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## “Perpetuity” – What Does It Mean for Conservation Easements and the Wyoming Constitution?

By Melinda Harm Benson, *esq.* The Helgo Otto Haub School and William D. Ruckelshaus Institute of Environment and Natural Resources

Questions sometimes arise over the relationship between Wyoming’s Rule Against Perpetuities (“the Rule”)<sup>1</sup> and the use of conservation easements, which are generally held “in perpetuity.” Closer examination of the meaning of “perpetuity” in each of these contexts reveals that there is no conflict between the Rule and conservation easements.

The term “perpetuity,” in the conservation easement context, refers to *how long* an easement is in effect. To qualify for a federal tax deduction, a grant or sale of a conservation easement must be *permanent*.<sup>2</sup> The term “in perpetuity” simply describes the permanent nature of the transfer. The IRS included this requirement to ensure that the donation is an enduring commitment to protect the values for which the easement was granted (see the text box on page 2 for a brief description of conservation easements).

By contrast, the term “perpetuity” in the context of Wyoming’s constitutional and statutory Rule Against Perpetuities means something entirely different.<sup>3</sup> In this context the term “perpetuity” refers to when a property interest *vests*, that is, when the transfer in property takes effect. It is not concerned with *how long* someone will hold the property once the transfer has taken place but only with *when* the transfer will occur.

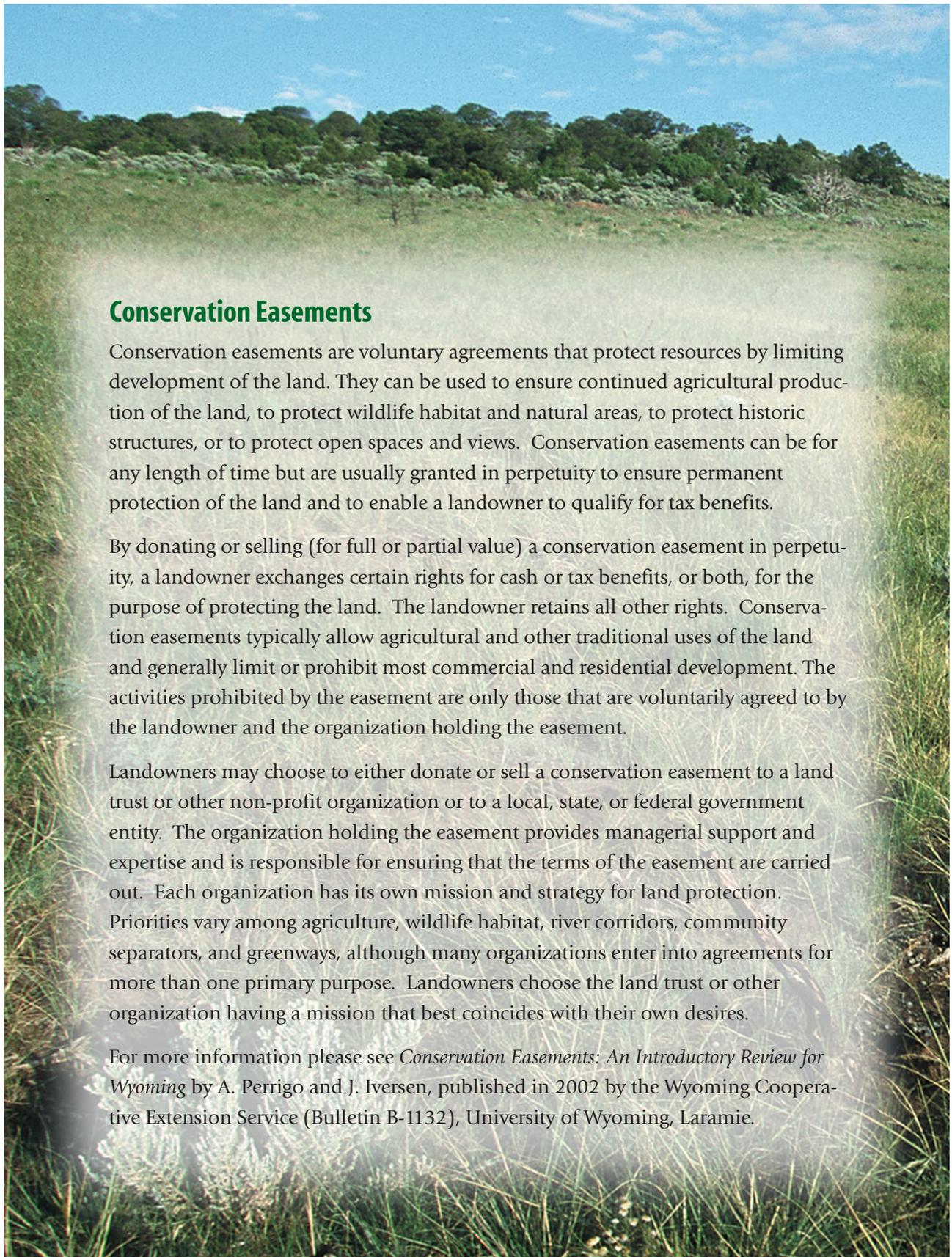
Wyoming’s Rule does not bar conservation easements because when a conservation easement is conveyed, the property interest vests immediately in the organization that holds the easement. Nor does the Rule bar the adoption of the Uniform Conservation Easement Act or similar legislation. Many states have both some form of the Rule Against Perpetuities *and* conservation easement legislation.<sup>4</sup>

<sup>1</sup> In Wyoming, the Rule Against Perpetuities is embodied both in statute and in the constitution. See WYO STAT. ANN. 34-1-138, et seq., WYO. CONST. art. I, § 30.

<sup>2</sup> Treasury Regulation § 1.170A-14(a). Deductions are available for easements that are donated or that are purchased for less than their appraised value (known as a “bargain sale”). See Internal Revenue Code § 1011(b) for provisions regarding bargain sales.

<sup>3</sup> See WYO STAT. ANN. 34-1-138, et seq., WYO. CONST. art. I, § 30.

<sup>4</sup> GEORGE G. BOGART, THE LAW OF TRUSTS AND TRUSTEES § 214 (Rev. 2d ed. 2003) (The Rule Against Perpetuities—History And Status Of Rule In The Several States); Michael R. Eitel, *Wyoming’s Trepidation Toward Conservation Easement Legislation*, 4 WYO. L. REV. 54, 66 n. 68 (2004) (every state except Wyoming and North Dakota have adopted some type of conservation easement legislation).



## Conservation Easements

Conservation easements are voluntary agreements that protect resources by limiting development of the land. They can be used to ensure continued agricultural production of the land, to protect wildlife habitat and natural areas, to protect historic structures, or to protect open spaces and views. Conservation easements can be for any length of time but are usually granted in perpetuity to ensure permanent protection of the land and to enable a landowner to qualify for tax benefits.

By donating or selling (for full or partial value) a conservation easement in perpetuity, a landowner exchanges certain rights for cash or tax benefits, or both, for the purpose of protecting the land. The landowner retains all other rights. Conservation easements typically allow agricultural and other traditional uses of the land and generally limit or prohibit most commercial and residential development. The activities prohibited by the easement are only those that are voluntarily agreed to by the landowner and the organization holding the easement.

Landowners may choose to either donate or sell a conservation easement to a land trust or other non-profit organization or to a local, state, or federal government entity. The organization holding the easement provides managerial support and expertise and is responsible for ensuring that the terms of the easement are carried out. Each organization has its own mission and strategy for land protection. Priorities vary among agriculture, wildlife habitat, river corridors, community separators, and greenways, although many organizations enter into agreements for more than one primary purpose. Landowners choose the land trust or other organization having a mission that best coincides with their own desires.

For more information please see *Conservation Easements: An Introductory Review for Wyoming* by A. Perrigo and J. Iversen, published in 2002 by the Wyoming Cooperative Extension Service (Bulletin B-1132), University of Wyoming, Laramie.



## What Would Violate the Rule Against Perpetuities?

The Rule Against Perpetuities is complicated—even experienced lawyers can struggle with the concept. For the purposes of considering conservation easements, it is not necessary to understand how the Rule works—it is enough to know that the Rule is concerned with when an interest in property *vests*, and that is *not* a concern with regard to conservation easements. The Rule simply does not apply.

Here is the actual language of the Rule, as stated in the Wyoming Statutes: “No interest in real or personal property shall be good unless it must vest not later than twenty-one (21) years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies.”<sup>5</sup> Wyoming’s constitutional provision states: “Perpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed.” The Wyoming Supreme Court has interpreted both the statute and the constitutional provision as embodying the common law Rule Against Perpetuities.<sup>6</sup>

The Rule, which originates from old English common law, is designed to prevent a long period of uncertainty about who will have what rights in a property.

Here are some examples:

Farmer Brown has a will that leaves his property “to my son Adam, as long as used for ranching purposes, then to my daughter Betty.” That’s void under the Rule because the property could be used for ranching more than 21 years after everyone alive today has died, leaving the fate of Betty’s interests uncertain. For example, say ranching occurs for 200 years on the property and then agricultural uses cease. Up until that point, the land passed according to Adam’s will. Now that agricultural uses have stopped, who gets the land? Betty is deceased, so should it go to her estate or her heirs, or should everything go on as it has been? The Rule was enacted to specifically deal with this type of problem. Since this event *might* occur (even if it doesn’t actually occur), the will violates the Rule.

John Doe’s will states that the deed to his ranch will pass to State College when a candidate for

<sup>5</sup> WYO STAT. ANN. § 34-1-139. In 2003, the Wyoming Legislature amended the statute as part of the Uniform Trust Code amendments, but those amendments do not apply to real property and are not relevant for our purposes.

<sup>6</sup> See *Williams v. Watt*, 668 P.2d 620, 629 (Wyo. 1983).

college president comes from John's home county. This violates the Rule because there is no "life in being" to whom the perpetuity clock can be attached. There is no time limit at all on when that condition might be fulfilled, and the college's interest might not vest until long after everyone alive today has died.

## Conclusion

In summary, the Rule does not prevent conservation easements in Wyoming. The term "perpetuity" has two completely different meanings in each context. Because conservation easements *vest* immediately upon transfer, the Rule is not violated. The fact that conservation easements are generally held "in perpetuity" is not contrary to the Rule because the perpetuity provision in most conservation easements refers to *how long* the transfer is in effect, not when it vests.

## Additional publications in this series include:

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