and the holder of the easement (grantee) whereby the landowner grants or sells the restriction or limited use of the land to the grantee, thus relinquishing the right to use the land in the manner agreed.[9]

There are a number of basic attributes of easements which are useful in categorizing and interpreting them. For example, easements can either be "appurtenant" or "in gross."[10] An appurtenant easement benefits a parcel of land, or the "dominant" estate owned by the holder of the easement, which is located adjacent to the "servient" estate owned by the grantor, which is burdened by the easement. An agreement by one landowner (grantor) not to build on his property so as to protect the view from a building on adjacent property owned by grantee/holder creates an appurtenant easement, with dominant and servient estates. With an easement in gross, there is no dominant estate because the holder of the easement has a bare interest in a servient estate, and owns no property to be benefited. If a party has an easement to drive across a piece of property but owns no property to be accessed, the easement is in gross. In addition, this easement would be characterized as affirmative because it entitles the holder to make use of the other party's land. In contrast, the easement in the first situation is an example of a negative easement, because it gives the holder a right to prevent the landowner from acting, building so as to block a view, rather than granting an affirmative right to make use of the property.

As relates to the ALT program, the easements contemplated would generally be negative easements in gross because they give the government the right to restrict the landowners use of their property for conservation reasons but do not benefit any adjacent land owned by the government. The conservation easements proposed in ALT are representative of a recent development in U.S. property law whereby the traditional common law tool of easements and other forms of less-than-fee interests in property (called such because they embody a property interest which is less than complete fee simple ownership) have been used to promote various societal goals such as historic preservation, protection of scenic views, and promotion of conservation values.[11] As will be discussed in the section on legal issues,[12] the common law in various states has traditionally taken a sometimes hostile attitude toward negative easements in gross such as those envisioned by ALT.[13]

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9. Zick, *Preservation Easements: The Legislative Framework*, NATIONAL TRUST FOR HISTORIC PRESERVATION — STATE LEGISLATION PROJECT 1-3 (1984) [hereinafter cited as Zick].

10. *See, e.g.*, RESTATEMENT OF PROPERTY §§ 453-54 (1944).

11. For two excellent articles discussing the legal implications of this development, see, e.g., Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 167 (1967) and Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540 (1979) [hereinafter cited as Netherton].

12. *See infra* section III and accompanying notes.

13. *See infra* section III (B)(1).

This common law hostility has led many states to pass statutes to address these concerns so that programs utilizing such easements can proceed.[14]

The development of these types of easements, here referred to as "conservation easements," as well as the adoption of state laws recognizing them, has been in large part the work of several hundred state and local governments and private groups, who are concerned with the protection or preservation of the various interests covered by the easements for the benefit of the public. Private organizations such as the National Trust for Historic Preservation, the Nature Conservancy, American Farmland Trust, Trust for Public Land, and the Iowa Natural Heritage Foundation have been actively involved in the negotiation and acquisition of conservation easements, just as have been a variety of state and local conservation and preservation agencies.[15]

Conservation easements offer a number of advantages that make their use particularly appropriate for a program such as ALT.[16] First, they can be used to obtain a variety of important public goals, such as historic preservation and agricultural conservation. They are very flexible, in that each easement can be drafted with the characteristics of a particular tract of land and the needs of the landowner in mind. The easements can be obtained through voluntary arm's length negotiation and bargaining and are thus less oppressive than regulatory restrictions or the use of eminent domain. Under an easement the ownership and management of the property stays in the hands of the private owner. Importantly, the easements are a cost effective method whereby limited federal conservation dollars can be used to acquire the maximum public benefit, much less expensively than full fee condemnation. The use of conservation easements allows for the restriction on the use of property to be established in a stable, readily understandable manner, through reliance on explicit language in the easement with reference to the applicable body of property law. Finally, the use of easements does not mean that the property is removed from local property tax rolls as may be the case with full fee acquisition by the federal government.[17]

The use of conservation easements also presents several disadvantages that must be considered. The implementation of a conservation easement acquisition program requires that someone be responsible for the supervision and enforcement of the easements. Supervision will require some method of periodically inspecting the property to insure compliance with the terms of the easement. Enforcement necessitates a procedure for initiat-

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14. *See* Zick, *supra* note 9; *see also infra* section III(B)(3).

15. For example, see *Heritage* (quarterly publication of Iowa Natural Heritage Foundation) which contains monthly reports concerning the acquisitions of easements and fee interests by the Foundation in their work to preserve Iowa's natural heritage.

16. *See generally* Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENVTL. L. 55, 67-70 (1985) [hereinafter cited as Atherton].

17. *See infra* section III(C)(2).

ing legal proceedings to enforce the terms of the agreement against the grantor or a successor in interest to the grantor. It is at the enforcement stage that various legal issues concerning the legality of the easement may be raised. The acquisition of conservation easements also requires the appraisal or valuation of the property interest involved, which because of the rather subjective, yet generally perpetual nature of the interests restricted, may be hard to price. For example, note the difficulty in valuing the present cost of agreeing never to build on a particular tract of land. This illustrates another feature of conservation easements which can be a disadvantage: they commonly are made perpetual in nature. While there often may be valid policy reasons for acquiring interests in perpetuity, for example, the public's interest in this value will not change over time, there are also legitimate concerns to be raised over locking property into certain fixed uses with no opportunity for change. This concern over the "deadhand" control of property is a primary justification for the common law's traditional hostility to negative easements in gross.[18] This concern also is reflected in common state marketable title statutes which act to extinguish stale use restrictions,[19] and in common law theories such as the recognition of changed circumstances to modify use restrictions. Concerns such as these can be mitigated by limiting the term of the easement, and/or including language in the easement to allow for later amendment or modification.

With this basic look at the concept of a conservation easement and how it relates to the ALT proposal, it is now appropriate to begin a consideration of the primary legal issues that are presented by such a program.

III. Major Legal Issues Affecting Consideration of Agricultural Land Trust Proposal

As noted above,[20] the use of conservation easements to forward significant public goals represents an innovative response to the current agricultural financial situation. In order to implement such an innovative program, a number of important legal issues must be addressed in order to consider what, if any, barriers they present to such passage and to glean whatever guidance might be offered to better draft the ALT program. The legal issues to be considered include: the constitutional authority for federal implementation of ALT; existing statutory precedent for federal involvement; issues relating to the interpretation of the nature of property interests to be obtained by the federal government, specifically, possible conflicts with state

18. *See infra* section III(C)(1).

19. *See, e.g.*, Iowa Code § 614.24 (1985), and Ryman, *The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations*, 19 Drake L. Rev. 56 (1969); *see also* Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232, 237 (Iowa), *cert. denied*, 423 U.S. 830 (1975) (application of Iowa marketable title statute extinguishes existing unrecorded reverter interest).

20. *See supra* section II(D) and accompanying note 11.

common law; and questions of income taxation of payments for ALT easements and the property taxation of such interests.

A. *The Constitutional and Legal Authority for Implementation of the ALT Proposal*

The first legal issue to be addressed focuses on the constitutionality of the federal government's implementation of ALT. This question is somewhat separate from the matter of statutory precedent for federal acquisition of less than fee interests for conservation-related purposes, discussed below,[21] in that the focus is on the government's legal authority to act in this situation as opposed to the practice of what has been done with other programs. While passage of the ALT proposal would indicate strong congressional support, federal legislation dealing with the protection and preservation of farmland such as ALT may still be challenged by parties affected by it. Such a group might include landowners whose easements would not be purchased or states which philosophically oppose federal acquisition of farmland.[22] Any challenge to such a federal undertaking would require inquiry on two main issues, the constitutional source of authority for the federal program and second, whether the federal action somehow violates any restrictions on federal authority.[23]

1. *Commerce Clause*

The constitutional basis for congressional passage of the ALT proposal, which combines the objectives of credit relief for the nation's agricultural sector and the promotion of soil conservation and agricultural land preservation, is found most directly in the commerce clause. The commerce clause provides that "The Congress shall have power . . . to regulate commerce . . . among the several states," and has a rich and powerful history of Supreme Court interpretation.[24] The clause has been interpreted by the Court to be a grant of plenary authority to the Congress,[25] which is "complete in itself, may be exercised to its utmost extent, and acknowledges no limita-

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21. *See infra* text accompanying notes 105-83.

22. For example, see the challenges to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (current version at 30 U.S.C. § 1201 (1982)), in *Hodel v. Indiana*, 452 U.S. 314 (1981), and *Hodel v. Mining and Reclamation Ass'n*, 452 U.S. 264 (1981).

23. For an excellent discussion of the *Hodel* decision and the broad subject of constitutional authority for federal involvement in agricultural land preservation programs, see Grossman, *Prime Farmland and the Surface Mining Control and Reclamation Act: Guidance for an Enhanced Federal Role in Farmland Preservation*, 33 DRAKE L. REV. 209, 251-81 (1984) [hereinafter cited as Grossman].

24. U.S. CONST. art. 1, § 18, cl. 3. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

25. National League of Cities v. Usery, 426 U.S. 833, 840 (1976).

tions other than those prescribed in the constitution."[26] Due to the judicial sanction given congressional exercises under the commerce clause, judicial review of state challenges to federal actions, which at the outset are entitled to a strong presumption of constitutionality, is very narrow, and challenges are generally unsuccessful. In a recent decision upholding the power of the federal government to regulate the reclamation of surface mined lands, even in the face of existing state regulatory schemes, the Court restated the applicable standard used to evaluate commerce clause issues:

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the assessed ends.[27]

The *Hodel* cases, dealing with the Surface Mining Reclamation Acts (SMCRA), are very significant in the context of any possible commerce clause challenge to ALT because the congressional policy under scrutiny was regulation of surface mining to protect and preserve agricultural land. The Court had no difficulty in determining that the mining of agricultural land affected interstate commerce in agricultural products, stating that: "In our view, Congress was entitled to find that the protection of prime farmland is a *federal* interest that may be addressed through Commerce Clause legislation."[28] The Court noted that the issue was not influenced by the volume of regulated activity moving in commerce but instead was " . . . whether Congress could naturally conclude that the regulated activity affect[ed] interstate commerce."[29] As to the second issue, the reasonable connection between the goals of the program and the method used, the Court also found such a nexus between restrictions on mining and preservation of farmland.[30]

The *Hodel* cases and the Court's restatement of current commerce clause analysis regarding protection of agricultural land is significant for the purposes of ALT. To begin, there is very little doubt that the twin purposes of ALT, conservation and protection of the economic viability of agricultural producers, are permissible congressional goals that can be achieved under the commerce clause, either singularly or jointly. The wealth of past and present federal legislative involvement of both issues, ranging from the Agricultural Conservation Act[31] to farm credit programs,[32] to the system of price

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26. Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 195.
27. Hodel v. Indiana, 452 U.S. 314, 323-24 (1981).
28. Hodel v. Indiana, 452 U.S. at 324 (emphasis added).
29. *Id.*
30. *Id.* at 327.
31. Ch. 85, 49 Stat. 163 (1935) (codified as amended at 16 U.S.C. §§ 590a-590q) (1982 & Supp. II 1984).
32. *E.g.*, Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1981-96 (1982 & Supp. II 1984).

support loans and deficiency payments,[33] all relate to these goals. Such programs evidence Congress' understanding that agriculture is very much part of interstate commerce. If there were any misgivings about the constitutionality of such federal actions, the Court's opinion in the *Hodel* cases should lay them to rest. In fact, one commentator has theorized that the opinions provide sound constitutional basis for broader federal involvement in the protection of farmland.[34] Second, the strength of the *Hodel* opinions goes beyond what is necessary for the purposes of ALT, since a system of federal regulation of local land use actions was at issue in those cases. While there is no federal police power as such, the commerce clause has provided a workable federal constitutional basis for forwarding goals of a general public welfare nature, such as those involved in *Hodel*. In the ALT situation, however, there is no federal regulation involved; rather the ALT program is based on the federal acquisition of less than fee interests in property on a voluntary basis. Thus the constitutional issue is not whether Congress can regulate local land use but whether the federal government has the power to buy property interests to forward important public goals. Thus the program envisioned in ALT is much less restrictive and intrusive than the one upheld in *Hodel*. This distinction, when added to the federal history of involvement in the agricultural sector, as well as the federal authority for and history of acquisition of real property interests for conservation purposes,[35] combine to offer substantial constitutional authority for federal involvement in the ALT program.

2. *Tenth Amendment*

The other area of constitutional inquiry required when considering adoption of the ALT proposal focuses on whether it somehow violates prohibitions on exercise of federal powers. A review of the Constitution indicates that the most likely basis for such a challenge would be the tenth amendment, or the states' rights clause.[36] The grounds for a tenth amendment challenge to ALT are rather limited, but the theory would probably be that the ALT envisions a form of federal land use control which intrudes on an area of responsibility traditionally left to the states. The lower federal courts in the SMCRA litigation adopted such a tenth amendment argument, holding that federal regulation of mining on prime farmland interfered with

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33. Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§ 590a-590h; Agricultural Act of 1949, 7 U.S.C. §§ 1421-49 (1982 & Supp. II 1984). *See generally* Hamilton, *Farmers Rights to Appeal ASCS Decisions Denying Farm Program Benefits*, 29 S. DAK. L. REV. 282 (1984).

34. Grossman, *supra* note 23, at 251-91.

35. *See infra* section III(A)(3).

36. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

the state's traditional governmental function of regulating land use.[37] However, the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Association*[38] reversed the lower courts in a detailed analysis and rejected the tenth amendment challenge to the SMCRA.[39] The lower courts had relied on the Court's *National League of Cities v. Usery*[40] opinion which prevented application of federal Fair Labor Standards Acts provisions to state and local employees.[41] In reversing, the Court noted the distinction between congressional regulation of private persons and businesses and regulation affecting the states as states. The tenth amendment does not prevent the regulation of individuals; instead such regulation is limited only by the requirement that "the means chosen . . . must be reasonably adopted to the end permitted by the Constitution."[42] In applying *National League of Cities* to the SMCRA situation, the Court identified the three requirements necessary to invalidate a congressional exercise of the commerce clause under the tenth amendment.[43] The Court noted that the first requirement, that the challenged legislation regulate the "states as states" was not satisfied, because in the case of SMCRA the regulations only affected private businesses and individuals. The law did not require the states to enforce the federal law, pay for it or participate, although like other valid federal laws it did establish a cooperative program whereby states could enact and administer their own programs within federal minimum standards.[44] The Court noted the wealth of federal precedent under the supremacy clause for congressional actions that may preempt state regulation of private activities affecting interstate commerce,[45] and that Congress could go so far as to prohibit all state regulation of an area, even an area of traditional exercise of state police power.[46] As a result, the Supreme Court upheld the federal involvement in protection of prime farmland under SMCRA and limited the lower courts' attempt to use *National League of Cities* to expand the tenth

37. Indiana v. Andrus, 501 F. Supp. 452, 461-68 (S.D. Ind. 1980).

38. 452 U.S. 264 (1981).

39. 452 U.S. at 283-93 (adopted by reference in Hodel v. Indiana, 452 U.S. 314, 330 (1981)).

40. 426 U.S. 833 (1976).

41. *Id.*

42. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964) (quoted in National League of Cities v. Usery, 426 U.S. at 840, and Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 286).

43. These requirements are that 1) the challenged legislation regulate the "states as states," 2) the federal legislation must "address matters that are indisputable 'attributes of state sovereignty' " and 3) the states' compliance with the law will directly impair the states' ability "to structure integral operations in areas of traditional governmental functions." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 287-88.

44. *Id.* at 289.

45. *Id.* at 290. *See also, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141-43 (1963).

46. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 291.

amendment as a control on federal commerce clause powers.[47]

The Court's resolution of the tenth amendment issue in connection with the SMCRA has certain applications in the context of a similar challenge to the ALT. First, however, it must be recognized that a tenth amendment challenge to the ALT starts from a point of weakness because the ALT does not involve a federal regulatory program such as in the SMCRA; instead, it relies on voluntary participation by individual landowners. With that in mind, the Court's analysis in the SMCRA cases is valuable because it illustrates the limited applicability of the tenth amendment and provides strong support for federal involvement in the preservation of agricultural productivity. Further, the Court's holding that the SMCRA does not regulate "states as states" is significant, as the ALT also would not regulate "states as states" but rather would encompass the actions of private individuals. As a result, the analysis in the SMCRA cases indicates that even if a tenth amendment challenge to the ALT could be formulated, it probably would fail.[48]

3. *Existing Federal Statutory Precedent Concerning the Acquisition of Less than Fee Interests*

In order for the ALT to achieve the dual purposes of agricultural credit relief and public enhancement of conservation protection, the act authorizes the federal government to obtain conservation easements in participating landowners' farm property.[49] As discussed above, the conservation easement has a recent but substantial and developing legal tradition in the United States.[50] To date, much of the activity involving conservation easements has been at the state and local level by public agencies or public interest groups. Significantly, though, the federal government has also had a long and substantial involvement in the acquisition of less than fee interests for conservation related purposes.[51]

The history of federal involvement in less than fee acquisitions of property is significant for several reasons. First, it provides precedential value for those who might feel that the program envisioned in the ALT is unique or

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47. The Court did not address whether land use regulations might not fit within the third test of *National League of Cities* as an "integral operation in areas of traditional governmental friction." *See* Grossman, *supra* note 23, at 246.

48. The possible application of the tenth amendment may be more significant as this relates to the theory that federal property interests in ALT easements should override possibly hostile state common law precedents. *See infra* section III(B)(2).

49. *See generally supra* section II(D), which discusses the scope and approach of the ALT.

50. *See supra* text accompanying notes 8-18.

51. *See, e.g.*, North Dakota v. United States, 460 U.S. 300 (1983) (dispute concerning federal acquisition of easements over hundreds of thousands of acres of land in connection with the Wetlands Act of 1961, 16 U.S.C.A. § 715 K-5, Pub. L. No. 87-383, 75 Stat. 813 and the Migratory Bird Conservation Act, 16 U.S.C. § 715d (1982, as amended)).

otherwise without legal predecessor. Second, the federal government's activities and experience under other programs provide guidance on matters such as proper administration of the program and identifying legal questions that might arise.[52] The variety of federal programs involving such acquisitions range from those designed to protect scenic easements adjacent to federal highways[53] and trails, to conservation easements to protect the habitat of migratory waterfowl,[54] to existing authority for the Secretary of Agriculture to acquire easements to forward U.S. soil conservation goals.[55] An extensive listing of the numerous federal laws authorizing the acquisitions of such interests is set out below.[56]

In order to perform the multitude of tasks which Congress deems necessary, the federal government, through its officials and employees, is often authorized to acquire such real property or property interests as are required for the goals of the program. For example, the law establishing the formation and administration of the National Forest System provides: "The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission."[57] It is clearly established that the federal government has the power to acquire real property in the states, with or without state consent, and even in the face of a prohibitory state statute.[58] When the federal government is authorized by statute to "acquire" property, the courts have interpreted the word "acquire" to include the taking of land by condemnation and the payment of just compensation.[59] While some federal land programs refer to the acquisition of property, others are more detailed, for example authorizing the government "to acquire lands, or rights and interests therein, by purchase, gift, condemnation, or otherwise, whenever necessary for the purposes of this chapter."[60]

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52. *See, e.g.*, Kiernat v. County of Chisago, 564 F. Supp. 1089 (D. Minn. 1983) (issue of applicability of local zoning ordinances to land covered by a scenic easement given the federal government under Wild and Scenic Rivers Program).

53. 16 U.S.C. §§ 460, 460a-3 (1982).

54. 16 U.S.C. § 715a-d (1982).

55. 16 U.S.C. § 590a(4) (1982).

56. *See infra* Table A.

57. 16 U.S.C. § 516 (1982).

58. *See, e.g.*, Paul v. United States, 371 U.S. 245, 264 (1963) and Kohl v. United States, 91 U.S. 367, 371 (1875).

59. *See, e.g.*, United States v. Graham & Irvine, 250 F.2d 499 (D. Va. 1917) (interpreting National Forest program authorization) and United States v. 365 Acres of Land, 428 F.2d 459 (4th Cir. 1970) (interpreting Blue Ridge Parkway authorization). In both cases, the courts relied on 40 U.S.C. § 257 (1888) the general authority for governmental procurement of real estate, to hold that if a statute authorizes the "acquisition" of property for public uses, the government is authorized to use condemnation "whenever it is necessary or advantageous to do so." United States v. 365 Acres of Land, 428 F.2d at 460.

60. 16 U.S.C. § 590a(4) (1935) (Secretary of Agriculture's general authority to establish a national soil conservation program).

Courts have held that when the government is authorized to "acquire lands or interests in land," this authority includes the power to condemn a less than fee interest such as a scenic easement in connection with the Wild and Scenic Rivers Program.[61] Likewise the Secretary of Interior's authorization under the Migratory Bird Conservation Act,[62] to acquire "small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto"[63] has been held to authorize the acquisition of easements designed to preserve waterfowl production areas.[64] These easements are a classic example of a conservation easement.

The value of this authority as it relates to the establishment of federal conservation easement acquisition program under ALT is clear. First, there is extensive federal precedent for the acquisition of these types of property interests. Second, because the authority for the acquisition of such interests and the exact nature of less-than-fee interests acquired will be provided for by the statute and in the instrument representing the interests, questions of authorization and interpretation are reduced to a minimum if not eliminated. In summary, rather than the question being one of whether the federal government can legally implement such a program, the question is simply whether the federal government would want to do so; once this policy question is answered affirmatively the precedent and legal authority for federal involvement is clear.

4. *Illustrations of Federal Involvement Through Land and Water Conservation Fund-Related Litigation*

A good example of federal involvement in the acquisition of interests in real property for conservation-related purposes can be found in the Land and Water Conservation Fund Act of 1965.[65] The program is designed to provide a revolving fund of federal money to be used:

> to assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations and visitors who are lawfully present within the boundaries of the United States of America such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisi-

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61. *See, e.g.*, United States v. Hanten, 500 F. Supp. 188 (D. Ore. 1980) (interpreting 16 U.S.C. § 1277(a) of the Wild and Scenic River Act), and United States v. 637.84 Acres of Land, 524 F. Supp. 688 (W.D. Mo. 1981).

62. 16 U.S.C. § 715 (1929).

63. 16 U.S.C. § 718d(c) (1934).

64. United States v. Albrecht, 364 F. Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).

65. 16 U.S.C. § 4601(4)-(11).

> tion, and development of needed land and water areas and facilities and (2) providing funds for the Federal acquisition and development of certain lands and other areas.[66]

Under this program, the federal government has acquired property and interests in property for such uses as expansion of national parks and additional outdoor recreation programs.[67] The program also provides funds to states to be used in furthering program goals.[68] The act specifically provides for the acquisition of "interests in land" which allows money to be used for the acquisition of conservation easements by either federal or state authorities.[69]

A recent court case illustrates certain features of the federal-state relation as concerns using these funds for conservation easement acquisition as well as the type of issues that can stem from use of conservation easements in general. In *Friends of Shawangunks, Inc. v. Clark*,[70] a group of environmentalists and concerned landowners were suing the Secretary of Interior for tacitly approving an amendment to a conservation easement obtained by a state with federal dollars.[71] The decision was part of the extensive litigation revolving around the Marriott Corporation's plans to develop a hotel-golf course complex on land in the Palisades Park area of New York.[72] The corporation had acquired land that included a lake and an existing golf course, and was planning on expanding the golf facilities.[73] Part of the land in question, however, was covered by a conservation easement that clearly restricted this development.[74] The corporation had negotiated with officials holding the easement, the Palisades Interstate Park Commission, and had reached an agreement whereby other lands would be restricted for public benefit in exchange for amending the conservation easement to allow an amended development.[75] The federal involvement in the case came in two ways: first, the easement was acquired with federal money; second, the law required that: "No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses."[76]

The Secretary had taken the attitude that because there was no public access to the easement land there was no "conversion," and in fact the nego-

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66. *Id.* at § 4601(4).
67. 16 U.S.C. § 4601(7) (1985 Supp.).
68. *Id.* at § 4601(7), (8).
69. *Id.* at § 4601(8)(a).
70. 754 F.2d 446 (2d Cir. 1985).
71. *Id.* at 449.
72. *Id.* at 448.
73. *Id.*
74. *Id.*
75. *Id.* at 448-49.
76. 16 U.S.C. § 4601(8)(f)(3) (1982).

tiated amendment to the easement led to increased public use.[77] The citizen-plaintiffs challenged this theory, arguing there was a conversion and before it could be approved the Secretary had to consider various alternatives required by federal law.[78] A federal district court upheld the government's position,[79] but on appeal the Second Circuit Court of Appeals reversed.[80] The court first noted that clearly this easement provided for "public outdoor recreation uses" even if no physical presence was possible, because the open space and scenic vistas of the easement fit within the court's view of outdoor recreation.[81] Further, the court deemed it unquestionable that the conversion of the area from an unspoiled area for public enjoyment to a private golf course was a "conversion" within the terms of the statute.[82] As a result, the court prohibited an amendment to the easement until the Secretary had gone through the process of considering alternatives to the conversion.[83] The case illustrates both federal involvement in the acquisition or funding the acquisition of conservation easements and the statutory responsibilities that can be created as to protecting public interests for which the easements were obtained. The case also illustrates the difficulties that can arise in attempting to amend conservation easements, and demonstrates the need to provide specific statutory authority for such amendment, if contemplated. As such, this case, and the statute it interprets, are good examples of federal involvement in a program similar to that envisioned under the ALT.

5. *Implementing ALT Goals Under Existing Agricultural Laws*

It is evident from the preceding discussion that there exists extensive statutory precedent for federal involvement in the acquisition of less than fee interests, which serves as a foundation for the adoption of ALT. More importantly though, a strong argument can be made that the goals of the ALT could be substantially implemented by the Secretary of Agriculture under existing authorities, with little or no additional statutory authorization required. Under this theory, all that would be required to implement the ALT is: 1) congressional encouragement of such action[84] and/or 2) will-

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77. Friends of Shawungunks, Inc. v. Clark, 754 F.2d 446, 449.

78. *Id.* at 451-52.

79. Friends of Shawungunks, Inc. v. Clark, 585 F.Supp. 195 (N.D.N.Y. 1984), *aff'd*, 754 F.2d 446 (2d Cir. 1985).

80. Friends of Shawungunks, Inc. v. Clark, 754 F.2d at 446.

81. *Id.* at 449.

82. *Id.* at 451.

83. 754 F.2d at 452.

84. The following is an example of possible statutory language concerning the Secretary's implementation of ALT goals using existing statutory authority:

> Sec. 1 To assist in the relief of current agricultural credit problems and to enhance U.S. soil conservation efforts, the Secretary is encouraged to utilize the existing au-

ingness on the part of the Secretary of Agriculture to support such a program. The argument supporting such an approach is based on three basic statutory provisions: 1) 16 U.S.C. section 590a, which sets out the Secretary's general authority in regards to national soil conservation policy; 2) 7 U.S.C. section 1985, which concerns the Secretary's servicing of FmHA loans; and 3) 16 U.S.C. section 1501, which authorizes the acquisition of perpetual easements under the Rural Environmental Conservation Program.

a. *Soil Conservation Authority*

While federal policies and programs concerning soil conservation are found in a variety of statutes,[85] the most important provisions of federal law are 16 U.S.C. section 590a, which sets out the Secretary's powers in connection with the implementation of soil conservation programs, and 16 U.S.C. section 590g(a), which establishes the policies and purposes of the Soil Conservation and Domestic Allotment Program. Section 590a provides specifically that:

> The Secretary of Agriculture, from now on, shall coordinate and direct all activities with relation to soil erosion and in order to effectuate this policy is authorized, from time to time —
>
> . . . .
>
> (4) To acquire lands, or rights or interests therein, by purchase, gift, condemnation, or otherwise, whenever necessary for the purposes of this chapter.[86]

This language explicitly authorizes the acquisitions of "interests" such as conservation easements[87] for conservation purposes and provides that the acquisition can be done by "purchase" or otherwise,[88] which would include the type of negotiated exchange for debt reduction contemplated under ALT. Further authorization for the Secretary's acquisition of conservation easements in exchange for credit relief can be found in 16 U.S.C. section 590c, which provides that:

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thority of 16 U.S.C. §§ 590a(4) and 590c(2) of the Soil Conservation and Domestic Allotment Act, to implement a nationwide program for the federal acquisition of conservation easements, on a voluntary basis, on real property which the Secretary determines to be suitable for the program, which is owned by or secures the indebtedness of farmer-borrowers who the Secretary determines may be in danger of losing their land as a result of the current agricultural financial crisis. In implementing this program, the Secretary shall make use of existing authority under 7 U.S.C. §§ 1981 and 1985 of the Consolidated Farm and Rural Development Act, to make such program available to qualified Farmers Home Administration borrowers.

85. *See, e.g.*, 16 U.S.C. §§ 1501-1510 (1982) (Rural Environment Conservation Program).

86. 16 U.S.C. § 590a (1982).

87. In *United States v. 637.84 Acres of Land*, 524 F. Supp. 688 (W.D. Mo. 1981), the court interpreted the phrase "[t]o acquire land or interests in land" to include a "scenic easement" under 16 U.S.C. § 1277, the Wild & Scenic Rivers Program.

88. 16 U.S.C. § 590a(4) (1982).

> As a condition to the extending of any benefits under this Chapter to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of this Chapter, require —
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> . . . .
>
> (2) Agreements or covenants as to the permanent use of such land.[89]

The policies to be advanced by the Secretary's actions are set out in section 590g(a) and include:

> 1) preservation and improvement of soil fertility; 2) promotion of the economic use and conservation of land; 3) diminution of exploitation and wasteful and unscientific use of national soil resources; 4) protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control; 5) [dealing with the establishment of price support and income assistance policies to improve agricultural incomes]; and 6) prevention and abatement of agricultural-related pollution.[90]

These policies are in many ways the same as those envisioned by the ALT.

To summarize the theory, the Secretary has the authority to acquire less than fee interests in the promotion of U.S. soil conservation policy goals. In addition, the granting of soil conservation benefits can be based on the conditioning or restriction of property rights. Therefore the Secretary could implement the goals of the ALT by:

> 1) using federal conservation dollars to acquire conservation easements under sections 590a and 590c(2);
> 2) the federal dollars spent could be made available to all types of borrowers, including those from government sources as well as private sources; and
> 3) the government's acquisition could be by outright purchase or "otherwise," which would include such things as a negotiated "write down" of a borrower's indebtedness to the government.

b. *Farmers Home Administration Loans*

In addition to the Secretary's general authority to implement the ALT under the guise of soil conservation policy, an additional but independent argument can be made that the Secretary has existing authority to implement such a program in connection with Farmers Home Administration borrowers. This theory is significant for a number of reasons. It offers a separate basis for approaching ALT goals. More importantly it relates to FmHA borrowers, who as a group have experienced more serious economic difficulties than other borrowers. Third, it concerns existing federal financial obli-

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89. 16 U.S.C. § 590c (1982).
90. 16 U.S.C. § 590g(a) (1982).

gations and allows the possible acquisition of property interests through debt relief rather than provision of new capital. This theory is based on two statutory provisions: 1) 7 U.S.C. section 1981, which authorizes the Secretary to compromise or adjust borrower's debts; and 2) 7 U.S.C. section 2985, which authorizes the Secretary to acquire such property so as to protect the government's security in the underlying debts. Section 1981 provides that the Secretary and the Administrator of FmHA are empowered to: "compromise, adjust, or reduce claims, and adjust and modify the term of mortgages, leases, contracts, and agreements entered into or administered by the Farmer's Home Administration under any of its programs as circumstances may require . . . ."[91] This language appears to authorize the negotiated reduction of the amount of a borrower's indebtedness, such as might be done if the Secretary was acquiring from a borrower a conservation easement under ALT. In addition, section 1987 provides that: "The Secretary may provide voluntary debt adjustment assistance between farmers and their creditors and may cooperate with State, territorial, and local agencies and communities engaged in such debt adjustment, and may give credit counseling."[92] This provision appears to authorize both adjustment of debt between FmHA and the borrower and involvement by the Secretary in the negotiation of debt relief with other creditors when the borrower has multiple creditors as is often the case.

The second main basis for this theory is found in section 1985, which states that:

> (a) The Secretary is authorized and empowered to make advances, without regard to any loan or total indebtedness limitation, to preserve and protect the security for or the lien or priority of the lien securing any loan or other indebtedness owing to, insured by, or acquired by the Secretary under this title or under any other programs administered by the Farmers Home Administration; *to bid for and purchase at any execution, foreclosure, or other sale or otherwise to acquire property upon which the United States has a lien by reason of a judgment or execution arising from, or which is pledged, mortgaged, conveyed, attached, or levied upon to secure the payment of, any such indebtedness whether or not such property is subject to other liens, to accept title to any property so purchased or acquired*; and to sell, manage, or otherwise dispose of such property as hereinafter provided.[93]

Under this language the Secretary is authorized to protect the government's interest in real property on which it holds a lien. In so doing, the Secretary is authorized to make advances to FmHA borrowers or to "acquire

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91. 7 U.S.C. § 1981(d) (1982). This ability to compromise or adjust debt is restricted by a number of procedural requirements, but these do not substantially reduce the availability of this relief.

92. 7 U.S.C. § 1987 (1982).

93. 16 U.S.C. § 1985(a) (1982) (emphasis added).

property . . . which is pledged, mortgaged, conveyed, or attached . . . and to accept title to property so purchased or acquired."[94] This language seems to mesh very directly with the goals of the ALT. It appears that this section would authorize the Secretary to "acquire" a "conservation easement" property interest on land used by a borrower to secure an FmHA loan. The acquisition of the conservation interest would protect the government's interest in the property from a conservation standpoint, but additionally would protect the government's security in the payment of the remainder of the indebtedness by restructuring or adjusting the borrower's debt obligation. In other words, the borrower would "sell" to the Secretary a conservation easement on FmHA-secured property in exchange for debt relief, which would advance the Secretary's attempt to secure the government's interest in the property. When this section is read in connection with the Secretary's general authority to adjust or compromise indebtedness as discussed above, the strength of the theory is buttressed.

There are several minor questions concerning the use of section 1985 in connection with conservation easement acquisition that must be considered. First, section 1985 uses the language "acquire property"[95] as opposed to the broader "or interests in property." While conservation easements would clearly have been covered if the latter language was used, it is not unreasonable to argue that the power to acquire property includes by definition the right to include less than fee interests.[96] A second problem concerns the language in section 1985 concerning the Secretary's management and disposal of property acquired under section 1985(a). It appears the purpose of these sections is to require the Secretary to dispose of acquired property, first by making it available to FmHA qualified borrowers and ultimately for general sale. The law provides specifically that when land is disposed of by the Secretary that the conveyance "shall include all of the interest of the United States, including mineral rights."[97] Thus the law would prevent the Secretary from first acquiring property in full fee and then stripping a conservation easement from it. These sections do not necessarily affect the actions of the Secretary in voluntarily acquiring a conservation easement from a financially troubled borrower, though, if this action does not include the Secretary's "disposal" of the property. Support for the theory that the acquisition of a conservation easement under section 1985(a) does not necessarily require a disposal can be found in section 1985(b), which provides: "Real

94. *Id.*

95. *Id.*

96. *See supra* note 71. The language of 7 U.S.C. § 1985 (1982) would indicate that the property interest anticipated to be acquired by the Secretary would be a full fee interest. *See, e.g.*, § 1985(b) (leasing and operating the property) and § 1985(c) (disposal of the property). However, an argument can be made that the Secretary has the discretion to decide the nature of the "property" that he must acquire to forward U.S. goals.

97. 7 U.S.C. § 1985(c) (1982).

property administered under the provisions of this title may be operated or leased by the Secretary for such period or periods as the Secretary may deem necessary to protect the Government's investment therein."[98]

Clearly this language gives the Secretary the discretion to hold the acquired property indefinitely, if that is required to protect the government's investment, as would be the case with an ALT conservation easement.

To summarize the theory, the Secretary is empowered to act to protect government interests in land used to secure FmHA debts. This power includes the ability to acquire "real property." In addition, the Secretary has the authority to adjust FmHA debt within certain guidelines.[99] In this way, the Secretary could implement a program of voluntary acquisition of conservation easements on land used to secure FmHA debts, as a form of debt adjustment relief to qualified borrowers.

c. *Rural Environmental Conservation Program*

In addition to these two statutory arguments a third law, the Rural Environmental Conservation Program (RECP),[100] provides direct authority for the Secretary to obtain ALT easements. This program authorizes the use of multiyear contracts with producers based on conservation plans to promote the national soil conservation goals set out in 16 U.S.C. section 590g(a).[101] Under this program, the Secretary is specifically authorized to "purchase perpetual easements to promote said purposes of this [chapter], including the sound use and management of flood plains, shore lands, and aquatic areas of the Nation."[102] This language would appear to directly authorize the acquisition of ALT conservation easements. The only concern over reliance on this authority concerns the continued viability or status of the RECP. While the law is on the books, it is neither certain that the USDA has utilized the law in recent years, nor even that the program has been funded. The Code of Federal Regulations for conservation programs contains no provisions relating to this program.[103] Therefore, in order for Congress to utilize the basic language of the RECP, it would appear that new life, either in the form of money or language directing the Secretary to make use of the law, would be needed.

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98. 7 U.S.C. § 1985(b) (1982).

99. All of the provisions concerning debt relief, etc. are further expanded in FmHA rules and regulations; *see, e.g.*, 7 C.F.R. § 1861 and § 1871.

100. 16 U.S.C. §§ 1501-1510 (1982).

101. *See supra* text accompanying notes 70-75.

102. 16 U.S.C. § 1501 (1982).

103. 7 C.F.R. § 701 (1986).

B. *Interpreting and Enforcing Property Interests Acquired Under ALT*

1. *Common Law Hostility Towards Property Interests such as Conservation Easement*

In order for the public goals envisioned in the ALT to be achieved, the land use restrictions bargained for in the acquisition of conservation easements must be enforceable in both the present and the future against whoever owns the property. The ALT program is based on the use of conservation easements because this form of less-than-fee acquisition offers the most flexible and effective method of transforming the conservation goals of ALT into permanent restrictions.[104] But while the legal understanding and acceptance of the concept of conservation easements has increased greatly in recent decades,[105] there remains a significant common law hostility towards such less-than-fee interests which are classified as negative restrictions in gross.[106] This hostility is reflected in a diversity of legal precedents among the states on issues such as transferability and enforceability of such interests.[107] Because these issues are of crucial importance to the sound structure and implementation of the ALT, it is important to consider the nature of this legal question in greater detail. Further, this issue — the possible hostility of state common law to ALT conservation issues — represents the most significant legal issue confronting the adoption of ALT, the resolution of which may require consideration of several different policy alternatives which in turn may affect the manner in which the ALT proposal is drafted and presented.

As was discussed above, a conservation easement as envisioned in ALT is a less-than-fee interest in the property of a landowner, whereby the government obtains a promise that the owner's use of the land will be controlled in certain explicit ways. At common law, this type of easement is categorized as negative and in gross, i.e., it restricts the actions of the fee holder and the benefit of this burden does not run to any property, or dominant estate, owned by the holder, in this case the government.

As the common law of property developed, first in England, and then in the United States, a traditional hostility to negative interests in gross developed.[108] A number of factors contributed to this development, distinguisha-

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104. Other possible less-than-fee interests, e.g., equitable servitudes and restrictive covenants, are not as versatile in their applicability nor in their legal suitability as easements. *See* Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVT'L AFF. L. REV. 105, 111-13 (1983) [hereinafter cited as Madden]; *see also* Netherton, *supra* note 11, at 545-53.

105. *See generally supra* text accompanying notes 8-21.

106. *See, e.g.*, Madden, *supra* note 104.

107. *See, e.g.*, Netherton *supra* note 11, at 545-50.

108. For a discussion of the English common law development see Netherton, *supra* note 11, at 543-45, who writes:

[T]hese predispositions against the running of easements and covenants were part of

ble with the treatment generally accorded appurtenant easements.[109] Among the basic justifications supporting this development were concerns that interests in gross without a "profit" would limit the development of property; difficulty in discover interests would cloud land titles; and allowing such interests to run in perpetuity would be dead hand control of land use.[110] The significance of the common law hostility is that it goes to the very heart of the main reason to acquire such an interest — certainty of land use. The result of this hostility is that in some jurisdictions such interests may or may not be assignable or transferable, affecting such basic issues as the holder's ability to enforce the restriction against the grantor's successor in interest.[111]

Because of this, the current body of jurisprudence in the area of legal recognition of easements in gross is best said to be diverse and confusing.[112] To begin, the restriction can be enforced between the original parties to the agreement, but what happens when the original grantor has died or sold the property to a successive interest is unclear. On the one hand, authorities such as the Restatement of Property support the idea that the burden of an easement in gross binds successive holders of the servient estate for the benefit of the original holder for as long as the successive holder has the same estate or interest held by the promisor at the time the easement was created.[113] Further, these authorities hold that the benefit of the easement may be assignable if the terms of the easement so provide.[114] The opposing view is that an easement in gross is a right personal to the one who made it and cannot be assigned or even possibly transferred. The case law of the various states is very divided on questions of easements in gross as a consequence. For example, in his seminal study, Netherton[115] found that twelve states would not recognize the assignability of easements in gross,[116] and that dicta in four more states supported nonassignability.[117] In five states such interests were assignable by judicial opinion[118] and in six other states, statutes

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the common law baggage that British colonists brought to America in the seventeenth and eighteenth centuries; and they were reflected in the warnings of the nineteenth century English judges that "it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner." *Id.* at 544.

109. *Id.* at 544.

110. *See id.*; *see also* 3 POWELL, REAL PROPERTY § 405 (1975).

111. *See* Madden, *supra* note 104, at 119.

112. *See* Netherton, *supra* note 11, at 549 ("There is general agreement that such diversity perpetuates a confusing and unsatisfactory situation.").

113. RESTATEMENT OF PROPERTY, §§ 491-92 (1944).

114. *Id.*

115. Netherton, *supra* note 11, at 545-47; *see also* Madden *supra* note 104, at 117.

116. The states are Arkansas, Idaho, Illinois, Maine, Maryland, Michigan, Missouri, Montana, North Carolina, Ohio, Rhode Island and South Carolina.

117. Connecticut, Indiana, Minnesota and Utah.

118. These states are Iowa, Massachusetts, Vermont, Virginia and Wisconsin. An example

supported assignability.[119] In another nine states the holdings were in conflict.[120] Many commentators have reflected on this diverse legal situation and recommended actions and theories which would both add greater uniformity to the condition of the law and provide greater legal support for the use of conservation easements.[121] Until such time as these changes are realized, this diversity will continue to raise questions about the assignability and transferability of conservation easements such as those contemplated in the ALT program. The possible effects of state law consequently must be factored into ALT consideration.

It is important to consider specifically what the effect of current attitudes towards conservation easements on the ALT program might be. The legal status of the conservation easement is most significant in terms of enforceability. As a starting point there would appear to be little difficulty in the government's enforcing the terms of the easement against the party granting it. But if the property was sold, or if the grantor died or otherwise transferred the property to another, then the variations among state laws might come into play. It is important to note that the introduction of the legal uncertainty as to enforceability comes at the very time when enforceability is most important, when the property has passed to another who has received none of the direct benefits of creating the easement, and who may not share the conservation "spirit" or the understanding of the agreement which the grantor had. Still, it is at this point that enforceability might be determined by reference to state law. In states that are judicially receptive to negative easements in gross this may not present a problem, especially in light of any explicit language in the instrument granting the easement. In addition, the fact that the holder is a public body may be an important

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of a significant judicial opinion in the development and recognition of this type of easement is *Kamrowski v. Wisconsin*, 142 N.W.2d 793 (Wis. 1966) (recognized scenic easements as an interest that could be condemned by the state).

119. Netherton, *supra* note 11, at 545-47.

120. These jurisdictions are California, Georgia, Kentucky, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and Texas.

121. *See* 3 POWELL, REAL PROPERTY § 404[2] (1975); Netherton, *supra* note 11, at 553-57; and Madden, *supra* note 104, at 119-22. Powell noted that:

> Over the past several decades . . . the case law [concerning easements] has been marking time, in that the same topics have been litigated for generations. In the coming decades, however, substantial legal questions remain to be answered and new techniques fashioned . . . . The coming of age of cluster housing developments, with their maximization of open lands, as well as the condemnation of scenic easements by public authorities, will also prove a fertile source of new approaches. Esthetic considerations will certainly move to the forefront. Finally, questions concerning easements . . . will continue to challenge the ingenuity of the judiciary, as an attempt is made to achieve sensible land use within the confines of not overly flexible rules of traditional property law. In summary, it may be anticipated that the next decade will witness long overdue progress in the field of easements, perhaps by way of federal, state, and local legislation.

3 POWELL, REAL PROPERTY § 404[2] (1975).

consideration.[122] But in those states where the judicial climate is hostile to these interests, or remains uncertain, the ability of the government to enforce the interest may be in doubt, even in light of explicit language and governmental involvement.[123] As a result, the long term protection of ALT goals may be jeopardized, not by the federal government's inaction, but by the law of states and the unwillingness of courts to enforce government restrictions against present landowners. The serious and significant legal and political problems that such uncertainty would create for the ALT proposal are apparent. Simply put, if the government can not be sure that it can enforce the interests it wants to obtain, it makes little sense for politicians to support funding such a program.

But the possible uncertainty of state law to the conservation easement contemplated in ALT does not mean the program should not be considered. First, state law touching on the negative easement in gross is not uniform. Further, some commentators believe the law may be changing. Also, none of the hostile common law cases have involved a conservation easement held by the federal government. Fourth, it is possible that the reasons for common law hostility to negative easements in gross have largely been addressed by developments such as improved recordation requirements, present in most states today,[124] and by a substantial change in public attitudes in support of conservation and environmental goals. Finally, possible common law hostility to ALT easements is by no means fatal to serious consideration of the program, since there are two alternative legal approaches to resolving the possible property law questions raised, each of which presents a different but substantial legal foundation for the sound implementation of ALT. These theories, the recognition of federal property interests in ALT conservation easements and the adoption of state conservation easement statutes, are the next subjects of discussion.

2. *Federal Common Law of Real Property Controls Interpretation of Federally Acquired Conservation Easements*

The preceding discussion indicates that the easement in gross nature of the property interests acquired pursuant to the ALT creates the possibility of state common law decisions that would be inhibitive to the long-term conservation goals of the program. It is not clear, though, that in a subsequent legal dispute over the enforceability of a conservation easement that state common law necessarily would be the applicable law, especially if this law was hostile to the interests of the program. This is so because a series of federal court and U.S. Supreme Court decisions provides a solid and perva-

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122. Madden, *supra* note 104, at 120.

123. *See, e.g.*, Atherton, *supra* note 16 (discussing use of conservation easements in light of Utah judicial holdings).

124. Madden, *supra* note 104, at 121-22.

sive basis for upholding the federal government's interest.[125]

To begin, one must start with the well-grounded rule of law that the federal government has the power to acquire state lands either by purchase or eminent domain.[126] This right exists without the consent of the state[127] and in the face of any prohibitory state statute.[128] Federal authority to acquire conservation easements would be expressly stated in the language of the ALT, and buttressed by supporting language and legislative history establishing the important federal basis for the program.[129] The act would create a federal land acquisition program involving less-than-fee interests for conservation purposes, and would be analogous to many other federal conservation programs under which such interests are obtained,[130] as with the Wild and Scenic Rivers Act,[131] or the Scenic Highway Program.[132] As a result of the strong federal purpose involved, the precedent for federal involvement in soil conservation, and the nonregulatory nature of the program, the ALT would clearly withstand any possible challenge of federal authority to implement such a program, on the basis of the commerce clause.[133]

Under the program, the nature of the property interest authorized to be acquired by the federal government would be expressly described in the easement document and would be obtained through voluntary bargaining and negotiation. The willingness of landowners to negotiate such agreements would therefore determine the success of the federal program.[134] Further, because the program involves land acquisition rather than some form of police power regulation, concerns over taking without due compensation are absent, and individual or state resistance to the program would be minimized. The major legal question concerning success of the federal program would become the manner in which the property interest obtained by the government would be interpreted.

While there would appear to be no reason for states or individuals to resist this program, the previous discussion of state common law indicates

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125. *See, e.g.*, United States v. Albrecht, 364 F. Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).

126. Kohl v. United States, 91 U.S. 367 (1875).

127. Paul v. United States, 371 U.S. at 264.

128. United States v. Burnison, 339 U.S. 87, 94 (1950).

129. This language would make the ALT comparable to the Migratory Bird Conservation Act, 16 U.S.C. § 715 (1929), interpreted in United States v. Little Lake Misere, 412 U.S. 580 (1973); North Dakota v. United States, 460 U.S. 300 (1983); United States v. Albrecht, 364 F.Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).

130. *See supra* section III(A)(3).

131. 16 U.S.C. § 1277 (1982).

132. 16 U.S.C. § 460 (1982).

133. *See supra* section III(A)(1); *see generally* Hodel v. Indiana, 452 U.S. 314 (1981) (upholding the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201-1328) (1977); Grossman, *supra* note 23, at 277.

134. North Dakota v. United States, 460 U.S. at 319.

that serious questions about the transferability of easements in gross and other state property questions could arise if such a challenge was made. In addition, one could also assume, for the sake of argument, that a state decides for whatever reasons to resist the ALT.

If either challenge was to materialize the following might arise:

> a) A subsequent holder of a tract of land subject to a conservation easement violates that easement and in a subsequent federal enforcement action argues that: i) state law does not recognize such an interest in property; or ii) even if it does, the interest has expired by operation of state law or application of a common law doctrine.
>
> b) A state passes legislation: i) prohibiting acquisition of ALT easements in the state; or ii) making such easements subject to provisions directly contradictory to the express terms of the easement.

In these situations the issue would then become: Is the "existence" of the easement a matter of state law or can it be determined on the basis of federal law?

As a starting point it must be noted that laws controlling the acquisition, definition, transmission and transfer of real property have traditionally been held to be within the domain of the states.[135] Given this starting point, though, the Supreme Court has recognized an important exception to this general rule when the application of state law is "aberrant or hostile" to the interests of a specific federal land acquisition program.[136] In *Little Lake Misere*,[137] the Supreme Court faced a choice of law question stemming from an attempt by Louisiana to affect the reservation of mineral rights on federal lands acquired under the Migratory Bird Conservation Act.[138] In that case, the Court determined that the matter was one of federal law, and while state law could be "borrowed" to resolve the matter, if the state law was aberrant or hostile to the federal interests, as the Court felt it was here, the federal courts need not apply it.[139] The Court noted:

> To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce

135. *See, e.g.*, Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944).
136. North Dakota v. United States, 460 U.S. at 318.
137. United States v. Little Lake Misere, 412 U.S. at 597.
138. 16 U.S.C. § 715 (1929).
139. *Id.*

funds.[140]

Subsequently, the *Little Lake* theory has been used by several other courts in situations where state property laws were urged which provided hostile interpretation of federal land interest acquisitions. The first major application came in *United States v. Albrecht*.[141] The federal government brought an action against a property owner to require the repair of drained wetlands held subject to a conservation easement acquired by the government under the Migratory Bird Conservation Act. The defendant argued that North Dakota law did not recognize such an interest in real property, and even if such interest was construed as an easement, it was in gross and not binding on the defendants as successors of title to the original grantors.[142] The federal court, in citing *Little Lake Misere* wrote:

> This Court would construe the law to mean that the United States may acquire something less than a fee title. In this case, it acquired an interest which it termed an easement. It is clear that the parties intended it to be a permanent interest. It appears to this Court to be immaterial what term is used to describe the interest acquired. To attach a label to it and then apply a rule of law applicable to that label that would wholly defeat the purpose of the program cannot by permitted.[143]

On appeal, the Eighth Circuit Court of Appeals affirmed this holding,[144] stating that:

> As in *Little Lake*, the question becomes what substantive law to apply, federal or state. Appellants aid us little in determining whether North Dakota law would absolutely preclude the conveyance of the type of easement granted to the United States. Appellants only assert without authority that the statutory laws of North Dakota do not provide for this easement or interest in property and that North Dakota does not recognize any other rights to land not statutorily enacted. However, under the context of this case, while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling, particularly if viewed as aberrant or hostile to federal property rights. Assuming *arguendo* that North Dakota law would not permit the conveyance of the right to the United States in this case, the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an

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140. *Id.*
141. 364 F. Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).
142. *Id.* at 1350.
143. *Id.* at 1351.
144. United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).

> important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C. § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the "interests therein."[145]

The most significant application of the *Little Lake Misere* approach to interpreting federal property interests is found in the Supreme Court's recent decision in *North Dakota v. United States*,[146] again involving a dispute concerning North Dakota's attempts to limit federal acquisition of waterfowl easements in the state.[147] The State of North Dakota had passed laws affecting the federal land acquisition programs in three ways: first, requiring that the government obtain the approval of county commissioners prior to subsequent acquisitions; second, that landowners have the right to drain after-expanded wetland, in direct contradiction to the easement language in use; and third, that all easements could run no longer than ninety-nine years.[148] The appeals court had held the state laws to be inapplicable as hostile to the federal program, citing *Little Lake Misere*.[149] On review, the Court analyzed each of the three provisions in question and found each to be inapplicable. First, the Court held that the statutory scheme involved did not allow for the revocation of the governor's consent to federal acquisitions of property interests, hence there could be no retroactive revocation or conditioning of that consent.[150] Second, as to the right of landowners to drain wetlands in contravention of the easements, the Court applied the language of *Little Lake Misere* to conclude that the choice of applicable law is a federal question, and that state law was aberrant or hostile to the interests of the United States.[151] The Court quoted the passage of *Little Lake* set out above,[152] ruling that to the extent state law allowed landowners to act contrary to the

145. *Id.* at 911 (citation omitted).

146. North Dakota v. United States, 460 U.S. 300 (1983).

147. *Id.*

148. *See* 460 U.S. at 306-08. In 1981, after litigation had begun, North Dakota passed legislation forbidding any new federal acquisitions of land for a migratory bird reservation. See N.D. CENT. CODE § 20.1-02-18.3 (Supp. 1981).

149. United States v. North Dakota, 650 F.2d 911, 917 (8th Cir. 1981), *aff'd*, 460 U.S. 300 (1983).

150. 460 U.S. at 316-17. Still, the Court sidestepped the issue of *prospective* conditioning.

151. *Id.* at 316-17.

152. *See supra* note 138.

terms of the easements, the law was hostile and "[could] not be applied to easements acquired under previously-given consent."[153]

The court noted that the federal government could incorporate into easement agreements rules and regulations deemed necessary by the Secretary, and that in this situation the easement agreement imposed restrictions on after-expanded wetlands.[154] Therefore, "as long as North Dakota landowners [were] willing to negotiate such agreements, the agreements [would] not be abrogated by state law."[155]

As to the third provision, an attempt to limit the easements' duration, the Court applied much the same analysis to conclude that such a limitation could not be applied to previously acquired easements. The Court reasoned that the federal commitment to migratory bird protection would not expire in ninety-nine years, and that the federal practice of obtaining permanent easements whenever possible was reasonable. The Court reasoned that "[t]he automatic termination of federal wetlands easements after 99 years would make impossible the [c]ertainty and finality that we have regarded as critical when . . . federal officials carrying out the mandate of Congress irrevocably commit scarce funds."[156]

The court concluded that the North Dakota statute was hostile to federal interests and could not be applied, citing both *Little Lake Misere* and the Eighth Circuit opinion in *United States v. Albrecht*.[157] The reference to *Albrecht* is significant because it can be taken as Supreme Court approval of the lower court's theory.[158] Further, the Court's citation was to that part of the *Albrecht* opinion, quoted above, where the Eighth Circuit held that government easements created a valid conveyance under federal law, whether or not they did under North Dakota law.[159]

The application and authority of this line of cases to the situation involving possible state law conflicts with easements maintained under the ALT is readily apparent. Policy reasons as to why federal interests in the easements must override contrary state common law property doctrine or hostile state laws would be nearly identical. But for the substitution of various state laws the arguments would be the same. Congress has expressed a strong federal policy concerning the acquisition of less-than-fee interests to promote soil conservation and agricultural land preservation. Such interests have been voluntarily negotiated by landowners. The terms and nature of the property interest urged by the federal government are explicit and

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153. 460 U.S. at 318-19. Again, the Court sidestepped the issue of prospective application. *See supra* note 21.

154. 460 U.S. at 319.

155. *Id.*

156. *Id.* at 320 (quoting United States v. Little Lake Misere, 412 U.S. at 597).

157. *Id.*

158. *See supra* note 18 and accompanying text.

159. 460 U.S. at 320.

clearly understandable. Therefore, any interpretation concerning the legality or duration of such an interest must be by reference to federal law, if state law is hostile to federal interests.

Two scholars writing on the issue of conservation easements, after considering traditional state common law hostility to interests such as conservation easements, have written that the *Albrecht* cases may well be at the forefront in the development of federal property law supportive of the conservation easement.[160] Netherton, in his seminal piece on this subject, stated that "[t]he decision in *United States v. Albrecht* may point the way to a liberalization of the rules of assignability and enforceability, at least in cases where the holder of an interest in gross is a public agency."[161] These views lend additional support to the applicability of the above-discussed principles in interpreting ALT interests.

3. *State Statutory Recognition of Conservation Easements — The Middle Ground*

The hostility of the common law toward recognition of easements in gross has presented significant legal obstacles to the development of state and local programs to conserve and preserve significant natural and cultural resources. To promote the achievement of the public policy goals implicit in such programs, forty states have enacted statutes to facilitate the creation of less-than-fee interests for conservation and preservation purposes.[162] Of these statutes, thirty deal with easements for conservation purposes, such as might be involved under the ALT program.[163]

Before turning to a discussion of the effect of these statutes on the legal issue of authority for the ALT, it is important to review the nature of these state statutes. While the statutes are similar, the language used and the property interests affected vary because each statute is drafted to address the needs of the individual states. The types of less-than-fee interests created or recognized by the statutes include preservation, scenic, open space, conservation and agricultural preservation. While the statutes differ, one commentator has observed one common characteristic: "[T]he simplification and clarification of common law doctrines so that understandable and enforceable property interests can be created."[164] The statutes share a great similarity in the areas addressed by the legislation, generally including the definition and categorization of the interest created; who can acquire such interests; the method of acquisition; recordation requirements; the enforce-

160. *See* Madden, *supra* note 104, at 119-20; Netherton, *supra* note 11, at 538.

161. Netherton, *supra* note 11, at 558.

162. Netherton, *supra* note 11, at 567-80. *See also* Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976).

163. *See, e.g.*, IOWA CODE §§ 111D.2-.5 (1985); TEX. [NAT. RES.] CODE ANN. §§ 181.001-181.057 (Vernon 1978 & Supp. 1984).

164. Atherton, *supra* note 16, at 55.

ability and assignability of the interest; duration and termination.[165] Due to the currency and significance of these statutes, they have been the subject of much legal analysis and law review articles in various states.[166] A list of the various state conservation easement statutes is set out in Table B below.[167]

It is valuable to look to the language of state law as an example of what is provided and how the statute may coordinate with the operation of the ALT. For example, consider the law of Iowa, a major agricultural state,[168] state and local governmental units[169] as well as private, nonprofit organizations[170] may "acquire by purchase, gift, contract, or other voluntary means, but not by eminent domain, conservation easements in land."[171] The statute then specifies that these easements may be for the following purposes: "to preserve scenic beauty, wildlife habitat, riparian lands, wet lands, or forests, promote outdoor recreation, or otherwise conserve for the benefit of the public the natural beauty, natural resources, and public recreation facilities of the state."[172]

A conservation easement is defined broadly by the statute to include "[A]n easement in, servitude upon, restriction upon the use of, or other interest in land owned by another, created for any of the purposes set forth in section 111D.1."[173] The statute specifically deals with possible concerns over the effect of applying the common law to such easements by providing that a conservation easement:

> shall be transferable to any other public body authorized to acquire conservation easements. A conservation easement shall be perpetual unless expressly limited to a lesser term, or unless released by the holder thereof, or unless change of circumstances shall render such easement no longer beneficial to the public. No comparative economic test shall be used to determine whether a conservation easement is beneficial to the

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165. It is understandable that the various state statutes would bear relative resemblance because the adoption of innovative state legislation such as this typically reflects a patterning or copying process. In addition, many of the laws are based on a Uniform Conservation Easement Act, developed by the Uniform Laws Commission. *See* 12 U.L.A. 55 (Supp. 1985).

166. For example, see the following well written articles which discuss the impact of state conservation easement legislation: Atherton, *supra* note 16; Cohen, *Progress and Problems in Preserving Ohio's Natural Heritage Through the Use of Conservation Easements*, 10 CAP. U.L. REV. 731 (1981); Knight & Dye, *Attorneys' Guide to Montana Conservation Easements*, 42 MONT. L. REV. 21 (1981); Comment, *New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences*, 49 ALB. L. REV. 430 (1985); Note, *Conservation Easements in Oregon: Abuses and Solutions*, 14 ENVTL. L. 555 (1984).

167. *See infra* Table B.

168. IOWA CODE § 111D (1985) (conservation easements).

169. *Id.* at § 111D.1.

170. *Id.* at § 111D.8.

171. *Id.* at § 111D.1.

172. *Id.*

173. *Id.* at § 111D.2.

public.[174]

To assist in interpreting the nature of the interest created, the statute requires that a conservation easement "shall clearly state its extent and purpose."[175] The law places certain obligations on those acquiring easements by requiring that conservation easements be recorded "as other instruments affecting real estate are recorded,"[176] and requires that each public body acquiring such easements maintain a current inventory thereof.[177] A conservation easement shall be deemed abandoned if it is not recorded or inventoried.[178]

The Iowa law is a good example of a state conservation easement statute. It is fairly specific and detailed both as to the nature of the property interest covered and the legal interpretation of such interest. As relates to the possible use of this statute in connection with the ALT, it is obvious that the listing of purposes under section 111D.1 does not include any mention of agricultural preservation or conservation, as contrasted to other statutes.[179] The statute does, however, refer to the easements that would "otherwise conserve for the benefit of the public . . . natural resources of the state."[180] Because the Iowa Supreme Court has declared that "[t]he state has a vital interest in protecting its soil as the greatest of its natural resources, and it has a right to do so,"[181] it is safe to say that Iowa courts would interpret a conservation easement obtained for the preservation or conservation of agricultural land such as is envisioned in ALT to be legal under Chapter 111D.

Whether the easements obtained under the ALT would fit within the language of other state statutes, would be a matter of interpretation in each case. This requirement, the need for individualized interpretation, illustrates one of the legal limitations of relying on state statutes to interpret ALT easements. This point serves as a good introduction to the more general question of what the existence of these state laws means for the implementation of the ALT.

The existence of this body of state law is of importance to the legal basis of the ALT for a variety of reasons. Initially, the state enactments are indicative of an increased public awareness of the conservation and preservation values inherent in the less-than-fee acquisition programs facilitated

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174. *Id.* Section 111D.8 makes easements acquired by qualified private groups also transferable and perpetual. *Id.* at § 111D.8.

175. *Id.* at § 111D.4.

176. *Id.* at § 111D.3.

177. *Id.*

178. *Id.*

179. *See, e.g.*, N.J. REV. STAT. § 13.8B-26 (Supp. 1982) (permissible interests include those relating to "conservation of soil"); R.I. GEN. LAWS §§ 34-39-1 to 34-39-5 (1984).

180. IOWA CODE § 111D.1 (1985).

181. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979).

by the statutes. This development of legal support at the state level helps provide support as a general matter for federal involvement in a program such as ALT. In many cases, the statutes represent both a recognition of the hostility of the common law and public dissatisfaction with the impediments that traditional common law property interpretations may present to the achievement of important developing public goals. Importantly, this body of statutes represents a middle ground between the traditional common law attitude towards negative easements in gross and the need to develop a federal common law as relates to the interpretation of property interests acquired by federal government.[182]

By a middle ground, it is meant that, rather than either to subject an ALT program to the whims of the traditional common law on a state-by state basis or face the political and/or legal fight perhaps necessary to establish supremacy of the federal property law theory, the use of state conservation easement statutes provides one possible way to insure achievement of the goals of an ALT conservation easement and still lend fidelity to state property laws. This approach is not meant to propose a lessening of support for the federal property theory, but instead suggests that political reasons may justify the need to develop an alternative theory of authority, here, a continued reliance on state property law, to interpret the nature of the federal property interest acquired.

Unfortunately, a reliance on state enactments of conservation easement statutes to insure the achievement of ALT goals carries with it legal and political problems. First is the problem that only a slight majority of the states have such statutes, meaning that in others an ALT conservation easement will be subject to whatever state common law principles provide on the issue of easements in gross. This would create two additional major difficulties: first this would make it impossible to guarantee the nature and security of the property interest obtained under the ALT in those states, seriously weakening the justification for expenditure of federal money in those states, and as a result perhaps crippling the program; second, the fact that the common law of certain states might be viewed as legally hostile to ALT would seriously affect the political attraction of such an extensive and possibly expensive program in Congress. That is, if there is a set of legal gaps among states in which the federal government would be willing to spend ALT dollars, then political support for the program by representatives and taxpayers in those states would diminish substantially.

A second problem concerning the state statutes relates to the content of the laws. While the language of the statutes varies by state, that is not as significant a problem as is the fact that only twenty-two of the statutes include provisions which would facilitate the assignment and enforcement of interests in gross, or, in other words, address the possible hostility of the

182. *See supra* section III(B)(2).

common law. Thus, the feasible use of state conservation easement statutes as the legal basis for the ALT is further reduced.

Of course, one alternative which could address to a significant degree both of these issues, namely the existence and coverage of such statutes, is federal encouragement of state adoption of those statutes which would be compatible with property interests authorized by the ALT. One way this could be done would be to condition expenditure of ALT money in a state on state attorney general certification that state law is compatible with federal goals. This approach would expand federal reliance on state property laws, avoiding that possible controversy or challenge to ALT. In addition, it would provide an incentive to the states to cooperate and participate in the operation of the ALT, thereby helping to localize the program and increase the number of political interests with a stake in the success of the program.

Reliance on state conservation easement statutes as legal authority for ALT property interests does, however, raise certain political and legal problems. First, there is the possibility that some states, due to local political concerns, may not act to allow participation, or due to the timing of legislative sessions may be unable to act for several years. This leads to the next problem, the fact that waiting until state law can guarantee the security of the ALT property interest could create lengthy delays in availability of ALT money in certain states. This would affect both the success of the program and the political support by representatives of those states for authorization or funding of the program. Of course, until such time as a state would act, the federal government could rely on the federal property theory argument to defend its interest in those states, combining the two approaches. In this regard, perhaps an even better resolution of the whole question of which law to use to interpret the nature of the property interest obtained by the federal government under ALT is to use a three pronged hierarchical approach as set out in the last section.[183]

C. *Tax Issues and the ALT*

1. *Federal Income Taxation and ALT Benefits*

One issue that must be addressed in considering the ALT proposal concerns the federal tax treatment of the money or other benefits received by participating land owners. The determination of how to treat the proceeds from the sale of an ALT conservation easement will affect both the willingness of landowners to participate, as well as the effectiveness and the real costs of the program. Basically, the decision as to tax treatment involves two choices: whether to tax or not to tax, and, if the decision is to tax, whether to treat the proceeds received as income or capital gains.

Presently, the federal tax code includes a number of important provi-

183. *See infra* section IV(A).

sions concerning the tax treatment of conservation easements.[184] The general purpose of these sections is to offer the taxpayer a charitable deduction for the donation of a "qualified conservation contribution" of perpetual duration to a qualified organization. A qualified conservation contribution has three basic requirements: that it be a qualified real property interest, made to a qualified organization, exclusively for conservation purposes.[185] Each of these elements is further defined both in the Code and Regulations.[186] Specific requirements for deductability have been the subject of IRS interpretations.[187] In addition, tax treatment of conservation easements has been the subject of numerous law review articles and other scholarly works.[188] Past experience with federal tax treatment of conservation easements is valuable for its role in establishing guidelines for structuring such easements and in valuing them for tax purposes. Issues such as the requirement that contributed property interests be "perpetual" also are of general value in providing guidance on such issues as how to interpret these interests under state property law.[189]

While present tax laws are valuable for interpreting gifts of conservation easements, their use under a program such as ALT is more limited. The main reason for this is that in the ALT program the federal acquisition of the property interest is an exchange for value rather than a gift. Under ALT, there would be no "charitable intent" on the part of the landowner, and thus no reason to grant a deduction for the value of the easement.

But just because there is no charitable intent on the part of the land-

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184. *See* I.R.C. §§ 170(c), 170(f)(3)(B)(iii), 170(i) (1985).

185. *Id.* at § 170(h).

186. For example, I.R.C. § 170(h)(4)(A) (1985) defines a conservation purpose to include:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, (iii) 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 a significant public benefit, or
>
> (iv) the preservation of an historically important land area or a certified historic structure.

Id.

187. *See, e.g.*, Rev. Rul. 75-373, 1975-2 C.B. 77 and Priv. Ltr. Rul. 77-34-024 (May 24, 1977).

188. Several of the better articles in this area are: Browne and VanDorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 THE TAX LAWYER 69 (1975); Hambrick, *Charitable Donations of Conservation Easements: Valuation, Enforcement and Public Benefit*, 59 TAXES 347 (1981); Madden, *supra* note 104; Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL ESTATE L.J. 304 (1979); Thomas, *Transfers of Land to the State for Conservation Purposes: Methods, Guarantees, and Tax Analysis for Prospective Donors*, 36 OHIO ST. L.J. 545 (1975); *Tax Incentives for Sensible Land Use Through Gifts of Conservation Easements*, 15 REAL PROP. PROB. & TR. J. 1 (1980).

189. *See* Madden, *supra* note 104, at 9-11.

owner, qualifying him as a taxpayer for a deduction, does not mean that ALT proceeds should instead be taxable. The decision as to the tax treatment of ALT benefits must be based on the effect such a decision would have on program goals. In this regard, the policy options are whether to treat the ALT benefits as income, as capital gains from the sale of real property, or as tax-free.

For a number of reasons, it would appear the best option would be to make benefits received in connection with an ALT property transfer tax-free; that is, to not consider the benefits as any form of income for tax purposes. The reasons for this are straightforward. First, to require that taxes be paid on such payments would reduce the value of the sale to the farmer and may require higher sales prices to obtain participation. In addition, because farmers participating in ALT are by law required to be in financial distress, it makes little policy sense to obligate them with increased tax liability. Third, from a federal income standpoint, the taxation choice is basically a wash decision if higher tax revenues from taxability are offset by higher ALT program costs to cover tax costs. When one considers as well the higher transaction costs associated with implementing a complicated tax valuation and collection system, the savings and benefits of a simple no tax policy are enhanced. It would appear to be more cost effective, therefore, to put federal dollars into conservation easement acquisition and avoid complicating the program with issues of income taxability.[190]

At the same time, it must be recognized that granting ALT benefits tax-free status may be criticized as overly generous or otherwise bad policy. An intermediate option would be to treat the income as capital gain under current tax rules. Using this approach, the government could maintain the integrity of its tax system. Moreover, many ALT participants would not experience immediate tax liability if the ALT benefits did not exceed the participant's basis in the property.

2. *Property Taxation*

Another tax-related issue that must be considered in conjunction with the ALT is the issue of state property tax liability. The questions involved are whether or not the sale of a conservation easement to the government should reduce the "taxable" value of the property in the hands of a landowner, and if so, whether the federal government should pay property taxes on the property interest represented by the easement. Resolution of these issue is of particular practical and political importance, since it will determine the possible effect on local tax bases and revenues and the possible continuing financial liability of the federal government.

Whether or not a sale of a conservation easement should be recognized

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190. No taxation is the method used in H.R. 1000, 99th Cong., 1st Sess. (1985) (a proposal to have the Secretary of Agriculture purchase conservation easements from FmHA borrowers).

as a factor in assessing the burdened property essentially would be a question of state law.[191] Recent history of the use of conservation easements indicates that disputes over property taxation have arisen.[192] The weight of opinion would appear to recognize that the grant of a conservation easement, which may include such valuable interests as future development rights, should be recognized in valuing real property. In fact, conservation easement statutes in fifteen states specifically require local tax assessors to take into account the property's restricted use for assessment purposes.[193] Experience indicates, however, that it is the current practice in most local jurisdictions for tax assessors to disregard the existence of a conservation easement as a basis for lowering property tax assessments. Because of this, the property tax consequences of an ALT easement transfer are primarily a state and local consideration which must be resolved at that level.

If the effect of creating an ALT easement is to lower the property tax value of the subject property, a second, related issue is whether the federal government has any liability for taxes on the property interest it holds. This issue involves two different questions: Does the federal government have any legal liability, or should it accept any liability? As to the first issue, can states tax property or property interests owned by the federal government, the general answer is that they may not, unless the federal government specifically allows them to.[194] For example, if enabling legislation authorizing the federal property acquisition provided for such taxation it would be permissible. Because the withdrawal of large amounts of land from the tax rolls could have a serious financial impact on state property tax revenue, it might be politically expedient to require such payments.[195] But, this reduction in local taxes will only result if local assessors consider conservation easements in their valuations. In the ALT situation, the issue of federal payment of

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191. *See* Zick, *supra* note 9, at 15.

192. Comment, *New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences*, 49 ALB. L. REV. 430, 466-76 (1985).

193. CAL. [CIV.] CODE § 815.10 (West 1986); COLO. REV. STAT. § 38-30.5-109 (1985); GA. CODE ANN. § 85-1409 (1985); IDAHO CODE § 67-4615(e) (1975); ILL. ANN. STAT. ch. 30 § 401 (Smith-Hurd 1985); IND. CODE ANN. § 32-5-2.6-7 (Burns 1985); KY. REV. STAT. § 65.450 (1985); ME. REV. STAT. ANN. tit. 33 § 476 (1985); MO. REV. STAT. § 67.895 (1986); MONT. CODE ANN. § 70-17-101 (1985); N.J. REV. STAT. § 13:8B7 (1986); N.C. GEN. STAT. § 113A-90 (1985); PA. CONS. STAT. ANN. § 5009 (Purdon Supp. 1986); TENN. CODE ANN. § 66-9-308 (1985); VA. CODE § 10-158.13 (1985 & Supp. 1986).

194. This has been a basic premise of U.S. constitutional doctrine since earliest times. *See* McCulloch v. Maryland, 17 U.S. 316 (1819) (power to tax is the power to control and under supremacy clause such taxation is not allowed). *See also, e.g.*, United States v. City of Pittsburgh, 589 F. Supp. 179 (W.D. Pa. 1984).

195. For example, the Army Corps of Engineers makes payments in lieu of taxation, amounting to 75% of revenue derived from leases of local land holdings. Also, the Farmers Home Administration pays property taxes on property it acquires. In some situations, state law may exempt federal property interests from taxation. *See generally* Farmers Prod. Credit Ass'n v. State, 481 A.2d 18 (Vt. 1984).

property taxes suggests a balancing of the monetary costs of such continuing liability and the effect such costs would have on program implementation, and the potential for political opposition from local governments if ALT easement acquisition would result in serious declines in the tax base. Therefore, while the law would indicate that the federal government would not have to pay property taxes on its property interests, whether it would want to or not is another matter that should be resolved in considering the program.

IV. Implications of the Legal Analysis for Consideration of the ALT Proposal

The preceding discussion has identified and discussed a number of significant issues relating to the ALT proposal. This exercise has been valuable in that it has identified possible legal obstacles and pitfalls, as well as demonstrated the strong statutory and judicial precedent for such a program. To make the greatest use of the analysis one must also consider how such a program could be integrated into the process of drafting, considering and administering the ALT program. The following discussion focuses on the possible implications of the legal findings of this study for the ALT program.

A. *Interpretation of the Property Law Questions: A Hierarchial Approach*

The most significant issue in the successful implementation of the ALT program is the ability of the federal government to acquire and enforce conservation easements. The legal discussion revealed that there are three distinct methods of approaching this problem, which in effect represent a hierarchy of legal theories. Traditionally, property law and the interpretation of property interests has been a function of state law, generally common or case law. The study reveals, however, that the common law attitude towards negative easements in gross has been hostile and that in some states it may be difficult to predict with any certainty that such interests could be enforceable against the grantor's successors in interest, a guarantee essential to federal acquisition. On the other hand, in other states the common law would apparently accept federal enforcement of such interests.

One result of common law hostility to property interest such as these has been the adoption of state statutes designed to provide legal recognition for such interests, and in some cases resolve possible common law concerns. These laws have been passed by many states and where they exist offer possible support for the recognition and enforcement of ALT interests. Not all states, however, have such statutes, and even some that do have not statutorily addressed the common law issues. Thus, there are still a number of jurisdictions in which enforceability of an ALT easement could not be guaranteed.

The analysis indicates that an alternative to reliance on state law may be found in the *Little Lake Misere* line of cases, which support the development and recognition of a higher federal law in controversies involving the enforcement of explicit federal property interests. This theory, supported by a recent Supreme Court case, would obviate the need to rely on state property law to interpret ALT easements.

The existence of these three approaches to analyzing the property law questions involved provide important guidance in the design and promotion of the ALT. The different legal theories could be considered as a matter of a choice, i.e., deciding which legal basis to follow and relying on it, such as by requiring state adoption of a conservation easement statute to participate in ALT, or instead relying on the federal property theory arguing that hostile state law must give way. But perhaps the best method of approaching this issue is to look at the three doctrines as a hierarchy of legal support, as opposed to presenting a choice. Reliance could be made on each theory in order. Such an approach can be considered as follows. First, the ALT law recognizes the primacy of state property law, if that law recognizes the federal interests involved. Second, the federal law supports and encourages the adoption of state statutes recognizing conservation easements such as those in ALT. Third, however, if state common law, as may or may not be expanded by statute, does not recognize the nature of the property interest explicitly acquired by the federal government, or is hostile to it, then the federal response would be that under the principles of *Little Lake Misere* and related cases state law must give way. This hierarchical approach permits the ALT program to rely on state law and to minimize arguments over supremacy of a federal common law of property, yet at the same time provides judicial certainty regarding the enforceability of legal interests obtained by the federal government.

B. *Encouragement of State and Local Cooperation*

To further the support for the adoption and implementation of ALT goals, the legislation should also encourage to the extent possible cooperation with state and local governments, as well as private groups involved in conservation and preservation. By writing such cooperation into the law, it would be possible to obtain the support and assistance of the hundreds of groups with experience in this area. In addition, cooperation with state and local officials may minimize potential legal challenges to the program which, although in all likelihood unsuccessful, would still detract from program implementation. In this area, one other issue that must be addressed to minimize local government concern is the issue of the impact of an ALT easement sale on the property tax liability of the property. It would appear that either the tax liability and source must remain the same, or the federal government must be willing to pay the taxes. Failure to do so could result in local government opposition to the program because of the possible decrease

in property tax revenues and declining tax base produced by the division of title to the property.

C. *Federal Taxation of ALT Benefits*

Another basic operational issue that must be resolved is the tax treatment of ALT benefits. The analysis presented above shows that the tax problem differs substantially from those resolved by current charitable deduction provisions. The issue here is basically one of whether or not to tax. The analysis indicates that a number of factors support a decision to not tax ALT receipts, although it is recognized that such a decision may raise funding and equity questions. Taxation of ALT benefits under current capital gains rules is therefore posed as a possible alternative.

D. *Use of Existing Legal Authority for Implementation*

An additional basis for implementation of the ALT program that must be considered is the use of existing statutory language to achieve ALT goals. This study has provided three separate arguments supporting the theory that the ALT could be substantially implemented under existing law. It is recognized that each theory makes use of language which was passed without the ALT specifically in mind, and this may raise possible legal questions. At the same time, however, the goals of the ALT clearly fit within the goals and purposes of those national programs. As a result, the possible use of these laws might serve as a backdrop or alternative strategy to consideration of the ALT proposal if, for whatever reason, adoption of the program as proposed cannot be achieved successfully.

E. *Drafting Recommendations for the ALT Statute*

Of course, it is a common goal of those involved with government to draft clear, concise, and effective laws, and such is the goal of ALT proponents. Legal analysis indicates that several things can be done in drafting the language of ALT legislation which would both assist in the implementation of the law and help minimize the likely success of any legal challenge. To begin with, it is important that both the legislative history and the bill itself contain explicit and extensive language concerning the purpose of the program, the need for the program, the traditional federal involvement in this area, and the federal issues at stake. This intent language is important in clarifying the purpose of the program, and also would be of value in subsequent legal challenges in providing support for the commerce clause theory of federal involvement as well as providing the very important foundation for the *Little Lake Misere* property interest theory. In addition, it is important that the legislation, and in particular those sections concerning the drafting and negotiation of conservation easements, contain explicit guidelines concerning both the purpose of the easement and the nature of

the property interest obtained. In this regard language concerning the duration of the interest, as well as its transferability and enforceability, should be included. This language should help remove uncertainty about the nature of the property interest obtained and would be important in later enforcement actions. In addition, it might be helpful to structure the easement so as to provide affirmative rights to the government, for example, to enter and inspect the property, thereby making it in part an affirmative easement as opposed to a negative one in order to help minimize possible state property law arguments. By taking these steps to minimize legal issues and provide clear, explicit guidelines, implementation and support for the ALT program could be enhanced.

Several other practical issues should be considered in drafting the ALT proposal. If the program is truly to be implemented as voluntary, then the language authorizing federal acquisition of the easements must clearly state that the power of eminent domain is not to be used. Otherwise courts may interpret the law as a grant to the government of just this authority. The question of whether to require the consent of state governors prior to ALT acquisitions, as has been done in certain other federal land acquisition programs, might also be reviewed, although it would appear that such a requisite may be unwise.

V. Conclusion

The Agricultural Land Trust concept represents an innovative approach to addressing current agricultural financial difficulties by integrating credit relief with promotion of public conservation goals through federal acquisition of conservation easements. This study has reviewed the legal bases and precedents for such a program, and has identified and discussed the major legal issues which would arise. Legal analysis indicates that while certain questions may be present, there is a strong case law basis, as well as substantial statutory precedent, for federal involvement in the program. By working to address identified legal questions in the drafting and implementation stages, as suggested in the preceding sections, possible legal challenges to the ALT program should be minimized. As a result, it is possible to conclude that, from a legal standpoint, consideration of the ALT program could proceed without serious concern that any major legal obstacles would jeopardize its vitality.

VI. Author's Postscript

On December 17, 1985, Congress passed the omnibus farm bill in the form of the Food Security Act of 1985, (99 Stat. 1444, Pub. L. 98-199) which authorized the federal acquisition of conservation easements by FmHA as part of a farm debt restructuring effort. This section was added in large part due to the work of the Iowa National Heritage Foundation and other conservation organizations. Section 1318 of the act, entitled "Farm Debt Restruc-

ture and Conservation Set Aside - Conservation Easements" amended the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) to add the following new section:

"SEC. 1318.(a) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 349.(a) For purposes of this section:

(1) The term 'governmental entity' means any agency of the United States, a State, or a unit of local government of a State.

(2) The terms 'highly erodible land' and 'wetland' have the meanings, respectively, that such terms are given in section 1201 of the Food Security Act of 1985.

(3) The term 'wildlife' means fish or wildlife as defined in section 2(a) of the Lacey Act Amendments of 1981 (16 U.S.C. 3371(a)).

(5) The term 'recreational purposes' includes hunting.

(b) Subject to subsection (c), the Secretary may acquire and retain an easement in real property, for a term of not less than 50 years, for conservation, recreational, and wildlife purposes.

(c) Such easement may be acquired or retained for real property if such property—

(1) is wetland, upland, or highly erodible land;

(2) is determined by the Secretary to be suitable for the purposes involved;

(3)(A)(i) secures any loan made under any law administered by the Farmers Home Administration and held by the Secretary; and

(ii) the borrower of such loan is unable, as determined by the Secretary, to repay such loan in a timely manner; or

(B) is administered under this title by the Secretary; and

(4) was (except in the case of wetland) row cropped each year of the 3-year period ending on the date of the enactment of the Food Security Act of 1985.

(d) The terms and conditions specified in each such easement shall—

(1) specify the purposes for which such real property may be used;

(2) identify the conservation measures to be taken, and the recreational and wildlife uses to be allowed, with respect to such real property; and

(3) require such owner to permit the Secretary, and any person or governmental entity designated by the Secretary, to have access to such real property for the purpose of monitoring compliance with such easement.

(e) Any such easement acquired by the Secretary shall be purchased from the borrower involved by canceling that part of the aggregate amount of such outstanding loans of the borrower held by the Secretary under laws administered by the Farmers Home Administration that bears the same ratio to the aggregate amount of the outstanding loans of such borrower held by the Secretary under all such laws as the number of acres of the real property of such borrower that are subject to such easement bears to the aggregate number of acres securing such loans. In

no case shall the amount so canceled exceed the value of the land on which the easement is acquired.

(f) If the Secretary elects to use the authority provided by this section, the Secretary shall consult with the Director of the Fish and Wildlife Service for purposes of—

(1) selecting real property in which the Secretary may acquire easements under this section;

(2) formulating the terms and conditions of such easements; and

(3) enforcing such easements.

(g) The Secretary, and any person or governmental entity designated by the Secretary, may enforce an easement acquired by the Secretary under this section.

(h) This section shall not apply with respect to the cancellation of any part of any loan that was made after the date of enactment of the Food Security Act of 1985.

(b)(1) The last sentence of section 335(c) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1985(c)) is amended by inserting, "other than easements acquired under section 349" before the period at the end thereof.

(2) The second sentence of section 1001 of the Agricultural Act of 1970 (16 U.S.C. 1501) is amended—(1) by striking out "perpetual"; and (2) by inserting "for a term of not less than 50 years" after "easements".

Table A: Selected Existing Legal Authority for Federal Acquisition of Less than Fee Interests in Real Property

I. *Conservation Related*
   A. *General Authority*
      1. *Land and Water Conservation Fund* - (general authority, various outdoor recreational related purposes, federal and state) 16 U.S.C. §§ 4601-4 - 4601-11
   B. *Specific Purposes*
      1. *Migratory Birds* - (waterfowl habitat) 16 U.S.C. § 1302
      2. *Wetlands* - Water Bank Program (waterfowl habitat - uses 10 year contracts) 16 U.S.C. § 1302
      3. *National Forests* - general land acquisition. 16 U.S.C. §§ 515, 516, 517 and 521
      4. *National Parks* - 16 U.S.C. § 460g-1 and § 460gg-6
      5. *Wilderness Areas* - (general land acquisition of private lands within designated areas) 16 U.S.C. § 1134(c)
      6. *Coastal Zones* 16 U.S.C. § 1451 and § 1455(d)
      7. *Coastal Barrier Resources* (specific authority for federal government *not* to acquire property interests) *See* 6 U.S.C. § 3504(a)

II. *Scenic Related*
   A. *Highways*

1. *Scenic Highway Authorization* (Blue Ridge and Natchez Parkways) 16 U.S.C. §§ 460, 460a-5
2. *National Scenic Highways* (Great River Road) 16 U.S.C. § 148(b)
3. *General Authority* (Scenic Easement Acquisition in Highway Funding) 16 U.S.C. § 319(b)

B. *Rivers*
1. *Wild and Scenic Rivers* (property interest acquisition) 16 U.S.C. § 1277

C. *Trails*
1. *National Trail System* (e.g. Appalachian Trail - acquisition of right of ways not held by government) 16 U.S.C. § 1246(e)

III. *Other Federal Less than Fee Acquisition Programs*

A. *Historic Preservation*
1. *National Historic Registry* (authorization of federal loans for preservation, requires Secretary to be adequately protected re mortgage) 16 U.S.C. §§ 470d(f) and (g)

B. *Navigation Servitudes*
1. *Army Corps of Engineers* (Navigable Rivers program and flood control) 33 U.S.C. §§ 595 and 701

IV. *Agricultural and Conservation Related*

A. *Agricultural Conservation*
1. *National Soil Conservation Program* (general authority for Secretary to acquire property in Agricultural Conservation Program) 16 U.S.C. § 590a(4)
2. *Rural Environmental Conservation Program* 16 U.S.C. § 1501
3. *Special Areas Conservation Program* (long term contracts with conservation plans) 16 U.S.C. § 34

B. *Agricultural Credit Program*
1. *Farmers Home Administration Loans* (authorizes Secretary to acquire property on which the U.S. has a lien) 7 U.S.C. § 1985

Table B

State Conservation Statutes

Arizona	ARIZ. REV. STAT. ANN. §§ 9-464, 11-935 (Supp. 1982).
California	CAL. CIV. CODE, §§ 813-816 (West 1982); CAL. GOV'T CODE, §§ 50280 - 50290, 51050 - 51065, 51070 - 51073, 51230 - 51239 (West 1983).
Colorado	COLO. REV. STAT. §§ 38-30.5-101 - 38-30.5-110

	(1983).
Connecticut	CONN. GEN. STAT. §§ 47-42(a) - 47-42(c) (1983).
Delaware	DEL. CODE ANN. tit. 7, §§ 6811 - 6815 (1983).
Florida	FLA. STAT. § 704.06 (1981).
Georgia	GA. CODE ANN. §§ 43-2301 - 43-2307, 85-1402-85-1410 (Supp. 1984).
Indiana	IND. CODE ANN. §§ 32-5-2.6-1 - 32-5-2.7 (Burns Supp. 1984).
Iowa	IOWA CODE §§ 111D.1 - 111D.5 (1985).
Kentucky	KY. REV. STAT. §§ 65.410 - 65.480 (1982).
Maine	ME. REV. STAT. ANN. tit. 33, §§ 667 - 669 (1964 & Supp. 1978-1983).
Maryland	MD. [REAL PROP.] CODE ANN. §§ 2-118 - 2-119 (1981 & Supp. 1983).
Massachusetts	MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West Supp. 1983).
Michigan	MICH. STAT. ANN. §§ 26.1287(1) - 26.1287(19) (Callaghan 1982 & Supp. 1984).
Missouri	MO. REV. STAT. §§ 67.870 - 67.910 (1983).
Montana	MONT. CODE ANN. §§ 76-6-101 - 76-6-211 (1983).
Nevada	NEV. S.B. 189 (1983).
New Hampshire	N.H. REV. STAT. ANN. §§ 477:45 - 477:47 (1983).
New Jersey	N.J. REV. STAT. §§ 13:8A-30 - 13:8A-31 (Supp. 1983-1984).
New York	N.Y. [GEN. MUN.] LAW § 247 (Supp. 1982).
N. Carolina	N.C. GEN. STAT. §§ 121-34 - 121-42 (1981); 113A-90 (1983).
Oregon	OR. REV. STAT. §§ 271.715 - 271.795 (1983).
Pennsylvania	PA. STAT. ANN. tit. 16, §§ 11941 - 11947 (Purdon Supp. 1983).
Rhode Island	R.I. GEN. LAWS §§ 34-39-1 - 34-39-5 (Supp. 1983).
S. Carolina	S.C. CODE ANN. §§ 27-9-10 - 27-9-30 (Law. Co-op. 1976 & Supp. 1983).

Tennessee	TENN. CODE ANN. §§ 11-15-101 - 11-15-08 (1980).
Texas	TEX. [RES.] CODE ANN. §§ 181.001 - 181.057 (Vernon 1978 & Supp. 1984).
Vermont	VT. STAT. ANN. tit. 10 §§ 6301-6308 (Supp. 1983).
Washington	WASH. REV. CODE ANN. §§ 84.34.200 - 84.34.250 (Supp. 1984).
Wisconsin	WIS. STAT. ANN. §§ 23.09(10), 23.30, 62.22 (West 1973 & Supp. 1983).