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Private Lands Conservation in the British Virgin Islands

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PRIVATE LANDS CONSERVATION IN THE BRITISH VIRGIN ISLANDS

**A Country Report by the Natural Resources Law Center,
University of Colorado School of Law**

September 2004

Sponsored by The Nature Conservancy

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Private Lands Conservation in the British Virgin Islands

A Report by the Natural Resources Law Center
University of Colorado School of Law

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BRIEF QUESTIONS

1. What legal tools are in place for the purpose of achieving private lands conservation in the British Virgin Islands?

Under the auspices of the National Parks Trust, trusts are the legal mechanisms used for national conservation programs in the British Virgin Islands.

2. What legal tools are recognized by the legal system and are capable of being used for private lands conservation in the British Virgin Islands?

Appurtenant easements, covenants, profits, restrictive agreements and usufructs are common law instruments that have been used successfully for conservation purposes in other jurisdictions. As these instruments are recognized in the British Virgin Islands, they could conceivably be employed to establish private reserves. In addition, the British Virgin Islands authorizes the formation of condominiums, which have been used in Costa Rica and Panama for the establishment and management of conservation programs. Trust law in the British Virgin Islands could also be used for the establishment or private land reserves.

3. Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation efforts in the British Virgin Islands?

British Virgin Islands law already recognizes appurtenant easements; however, the introduction of a national statute explicitly authorizing conservation easements—both in gross and appurtenant—would lend a degree of security, flexibility and simplicity to conservation efforts that does not exist under the current property law regime. Given the reliance on and persuasiveness of certain outside legal authorities, if a conservation easement were passed into law in either Great Britain or another Eastern Caribbean state, the concept would possibly be honored in the British Virgin Islands as well.

In addition, providing a formal mechanism whereby landowners dedicating their property to conservation were automatically exempted from property taxes—or granted other tax incentives—would further private conservation efforts by reducing the financial burden on conservationists. Purchased development rights and leaseback agreements also present a potential means by which foreign conservationists could work with existing “belonger” owners to establish private reserves.

Civil contracts have been used to great effect in Great Britain and in Belize; and given the persuasiveness in the British Virgin Islands of the legal authority of England and former British dependencies, contracts modeled after civil contracts that have withstood legal challenges in such locales could serve as useful templates for conservation efforts in the British Virgin Islands.

4. What challenges to private conservation exist in the British Virgin Islands?

Perhaps the greatest challenges to private conservation in the British Virgin Islands are the scarcity of available land and the reluctance to cede land to “non-belongers.” Both government policy and local bias disfavor the acquisition of land by non-British Virgin Islanders. While locally based conservation groups could more readily purchase land for conservation purposes, conservation groups with even a single non-belonger director would have to apply for a Non-Belonger Land Holding License. Ideally non-belongers would be able to own and manage private reserves in the British Virgin Islands, but a number of legal hurdles could hinder such efforts. Thus, perhaps the most efficient and effective strategy for non-belongers wishing to maximize resources in service of conservation in the British Virgin Islands would be to work with existing conservation groups, such as the National Parks Trust, or to fund or manage existing conservation groups and projects. While such activities would not afford non-belongers direct control, they

would allow them to effect positive change under the auspices of legally recognized entities with a minimum of bureaucratic challenge.

INTRODUCTION

Although it encompasses an area of only 153 square kilometers, the British Virgin Islands contains a wealth of natural treasures. A land of mangrove swamps, salt ponds, and steep slopes, it is home to endangered plant and animal life, including the Anegada rock iguana, which once inhabited Puerto Rico and St. Thomas but now resides only in the British Virgin Islands. To protect these resources, the territory has established a system of National Parks managed by the National Parks Trust. However, few private conservation reserves have been established on the islands. The information contained within this memo will serve as an aid to those who wish to engage in private lands conservation in the British Virgin Islands.

This report seeks to provide the reader with a basic understanding of the legal instruments, processes and institutions within the British Virgin Islands that are relevant to private lands conservation, and to evaluate the legal feasibility of introducing conservation easements into the British Virgin Islands legal system for the purpose of achieving private lands conservation. Section I of the report provides relevant background information on the history and culture of the British Virgin Islands. Section II of the report explores the territory's general governmental and legal context, while Section III looks more specifically at the procedures, rights and restrictions pertaining to private lands in the British Virgin Islands. Section IV discusses the legal tools presently in place in the British Virgin Islands that could be used in service of private conservation efforts, and Section V augments that discussion with a survey of tools that could plausibly be introduced to the British Virgin Islands legal system in order to further private conservation efforts. Section VI considers promising tactics for achieving the goal of private lands conservation, such as the establishment of private reserves or the introduction of new legislation.

I. RELEVANT BACKGROUND

A. Overview of the Land, Demographics and Related Issues

The British Virgin Islands consists of more than 40 islands, 16 of which are inhabited, and is situated about 60 miles east of Puerto Rico. The total land area of the British Virgin Islands is 153 square kilometers (59 square miles). The largest islands, in order of size, are Tortola (54 square kilometers), Virgin Gorda (21 square kilometers), Anegada (38 square kilometers), and Jost Van Dyke (9 square kilometers). Other major islands include: Beef, Cooper, Ginger, Great Camanoe, Guana, Little Tobago, Norman, Peter, Salt, Scrub, and Tobago.¹

Most of the islands are characterized by steep slopes rising precipitously from the sea, except for Anegada, which is a very flat limestone island. One quarter of Anegada's surface is covered with salt ponds and sand dunes. The other islands are covered in a shallow, friable, sandy soil, and are dotted with large boulders. The highest point in the British Virgin Islands is Mount Sage on Tortola, at 543 meters above sea level.²

All natural surface water bodies in the British Virgin Islands are estuaries, cays, or salt ponds. All are of high salinity. The only fresh surface water in the British Virgin Islands consists of small ponds or miniature dams created by the Department of Agriculture for use by farmers. These ponds and dams have a capacity of about 14,000 cubic meters. A few perennial springs exist in the hills, but the volume of their flows has not been documented.³

The wetlands of the British Virgin Islands are continually being filled, and a number of salt ponds have been lost. Originally, development in the British Virgin Islands was concentrated in the flats, but with a growth in development, wetlands that were previously devoted to agriculture or

¹ Government of the British Virgin Islands, *National Integrated Development Strategy: Habitats* (2002) at <http://dpu.gov.vg/Plans/NIDS/habitats.htm> (hereinafter G.B.V.I., *Habitats*) (last visited August 17, 2004).

² Leland Dennis, *Land Resources Information Systems in the Caribbean: British Virgin Islands* (2000) at <http://www.fao.org/DOCREP/004/Y1717E/y1717e09.htm> (hereinafter Dennis, *Land Resources Information Systems*) (last visited August 17, 2004)

were virgin areas have been encroached upon, despite initiatives to replant mangroves.⁴ Additionally, land reclamation efforts, primarily occurring along the coast of Tortola, have proceeded in an incremental and uncoordinated fashion and threaten the adjacent seabed and reefs.⁵

The total natural forest area of the British Virgin Islands is 4,000 hectares, or 27 percent of the total land area. There are remnants of primeval rain forests in Tortola, but no substantial stands of forest. Reforestation of the mahogany and white cedar in the remaining primeval rainforests has been undertaken on Sage Mountain, a national park, and plans to protect and replant the even smaller fragments of forest in Virgin Gorda and Jost Van Dyke were put in place in the 1980s.⁶

In 1996, 19,000 people lived on the islands, yielding a population density of 124 persons per square kilometer. However, two-thirds of the population of the British Virgin Islands lives on Tortola, and another 15 percent of the population lives on Virgin Gorda. The remainder of the islands' inhabitants occupy a few of the other larger islands, leaving many islands and cays unpopulated.⁷

In 2004, the population of the British Virgin Islands was estimated at 21,000, reflecting the continued growth of the islands' population. In 1980, the census revealed a population of 12,034, which was more than a 20 percent increase over the 1970 census and almost a 100 percent increase over the 1960 population. The precipitous growth in population over the last half of the 20th century was fed by an influx of immigrants, stimulated by the rapid development of the tourism and offshore banking industries and those industries' needs for human capital. However, dramatic rates of immigration also fed native islanders' concerns about persons of other races and

³ Dennis, *Land Resources Information Systems*.

⁴ *Id.*

⁵ G.B.V.I., *Habitats*.

⁶ Dennis, *Land Resources Information Systems*.

nationalities disturbing the harmony, wealth and opportunities available to native British Virgin Islanders. Hence, strict labor and immigration policies were put in place, the result being that certificates of residence and “belonger” status are rarely issued to immigrants—and then only in exceptional circumstances.⁸

B. History of Land Use and Tenure

In Pre-Columbian times, the Virgin Islands archipelago was settled by the Taino and Carib peoples, tribal groups that had migrated to the Caribbean from South America by ocean-going dugout canoes. These original islanders with their strong community structures made their living as subsistence fisherman and farmers and were highly skilled potters.⁹

Following Columbus’s discovery of the islands in 1493, however, Europeans all but exterminated the tribal people. In their place, they established plantation systems, dependent upon slaves for their operation. The Dutch founded the first permanent settlements in 1648, but by 1672, possession of the islands had passed to the British. The plantations grew cotton, sugar cane, ginger and indigo, and the booming economy they produced, supported by a lively trade with New England, caused the population of Tortola alone to reach almost 12,000 residents by the late 18th century. In time, however, poor rainfall and soil made this economy unsupportable, particularly after Great Britain outlawed slavery in 1808, and many planters abandoned the islands. Those that remained became small farmers and fishermen and were joined by the many Quakers who came to the islands in the late 18th century.¹⁰

⁷ G.B.V.I., *Habitats*.

⁸ International Monetary Fund. *British Virgin Islands—Overseas Territory of the United Kingdom: Assessment of the Supervision and Regulation of the Financial Sector* (Washington, D.C., April 2004), IMF Country Report No. 04/92 (hereinafter International Monetary Fund, *British Virgin Islands*).

⁹ Randall Peffer, *British Virgin Islands* (Lonely Planet Guides, 2001). Available at: http://www.lonelyplanet.com/destinations/caribbean/british_virgin_islands/history.htm (last visited August 17, 2004).

¹⁰ Kenneth Robert Redden, *Modern Legal Systems Cyclopedic: Central America and Caribbean*, Vol. 7, Chapter 16A, § 7.34 (Buffalo, NY: William S. Hein & Co., Inc., 1995) (hereinafter Redden, *Modern Legal Systems Cyclopedic*).

Agriculture and fishing still play a role in the British Virgin Islands economy, but that role is much diminished—to the extent that the government has made concerted efforts to encourage new investment in agriculture in an effort to revitalize this key component to the islands’ self-sustenance. By giving aid and advice to livestock breeders and farmers, the production of fresh vegetables and fruit has improved in recent years, and bananas and root crops now make up 90 percent of agricultural output.¹¹

Still, agriculture accounts for less than 10 percent of the territory’s GDP, replaced by tourism and the offshore financial sector, both of which account for approximately 40 to 45 percent of GDP. The tourism industry, which was inaugurated in the 1960s when Laurence Rockefeller built Little Dix Bay on Virgin Gorda, has become the main driver of the British Virgin Islands economy, stimulating the expansion of the construction and service industries. In 1982, more than 155,000 visitors came to the British Virgin Islands—a threefold increase over 1972. Tourist expenditure in 1982 was US\$112 million, seven times as much as in 1975.¹²

Offshore companies have been attracted to the British Virgin Islands by low tax rates and double taxation relief agreements with many countries. More than 800 international business companies (IBCs) were registered in the British Virgin Islands by 1982, and since then the number has grown exponentially to 350,000 active registered IBCs in the British Virgin Islands in 2004—45 percent of the world IBC market.¹³

Further growth in the tourism and offshore business sectors is subject to several constraints. The British Virgin Islands offers a limited stock of office and hotel space, and possesses a small airport unable to accommodate wide-body planes. These limitations stem from the islands’ physical limitations and from governmental policies. The islands, being small and extremely steep,

¹¹ *Id.*

¹² International Monetary Fund. *British Virgin Islands*.

offer only limited amounts of land suitable for the construction of tourism and business facilities. Furthermore, government policies demand the preservation of the environmental qualities of the islands and therefore limit the size and number of new construction projects. The small population and the limited secondary educational opportunities on the island contribute to a lack of sufficient human capital for the tourism and financial industries, so more than 40 percent of the labor force comes from outside of the territory—despite labor and immigration laws that discourage the hiring of “non-belongers.”¹⁴

C. Belonger and Non-Belonger Status

As members of a relatively new and small country, British Virgin Islanders have placed great importance on the idea of “belonging” to the British Virgin Islands. Emphasis on this concept has grown in response to on-going concerns over increased immigration, and the Legislative Council has enacted several pieces of legislation designed to place certain controls on the situation. While other countries refer to “aliens” and specify the rights and privileges that do and do not extend to them, the British Virgin Islands have carefully prescribed “belonger” and “non-belonger” status. The legal categories of “belonger” and “non-belonger” were popularized in laws passed by the first ministerial government—most notably, the 1969 Immigration and Passport Ordinance, updated in 2000.¹⁵

Non-belongers—those who were not born on the Islands or born to British Virgin Islanders—generally may achieve believer status only by possessing a certificate of residence for not less than twelve years, residing in the territory for a minimum of ten years (five years if

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Bill Maurer, *Recharting the Caribbean: Land, Law and Citizenship in the British Virgin Islands* (Ann Arbor, MI: University of Michigan Press, 1997) (hereinafter Maurer, *Recharting the Caribbean*).

married to a British Virgin Islander) before application for believer status, and by demonstrating an intention to make the British Virgin Islands a permanent home.¹⁶

The ability of non-belongers to participate fully in the culture, economy and law of the British Virgin Islands is circumscribed by law. In addition to facing labor and voting regulations, non-belongers must comply with property ownership restrictions.¹⁷ They must apply for special licenses in order to purchase property on the islands. They may not acquire and hold land in excess of five acres by annual tenancy without obtaining a land-holding license. Indeed, companies with even a single non-belonger director or with non-belongers comprising more than one-third of their voting members must apply for licenses before purchasing property on the islands.¹⁸ Licenses granting non-belongers the right to purchase property in the British Virgin Islands are issued sparingly, as the government favors ownership by believers of the territory's scarce resources.¹⁹

D. Relations With Britain

As a dependency of Great Britain, the British Virgin Islands maintains close ties with the United Kingdom. Although the British Virgin Islands is a self-governing territory, the Governor, who is appointed by the Queen, holds responsibility for the country's defense, internal security, external affairs, public service and administration. The roads, airport, electricity and water facilities, schools and other public services have been funded not only from local revenue, but by external assistance, particularly from the United Kingdom.²⁰ While British law does not extend automatically to the British Virgin Islands, the British Parliament may, by explicitly stating so,

¹⁶ *Island Sun Newspaper*, "BVI Gets 64 More Residents and Belongers" (Road Town, Tortola, May 31, 2003).

¹⁷ Maurer, *Recharting the Caribbean*.

¹⁸ Non-Belongers Land Holding Regulations, §§ 1-6.

¹⁹ Maurer, *Recharting the Caribbean*.

²⁰ Redden, *Modern Legal Systems Cyclopedia*.

extend laws and treaties to the British Virgin Islands, and the Islands' judiciary frequently consults and relies upon English common law precedent.²¹

II. OVERVIEW OF LEGAL CONTEXT

A. Government

In 1774 a legislative form of government was established in the British Virgin Islands. Originally this consisted of a representative council, but in 1902 the council was replaced by a single, nominated authority. As a member of the Federal Colony of the Leeward Islands, representative government for the British Virgin Islands was reintroduced in 1950. In 1956 the Leeward Islands were defederated, and the British Virgin Islands became a separate dependency, though it continued to be administered by the Governor of the Leeward Islands until 1960. In 1960 the office of the Governor of the Leeward Islands was abolished and that role was filled by an administrator of the British Virgin Islands who was the Queen's representative. A ministerial form of government was introduced under a new constitution in 1967; and in 1977, under an amended constitution, the role of administrator was instead vested in a governor who was to serve in concert with an executive and legislative council.²²

Currently the British Virgin Islands, still a dependent territory of the United Kingdom, is constitutionally autonomous from the United Kingdom and is internally self-governing. The territory has a legal system based on the British legal system, with an executive branch, a Legislative Council and a judiciary. With a population of just 21,000, British Virgin Islanders have not established an underlying system of local government.²³

²¹ Colin T.S. O'Neal and Paul A. Webster, *A Lawyer's Guide to British Virgin Islands* (Road Town, Tortola: O'Neal Webster O'Neal Myers Fletcher & Gordon, September 1998) (hereinafter O'Neal and Webster, *A Lawyer's Guide to British Virgin Islands*).

²² Redden, *Modern Legal Systems Cyclopaedia*.

²³ Government of the British Virgin Islands, Development Planning Unit, *Government of the British Virgin Islands* (Road Town, Tortola, 2003) at <http://dpu.gov.vg/AboutUs/GovernmentBVI.html> (hereinafter G.B.V.I., *Government of the British Virgin Islands*) (last visited August 17, 2004).

The executive authority is vested in a Governor, appointed by the British Government, who acts as the representative of the British Crown in the territory. The Governor acts on the advice of the locally elected government and is responsible for defense, external affairs, the local police force, and the administration of justice. The Governor is assisted in these functions by an Executive Council. The Council is composed of a Chief Minister, appointed by the Governor from the elected members of the Legislative Council. The Council consists of not less than two nor more than three Ministers appointed by the Governor in accordance with the advice of the Chief Minister from among members of the Legislative Council; and one ex-officio member, the Attorney General. The Governor, while not a member of the Executive Council, is required insofar as is practicable to attend and preside at meetings of the Executive Council. The Governor may assign duties to each minister on the advice of the Chief Minister; ultimately, however, the Governor retains personal responsibility for the defense, external affairs, police, and administration of the British Virgin Islands.²⁴

Most other government functions, however, including the authorization of all public spending, are the responsibility of the locally elected representatives who, together with opposition members, comprise and sit in the Legislative Council, a unicameral body consisting of 13 members. Four of these members are elected territory-wide, and nine of them are elected by district. Members of the Legislative Council select a speaker and a deputy speaker. All members of the Council are elected for a term not to exceed four years. The Chief Minister may trigger an election for the purposes of forming a new government by dissolving the Council.²⁵

The judicial branch of the British Virgin Islands consists of a Magistrate Court, a High Court, and a Court of Appeal. On the British Virgin Islands, there is the Magistrate Court, a

²⁴ B.V.I. Constitution §§ 3-23.

²⁵ B.V.I. Constitution §§ 25-35.

juvenile court and a court of summary jurisdiction. Two resident High Court judges in the British Virgin Islands handle a wide variety of civil and criminal cases. But the High Court and Court of Appeal for the British Virgin Islands is actually the Supreme Court for the Organisation of Eastern Caribbean States (OECS); thus, most appeals and purely legal disputes are handled off the islands in the courts of the OECS.²⁶ In addition, OECS judgments have a final right of appeal to the Privy Council in London.²⁷

B. Legal Authority

The current law of the British Virgin Islands is based on the common law of England and the principles of equity as of 1666, as altered by subsequent U.K. or local legislation. The British Virgin Islands possesses a Constitution, as well as acts and statutes passed by the Legislative Council and compiled in the *Revised Edition of the Laws, 1991*. In addition, local and OECS judicial interpretation and analysis, or the common law, are valid legal authorities. U.K. statutory law does not apply to the British Virgin Islands except where the U.K. Parliament has specifically extended legislation to the territory.²⁸ However, decisions handed down by English courts and by the high courts of Caribbean states presently or formerly under British dominion are highly persuasive and frequently cited by judges and counsel in the courts of the British Virgin Islands—except when based on legislation peculiar to the United Kingdom or the particular Caribbean state.²⁹ There is no customary law in the British Virgin Islands.³⁰

²⁶ Member states of the Organisation of Eastern Caribbean States are: Anguilla, Antigua and Barbuda, British Virgin Islands, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, Saint Lucia, and St. Vincent and the Grenadines.

²⁷ G.B.V.I., *Government of the British Virgin Islands*.

²⁸ Thomas Reynolds and Arturo Flores, *Foreign Law: Current Sources of Codes and Legislation in Jurisdictions of the World*, vol. 1, Western Hemisphere (Buffalo, NY: William S. Hein & Co., Inc., 2003) (hereinafter Reynolds and Flores, *Foreign Law*).

²⁹ O'Neal and Webster. *A Lawyer's Guide to the British Virgin Islands*.

³⁰ U.S. Department of the Interior, Office of Insular Affairs, *A Report on the State of the Islands* 70 (1999).

III. PROCEDURES, RIGHTS AND RESTRICTIONS PERTAINING TO PRIVATE LANDS

A. Institutional Framework

The Ministry of Natural Resources and Labour is the main agency with control over land administration in the territory, both directly and through its Departments of Agriculture, Conservation and Fisheries, and the National Parks Trust. Other government agencies involved in land management are the Ministry of Communication and Works and the Town and Country Planning Department, which is responsible for physical development planning. The Department of Conservation and Fisheries is responsible for wetlands and mangroves.³¹

Conservation in the territory is handled by three departments: the Department of Agriculture, which oversees cultivable land and irrigation systems; the Conservation and Fisheries Department, which deals with the marine and coastal area; and the National Parks Trust, which deals with established parks. All other areas are left to the Engineering Division of the Department of Agriculture by default or by established laws.³²

The Development Planning Unit (DPU), under the Ministry of Finance, assists the Government of the British Virgin Islands in developing and reviewing economic, social and developmental policies, including environmental policies.³³

B. Ownership of Private Property³⁴

Land in the British Virgin Islands falls into two categories: Crown Land (39 percent of the territory) and Private Land (61 percent of the territory). Crown Land can become private land upon

³¹ Dennis, *Land Resources Information Systems*.

³² *Id.*

³³ *Id.*

³⁴ Further information is available from the British Virgin Islands Government.

http://www.bvi.gov.vg/template_text.php?main=cahe§ion=investment&sub=property_and_land (last visited August 17, 2004).

issuance of it by the government to a private owner. However, the government does not issue Crown grants to non-British Virgin Islanders, except in special circumstances.³⁵

Private land can be leased or purchased. The term for a long lease is normally 99 years, or the unexpired term in the case of an assignment of a lease.³⁶ For practical purposes a purchaser of such a leasehold interest will enjoy all the benefits of an absolute title for the duration of the lease.³⁷

Purchased land is typically held in fee simple. Non-British Virgin Islanders (non-belongers) must obtain a Non-Belongers Land Holding License in order to complete the purchase of any land in the British Virgin Islands. Such licenses are by no means issued automatically upon request. Rather, it is the government's policy that locals maintain ownership of land.³⁸ Land is at a premium, and can be difficult to find.³⁹ Therefore, the government's policy is that belongers should have the first choice of property selection.

Application for a Non-Belongers Land Holding license can be made only after the non-belonger has advertised his or her intent to purchase a specific property for four consecutive weeks in a local paper. The application for the license must be supported by two character references, a financial reference, a certificate of good standing, other supporting documentation, and a filing fee of \$50 for each person (and \$75 for each company) named on the application. Applications for all licenses are referred to the Executive Council for approval. Any Non-Belongers Land Holding License issued by the government grants an entitlement to own a specific property only and is non-

³⁵ G.B.V.I., *Habitats*.

³⁶ Non-belongers may lease land only for an annual tenancy and in a size no greater than five acres without a Non-Belonger Land Holding License. Non-Belongers Land Holding Ordinance § 3(a).

³⁷ Smiths Gore Overseas Ltd., *Real Estate and Property in the Caribbean: British Virgin Islands* (Road Town, Tortola, 2003) (hereinafter Smiths Gore Overseas, *Real Estate and Property in the Caribbean*).

³⁸ Government of the British Virgin Islands Trade & Investment Promotion Department (2003) at <http://www.trade.gov.vg/business1.htm> (hereinafter G.B.V.I., *Business*).

transferable. The license itself, if granted, costs \$150 for each person (\$200 for each company) named therein.⁴⁰

If a non-belonger wishes to purchase undeveloped property, he or she must commit to expending a specific sum on development within a specified time period, generally three years. This sum is generally no less than \$100,000, and can range upwards depending on the acreage of the parcel the non-belonger proposes to purchase. Undeveloped land cannot be resold until this development commitment is met or until the non-belonger pays a penalty of 25 percent of the sale contract price. The additional regulations pertaining to the purchase and sale of undeveloped land by non-belongers serve to limit speculation on undeveloped land.⁴¹

Non-belongers must obtain approval from the Executive Council to lease out property on either a short-term or long-term basis. Application for this approval, a “trade” license, is submitted in concert with the application for a Non-belongers Land Holding License.⁴²

Privately owned land in the British Virgin Islands is taxed at a flat rate. British Virgin Islanders pay a land tax of \$10 per year on the first acre or part thereof, and \$3 per year per additional acre (or part thereof).⁴³ Non-belongers pay a \$50 annual land tax for any acreage less than half an acre. For half an acre to one acre, non-belongers are charged a land tax of \$150 per year; for any additional acreage thereafter, a land tax of \$50 per acre is assessed annually.⁴⁴ House

³⁹ Ministry of Natural Resources & Labor, http://www.bvi.gov.vg/template.php?main=yg§ion=directories&sub=ministries&fourth=ministry_of_natural_resources_and_labour (last visited August 17, 2004).

⁴⁰ Government of the British Virgin Islands Trade & Investment Promotion Department (2003) at <http://www.bvi.gov.vg/template.php?main=cahe§ion=investment> (hereinafter G.B.V.I., *Investment*) (last visited August 17, 2004).

⁴¹ *Id.*

⁴² G.B.V.I., *Business*.

⁴³ Land and House Tax Ordinance Schedule 1(1).

⁴⁴ *Id.* at Schedule 1(2).

Tax is also levied annually on all privately owned buildings at the rate of 1½ percent of the assessed annual rental value of the building.⁴⁵

C. Establishing Clear Title

Most private land in the British Virgin Islands is owned in fee simple. A purchaser will normally acquire absolute title, which is registered in the British Virgin Islands Land Registry.⁴⁶ Certificates of title relate to a detailed cadastral survey, which defines the legal boundaries of the property described on a deed or title.⁴⁷ Those certificates of title filed in the Land Registry, granted in accordance with the Title by Registration Act and the Registered Land Ordinance, are deemed indefeasible, and grant absolute title subject only to the encumbrances duly noted therein or imposed by statutory law.⁴⁸ Every proprietor acquiring land is deemed to have had notice of any encumbrance on the land noted in the register, regardless of whether the purchaser has actually checked the register.⁴⁹

Section 38(1) of the Registered Land Ordinance (1970) provides that no person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or (b) to see to the application of any consideration or any part thereof; or (c) to search any register kept under the Registration and Records Ordinance. The courts have held this to mean that registration “confers indefeasibility of title to the specified parcel of land upon the registered proprietor and dispenses with any need on the part of persons dealing with him to investigate further his right thereto.”⁵⁰

⁴⁵ *Id.* at Schedule 2.

⁴⁶ Registered Land Ordinance § 9.

⁴⁷ *Id.* at § 14.

⁴⁸ Title by Registration Ordinance § 8; Registered Land Ordinance § 23

⁴⁹ Registered Land Ordinance § 30.

⁵⁰ *Racoon Limited v. Turnbull*, Privy Council, Appeal No. 33 of 1995, delivered on May 22, 1996. This case was appealed to the Privy Council from the Court of Appeal of the British Virgin Islands, decision delivered on January 10,

The Racoon v. Turnbull holding indicated that registration in the Land Registry establishes clear title, despite possible contradictory interpretations of statutory provisions. For instance, Section 135 of the Land Registration Ordinance provides that “ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twenty years.” The High Court determined in Ira George v. Oswin George, Civil Suit No. 90 of 1999 (decided on July 31, 2002), that while an owner is registered as the registered proprietor, under Racoon v. Turnbull he is immune from attack by adverse claims to the land. However, he is not immune against “any claim whatsoever.” The Owen court determined that while an individual could not adversely possess against a registered owner, the claimant could claim a right of way, protected by a permanent injunction restraining the registered owner from in any way limiting or interfering with enjoyment of a right of way over the land.

D. Land Transfer

Once agreement in principle has been reached between a purchaser and a vendor of land in the British Virgin Islands, the vendor’s attorney draws up a legally binding purchase and sale agreement that both parties sign.⁵¹ Normally, when the purchaser is a non-belonger, the agreement will contain a condition that completion of the purchase is contingent upon the purchaser obtaining a Non-belongers Land Holding License.⁵² Purchasers are generally contractually required to submit their Non-belongers Land Holding License application within a specified period following the signing of the purchase and sale agreement.⁵³ Licenses are required for the purchase and ownership of any property by a non-belonger, whether raw land, a home, multiple dwellings or a

1994; which in turn had been appealed from the High Court of the British Virgin Islands, decision delivered on May 30, 1991.

⁵¹ *Smiths Gore Overseas, Real Estate and Property in the Caribbean.*

⁵² *Id.*

⁵³ *Id.*

business or commercial venture.⁵⁴ The license, if granted, gives an entitlement to own a specific property only, and is not transferable.⁵⁵

In the British Virgin Islands, it is normal practice for a prospective purchaser to pay a 10 percent earnest deposit to the vendor's agent to be held in escrow prior to signing a purchase and sale agreement.⁵⁶ Although payment of a deposit does not bind the vendor or their agent legally, it is taken as a clear indication that a purchaser intends to sign a purchase and sale agreement.⁵⁷ Interest earned on this deposit goes to the purchaser in the event that the purchaser withdraws prior to signing the contracts; if the purchase proceeds to contract, interest goes to the vendor, and the deposit is non-refundable.⁵⁸

Completion of the sale and transfer of title generally takes place soon after the receipt of the Non-Belongers Land Holding License. Payment of the balance of the purchase price is due at this time.⁵⁹ The sale and title transfer, however, will be void unless registered with Land Registry within three months if the sale took place within the Territory or within one year if the sale took place outside of the British Virgin Islands.⁶⁰ Only deeds registered within the appropriate time frame are valid.⁶¹ Furthermore, no transfer of land will take place unless the boundaries of the property have been determined to the satisfaction of the Registrar of Lands.⁶²

⁵⁴ Forms for the Non-Belongers Land Holding License can be obtained from the Ministry of Natural Resources and Labour at: 22 Administration Drive, Central Administration Complex, Road Town, Tortola, British Virgin Islands; Tel: (284) 468-3701 x2147; mnrl@bvirginislands.gov.bm.

⁵⁵ Non-Belongers Land Holding Ordinance § 4(2)(b).

⁵⁶ Smiths Gore Overseas, *Real Estate and Property in the Caribbean*.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Registration and Records Ordinance §§ 3, 6.

⁶¹ *Id.*

⁶² While this power is provided for by the Registered Land Ordinance § 6, it is exercised only when the boundaries of the property in question are under dispute.

To register the deed, the purchaser must present a signed, witnessed instrument of sale to the Registrar.⁶³ The format of the deed presented must comply with a template created by the court.⁶⁴ If the deed complies with the specifications, the Registrar files it in book form and gives the bearer a certificate acknowledging receipt of the deed.⁶⁵ On the transfer of title to a property, the purchaser is required to pay Stamp Duty at the rate of eight percent of the purchase price or appraised value.⁶⁶

Under Section 38 of the Registered Land Ordinance, no purchaser is required to inquire about, ascertain the circumstances in which, or determine the consideration for which the vendor or any previous proprietor was registered, or to see to the application of any consideration or any part thereof, or to search any register kept under the Registration and Records Ordinance. Rather, the transfer is verified by the Registrar and filed in the Land Registry books with the records for the pertinent parcel.⁶⁷

Any condition or limitation upon the use or enjoyment of the land made in relation to a transfer of land will be deemed void, unless the condition is clearly defined in Division 5 of the Registered Land Ordinance—that is to say, an easement appurtenant, a restrictive agreement that runs with the land, a license, or a profit.⁶⁸

E. Land Registration

The Land Register is maintained at the Land Registry in Road Town, Tortola, as is the Registry Map. All the files for each parcel, which contain every instrument that supports the entries in the land register, are stored with the Land Registry, as are any filed plans and documents pertaining to land in the British Virgin Islands. An index, in alphabetical order, of the names of the

⁶³ Registered Land Ordinance §§ 106-107, Conveyancing and Law of Property Ordinance § 4.

⁶⁴ Conveyancing and Law of Property Ordinance § 18.

⁶⁵ *Id.* at § 21.

⁶⁶ S tamps Ordinance § 30, Stamps Ordinance Schedule.

⁶⁷ Registered Land Ordinance § 38.

proprietors of land, leases, and charges, showing the numbers of all parcels in which the individuals are interested, is also kept at the Land Registry—as is a register of powers of attorney. In addition, the Land Registry office keeps a book (known as the application book) with records of all applications (such as applications for Non-Belongers Land Holding Licenses) numbered in the order in which the applications are made at the registry. A separate register tracks all records specified under the Condominium Ordinance.⁶⁹

The Land Register comprises a register with respect to every parcel that has been adjudicated under the Land Adjudication Ordinance, every strata lot registered in accordance with the Condominium Ordinance, and every lease required to be registered by the Registered Lands Ordinance (this generally means long-term leases).⁷⁰ The Land Register indicates whether the land is private land or Crown land; and, with respect to private land, whether the title is absolute or provisional.⁷¹ Registry information for each parcel is divided into three sections:

1. The property section, which contains a brief description of the land, strata lot, or lease, together with particulars of its appurtenances and, where the title is provisional, of the information recorded in the adjudication record, and a reference to the Registry Map and filed plan, if any exists.
2. The proprietorship section, containing the name, and, where possible, address of the proprietor and a note of any inhibition, caution, or restriction affecting his right of disposition.
3. The incumbrances section, containing a note of every incumbrance and every right adversely affecting the land strata lot or lease.

For Crown Land no entry is required in the proprietorship section.⁷²

⁶⁸ *Id.* at § 86.

⁶⁹ *Id.* at § 4.

⁷⁰ *Id.* at § 9(1).

⁷¹ *Id.* at § 9(2).

⁷² *Id.* at § 9(3).

The Registrar may, on application by the proprietor, combine contiguous parcels owned by the same proprietor and subject in all respects to the same rights and obligations. To do so, the Registrar closes the registers relating to the individual parcels and opens a new register with respect to the parcel resulting from the combination.⁷³ Similarly, the Registrar may divide a parcel upon application by a proprietor by closing the register relating to the parcel and opening new registers for the new parcels resulting from the division.⁷⁴

F. General Restrictions on Land Use

Certificate of title, registered in the Land Registry, grants a private owner indefeasible rights of ownership; however, such title in no way affects any rights of common, rights of way, or rights to be exercised over any ponds streams or other water, any easements or profit à prendre, or the ownership of any public road.⁷⁵

Thus, unless noted to the contrary on the register, all registered land is subject to the following overriding interests and restrictions—even if they are not noted on the register:⁷⁶

- rights of way, rights of water and any easement or profit subsisting at the time of first registration under the Registered Land ordinance
- natural rights of light, air, water, and support
- rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other written ordinance
- leases or agreements for leases for a term not exceeding two years, and periodic tenancies
- any unpaid moneys which, without reference to registration under the Registered Land act, are expressly declared by any written law to be a charge upon land
- rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription

⁷³ *Id.* at § 21(1).

⁷⁴ *Id.* at § 21(2).

⁷⁵ Title by Registration Ordinance § 11.

⁷⁶ Registered Land Ordinance § 28.

- the rights of a person in actual occupation of land or in receipt of the rents and profits thereof except where inquiry has been made of such person and the rights were not disclosed
- electric supply lines, telephone and telegraph lines, or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law
- arrears of land or house tax due to the government

Mineral rights are never vested in private owners. All minerals in, on or under any land in the British Virgin Islands are vested in and subject to the control of the Crown.⁷⁷ These limitations do not apply to rock salt or to substances commonly used for the construction of roads or building, such as clay, sand and limestone.⁷⁸ They do, however, apply to precious gems and metals.⁷⁹

Development on privately owned land in the British Virgin Islands is controlled by Planning Guidelines that determine general policy. The Land Development Control Authority, which is concerned with planning matters, and the Building Authority must approve development work, which is responsible for ensuring that buildings conform with the building code guidelines.⁸⁰ It is preferred that working drawings submitted to these authorities are prepared by architects based in the British Virgin Islands.⁸¹

Development in certain areas of the British Virgin Islands requires the additional approval of other bodies. For example, development on Wickhams Cay, Road Town, Tortola requires the approval of the Wickhams Cay Development Authority. In National and Marine Parks areas, the National Parks Trust is empowered via the authority of the National Parks Ordinance and the Marine Parks and Protected Areas Ordinance, to permit development. Where a development

⁷⁷ Minerals (Vesting) Ordinance § 3.

⁷⁸ *Id.* at §§ 2(i)-(ii).

⁷⁹ *Id.* at §§ 2(d)(i)-(ii).

⁸⁰ Land Development (Control Ordinance) §§ 7-8.

⁸¹ G.B.V.I., *Business*.

proposal is made for the use of Crown Land, including the seabed, the Ministry of Natural Resources and Labour and the Executive Council must approve the proposal.⁸²

Any person or entity intending to carry out construction of any type on a site is required by the Building Ordinance to obtain the approval of the Building Authority. A Building Permit is required before the erection or any new building, addition or alteration to any building, or removal or demolition of any building. Any work carried out must comply with the permit.⁸³

G. Dispute Resolution

Ownership Disputes. Civil suits and proceedings relating to the ownership or possession of any land, lease or charge registered under the Registered Land Ordinance, or to any interest in any land, lease or charge that is registrable under the Registered Land Ordinance, shall be tried to the High Court.⁸⁴ However, if the value of the subject matter in dispute does not exceed \$500, a Magistrate's Court may handle the suit or proceedings.⁸⁵

Boundary Disputes. Because the Land Registry Maps indicate only approximate boundaries and the approximate situation of the parcel, unless the Registrar has intentionally and specially fixed the boundaries,⁸⁶ boundary disputes could quite easily arise. When uncertainty or dispute arises, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar deems relevant, determine and indicate the position of the uncertain or disputed boundary.⁸⁷ When he makes his determination, the Registrar makes a note on the Registry Map and files a plan or description to record his decision.⁸⁸ Under the Registered Land Ordinance, no

⁸² *Id.*

⁸³ For more information, contact the Public Works Department, Buaghers Bay, P.O. Box 284, Road Town, Tortola, British Virgin Islands; Tel: (284) 468-2722; email: pwd@mailbvi.government.org

⁸⁴ Registered Land Ordinance § 157. Unregistrable interests in land are generally deemed void by the courts. *Id.* at § 37, 161.

⁸⁵ Registered Land Ordinance § 157.

⁸⁶ *Id.* at § 17(1).

⁸⁷ *Id.* at § 17(2).

⁸⁸ *Id.* at § 17(3).

court shall entertain any action or other proceeding relating to a dispute about the boundaries of registered land until the boundaries have been determined in accordance with this procedure.⁸⁹ The court and the Registrar are authorized to consider any evidence regarding boundaries and situation that they see fit in order to make their determination.⁹⁰

IV. LEGAL TOOLS IN PLACE FOR PRIVATE LANDS CONSERVATION

In the British Virgin Islands, the Law of England—as it stood in April of 1845—defines all interests in land.⁹¹ Thus, seemingly outmoded interpretations of British law may have some relevance in the British Virgin Islands. Furthermore, the cursory nature of the British Virgin Islands’ legal code and the highly persuasive role of the common law decisions of the courts of England and those Eastern Caribbean states that are former English colonies make plausible a wealth of possible interpretations of property law by the creative, resourceful conservationist.

Because of the British Virgin Islands courts’ heavy reliance on British common law, the experience of the English National Trust system for private lands conservation seems particularly relevant. The National Trust came into being in 1895 when there were no English statutes for the protection of either land or buildings for their historic, scientific, recreational or cultural value.⁹² In order to establish reserves, the Trust relied on the long-standing tradition of inalienability of land—absolute ownership under English law has been the one, sure-fire path to preservation. The National Trust has also employed restrictive covenants, but Martin Drury, Director-General, notes that these devices are more tenuous. While the National Trust has always won on the rare occasions they have challenged landowners for the violation of these covenants, Drury notes that “[covenants] are always at the mercy of British law, which is inherently unsympathetic to anything

⁸⁹ *Id.* at § 17(4).

⁹⁰ *Id.* at § 17(5).

⁹¹ Conveyancing and Law of Property Ordinance § 3.

which constrains the right of a landowner to do what he likes with land or on it, so long as he does not damage the interests of others.”⁹³ Thus, while such tools as easements, covenants, equitable servitudes and usufructs—described in detail below—are logical devices to employ in service of conservation efforts, one must bear in mind their precarious nature and their possible need for defense in the courts.⁹⁴

A. Easements

Easements have been recognized as legitimate interests in land for centuries. An easement is a limited right voluntarily granted by a landowner, either through donation or sale, to a person or organization, allowing for the use of all or part of his or her property for specific purposes.⁹⁵ The grant is legally recorded, and the ensuing deed restrictions “run with the land;” subsequent owners cannot disregard them. In the British Virgin Islands, the right to grant an easement, either in perpetuity or for a term of years, is recognized under the Registered Land Ordinance and by the Conveyancing and Law of Property Ordinance.⁹⁶

Easements generally fall into one of two categories: appurtenant easements and easements in gross. An appurtenant easement is an easement created to benefit a particular parcel of land; the rights effected by the easement are thus *appurtenant* or *incidental* to the benefited land. Put differently, if an easement is held incidental to ownership of some land, it is an appurtenant easement. The land subject to the appurtenant easement is called the *servient estate*, while the land benefited is called the *dominant estate*. Unless the grant of an appurtenant easement provides

⁹² For more background and information on the English National Trust, see <http://www.nationaltrust.org.uk/main/nationaltrust>.

⁹³ Martin Drury, *Making protected areas effective: Overview and National Trust experience* (Presentation for “Calpe 2000” conference).

⁹⁴ Provisions of the British Virgin Islands code authorize courts to remove incumbrances such as easements and restrictive agreements upon application by any interested, affected party once the court is satisfied that removal of the incumbrance will not injure the person entitled to the benefit and that the incumbrance is now obsolete or impedes public or private purposes. Registered Land Ordinance § 97.

⁹⁵ Black’s Law Dictionary, Seventh Edition (Bryan A. Garner ed. 1999).

otherwise, the benefit of the easement is automatically transferred with the dominant estate—meaning that it “runs with the land.”⁹⁷ Unlike an appurtenant easement, an easement in gross is not created for the benefit of land owned by the owner of the easement, but instead attaches personally to an easement owner (whether a person, an NGO, or the state)—regardless of whether the owner of the easement holder owns any land.⁹⁸

Only appurtenant easements are recognized in the British Virgin Islands; there is presently no provision in the British Virgin Islands code explicitly authorizing easements in gross.⁹⁹ Furthermore, under British Virgin Islands law, the easement must provide a benefit to the dominant tenement.¹⁰⁰ However, legislation in the British Virgin Islands does not indicate that appurtenant properties must be contiguous. So long as a practical relationship exists between non-adjacent properties, it is possible that an appurtenant easement between the two could stand in the British Virgin Islands, as has been the case in many U.S. jurisdictions and in Costa Rica, where the Center for Environmental Law and Natural Resources (CEDARENA) successfully created an appurtenant easement between a parcel of private land and a nearby state reserve that both serve as habitat to the same species of birds.¹⁰¹

⁹⁶ Under the Registered Land Ordinance § 93(1), the proprietor of a land or lease may grant an easement over his land, or the land comprised in his lease, to the proprietor or lessee of other land for the benefit of that other land.

⁹⁷ Roger Bernhardt and Ann Burkhart, *Real Property in a Nutshell* 191, 214 (4th ed. 2000). An interest “runs with the land” when a subsequent owner of the land has the burden or benefit of that interest. An appurtenant easement runs with the land since the servient estate remains subject to it after being transferred, and the dominant estate retains the benefit after being transferred. With an easement in gross, the benefit cannot run with the land as there is no dominant estate—however, provided certain requirements are met, the burden can run with the land.

⁹⁸ Examples of typical easements in gross include the right of a non-owner to harvest timber, mine minerals, extract water or other items from the owner’s land.

⁹⁹ Registered Land Ordinance § 93.

¹⁰⁰ *Id.* at § 93(2).

¹⁰¹ *Verzeano v. Carpenter*, 108 Or.App. 258, 815 P.2d 1275 (1991) (“[W]e agree with the majority view that an easement may be appurtenant to noncontiguous property if both tenements are clearly defined and it was the parties’ intent that it be appurtenant.”) (citing 7 Thompson on Real Property § 60.02(f)(4)); see also *Day v. McEwen*, 385 A.2d 790, 791 (Me.1978) (enforcing reserved “right of an unobstructed view” over servient tenement where dominant tenement was on the other side of a public road); *Private Road’s Case*, 1 Ashm. 417 (Pa.1826) (holding that a circumstance in which a navigable river intervenes between a meadow and an island is no legal reason why a way across the former should not be appurtenant to the latter); *Saunders Point Assn., Inc. v. Cannon*, 177 Conn. 413, 415, 418 A.2d 70 (1979) (holding that while an easement appurtenant must be of benefit to the dominant estate, the servient

Under traditional common law, recognized easements, in addition to being appurtenant, are usually “affirmative,” allowing the holder to engage in specific, affirmative actions. For example, one landowner might hold an easement in the land of a neighbor (an appurtenant easement), allowing him or her to cross the neighbor’s property or draw water from the neighbor’s well (an affirmative easement). While a conventional easement involves the conveyance of certain affirmative rights to the easement holder, an easement for conservation purposes generally involves the relinquishment of rights and a conferral of power in the new holder of the rights to enforce the restrictions on the use of the property. Thus, conservation easements are generally “negative” rather than affirmative, prohibiting the owner of the servient estate from doing something, such as developing the land in any way that would alter its existing natural, open, scenic, or ecological condition. This is a critical distinction—the landowner relinquishes the right to develop the land, but that right is not conveyed to the easement holder. That particular right (to develop the land) is extinguished.¹⁰² What the easement holder does acquire is the right to enforce the land-use restrictions. The common law has generally recognized and enforced only certain limited types of negative easements. Under the British Virgin Islands’ Registered Land Ordinance, however, an instrument creating an easement can specify “conditions, limitations or restrictions intended to affect its enjoyment,”¹⁰³ suggesting that negative easements, and therefore conservation easements, would garner recognition under British Virgin Islands law.

estate need not be adjacent to the dominant estate); *Woodlawn Trustees, Inc. v. Michel*, 211 A.2d 454, 456 (1965) (holding that in cases of noncontiguous parcels, the easement over the land of the servient tenement is valid and enforceable if, by means of a right of way of some sort which traverses land of another, the servient tenement benefits the dominant tenement).

¹⁰² Conservation easements generally extinguish development rights. However, with certain types of agreements—such as those involving *purchased development rights* (PDRs)—the development rights are not necessarily extinguished, but instead become the property of the easement holder. PDRs are generally classified as easements in gross.

¹⁰³ Registered Land Ordinance § 93(3)(a).

To create an easement in the British Virgin Islands, a written instrument filed with the registrar must detail the following:¹⁰⁴

- the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment
- the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened
- the land which enjoys the benefit of the easement

The grant or reservation of the easement is complete upon the filing of the instrument and registration as an encumbrance in the Land Register in the property sections of the records for both the land burdened and the land benefited.¹⁰⁵ The Registrar may require a plan or map defining the easement.¹⁰⁶ Easements granted by the proprietor of a lease are capable of existing only during the subsistence of the lease.¹⁰⁷

Under the existing legislative framework, appurtenant easements could be employed in service of conservation in the British Virgin Islands in a number of ways:

Reciprocal Easements. Reciprocal easements can enable adjacent landowners to limit their respective land uses through easements granted to each other—a method that provides protection for both properties.¹⁰⁸ Working with private landowners, conservation groups in Latin America have used reciprocal easements that grant a third-party NGO the right to enforce the easement—with express authority to enter the property, monitor compliance, and seek judicial enforcement of the rights and obligations derived from the easement. Thus, the use of reciprocal easements can

¹⁰⁴ *Id.* at § 93(3).

¹⁰⁵ *Id.* at § 93(4).

¹⁰⁶ *Id.* at § 93(3).

¹⁰⁷ *Id.* at § 93(5).

¹⁰⁸ In order to take advantage of federal and state tax incentives, U.S. landowners must grant the conservation easement to either a governmental entity or an authorized NGO. Thus, while the use of reciprocal easements between private landowners is potentially an effective method for achieving private lands conservation, conservation incentives provided under U.S. federal and state law would not be available for this type of arrangement.

potentially provide a conservation NGO with enforceable rights over land, without the need for the NGO to own adjacent land.

In Belize, a former British territory with a legal code similar to that of the British Virgin Islands, more than 100 private landowners scattered along thirty-three kilometers of the Belize River signed a voluntarily management agreement, committing themselves to land management practices designed to accommodate the local black howler monkey (known as the “baboon” in local parlance) population. The management practices benefit landowners by reducing erosion, preventing river siltation and allowing for more rapid replacement of forests after slash-and-burn clearings. These reciprocal easements enabled the creation of a Community Baboon Sanctuary. Ongoing financial support for the sanctuary comes from the International Primate Protection League, the Lincoln Park Zoological Society, the Zoological Society of Greater Milwaukee, and The World Wildlife Fund. The Belize Audubon Society administers its finances. But its management is controlled by a committee representing the villages and private landowners who submitted to the voluntary restrictions, in consultation with a zoologist, Dr. Robert Horwich, of Community Conservation Consultants.¹⁰⁹ Similarities between the provisions of the Belizean and British Virgin Islands codes concerning easements suggest that the successful legal implementation of reciprocal easements to create a conservation sanctuary in Belize could be duplicated in the British Virgin Islands.

Use of public lands as the dominant estate to hold an easement. In several Latin American countries, easements over private land have been created using adjacent or nearby public lands as the dominant estate. In some instances, the easements have also provided a third-party NGO with the right to enforce its terms.

¹⁰⁹ More information on the Community Baboon Sanctuary is available from the Belize Audubon Society at PO Box 1001, 12 Fort Street, Belize City, Belize. A website, <http://www.belizeaudubon.org>, is under development.

Legal Limitations and Uncertainties to Third-Party Enforcement. The common law—or civil code—of many jurisdictions only recognizes the right of an easement’s holder to enforce its terms. In the British Virgin Islands, however, a person may take an interest in land even if he or she is not named on the deed.¹¹⁰ Thus, in the British Virgin Islands, the practice of granting a third-party NGO the right to enforce an easement could survive legal scrutiny. The relevant legal authority is unclear as to whether such a grant to an NGO of the right to monitor and enforce an easement is a real property right that runs with the land, or a personal right enforceable only against the original maker of the easement.

B. Covenants

Covenants are conceptually similar to easements, in that through them owners may voluntarily restrict the use of their property for the benefit of another property. However, for a covenant to be binding upon a subsequent owner, it must be restrictive, imposing no positive obligation upon the owner of the servient tenement. If a covenant is violated, the owner can sue for damages. In the British Virgin Islands, the right to enter into a covenant is granted by the Conveyancing and Law of Property Ordinance and by the Registered Land Ordinance.¹¹¹ The Registered Land Ordinance, while not explicitly recognizing covenants, recognizes the right of a proprietor to restrict the building on or other enjoyment of his land for the benefit of the proprietor of other land, and the provisions contained therein would allow private landowners to voluntarily restrict development, logging, and other destructive activities on their lands for the benefit of other parcels. The Conveyancing and Law of Property Ordinance, which explicitly recognizes covenants, may actually allow the imposition of positive obligations upon parties, as it states “A covenant, bond, obligation or contract by deed . . . to do any act . . . shall be deemed to include, and

¹¹⁰ Under the Conveyancing and Law of Property Ordinance § 12, a person may take an immediate or other interest in land or other property or the benefit of any condition, right of entry, covenant or agreement over or respecting land or

shall by virtue of this Ordinance, imply an obligation to do the act to, or for the benefit of, the survivor or survivors of them and to, or for the benefit of any person to whom the right to sue on the covenant, bond, obligation or contract devolves.”¹¹² Under the Conveyancing and Law of Property Ordinance and the Registered Land Ordinance, both the benefit and burden of covenants running with the land vest in successors to the title of the land without the use of any technical expression.

C. Profits à Prendre

A profit à prendre, or, simply put, a profit, is a common law interest in land that gives a right to enter and take part of the land or something from the land.¹¹³ Under the common law, a landowner can grant a profit to anyone—there is no requirement that the holder of a profit own adjacent property.¹¹⁴ Indeed, in the British Virgin Islands proprietors may grant profits both appurtenant and in gross.¹¹⁵ A profit in gross may be dealt with as though it were land—meaning it can be bought, sold, and registered as could any interest in land.

Although not commonly used for conservation purposes, profits have the potential to facilitate the conservation of private lands. For instance, a landowner who wishes to protect the timber on his or her property could grant a profit à prendre to a conservation group with respect to

other property, although he may not be named as a party to the conveyance or other instrument.

¹¹¹ Conveyancing and Law of Property Ordinance §§ 28-31, Registered Land Ordinance § 94.

¹¹² Conveyancing and Law of Property Ordinance §§ 28-30.

¹¹³ See 28A C.J.S. Easements § 9 (noting that a “right to profits à prendre is a right to take a part of the soil or product of the land of another. It is distinguishable from a pure easement.” Historically, there were five types of profits à prendre depending on the subject matter of the profit: (1) rights of pasture—where the taking is done by the mouths of the grazing animals; (2) rights of piscary—to harvest the fish; (3) rights of turbary—to cut turf or peat as fuel; (4) rights of estover—to take wood necessary for furniture for a house; and (5) a miscellaneous group referring to the taking and using of sand, gravel, stone, etc. A profit à prendre cannot generally be used to take minerals.

¹¹⁴ Profits à prendre of this kind are called *profits en gross*.

¹¹⁵ Registered Land Ordinance, section 95. Under the Registered Land Ordinance, section 2, a profit is defined specifically as the right to go on the land of another and take a particular substance from that land, whether the soil or products of the soil.

that timber.¹¹⁶ The conservation organization would have the exclusive right to decide whether and what trees to cut. By granting such a right to a conservation group, the landowner would prevent future owners of the land from harvesting the trees, since that right has been given away.

A landowner in the British Virgin Islands creates a profit à prendre by granting it in writing to the profit holder.¹¹⁷ Under British Virgin Islands law, profits must be registered by an instrument detailing whether the profit is appurtenant to other land or a lease or in gross, and whether it is to be enjoyed exclusively by the grantee, or by the grantee in association with the grantor.¹¹⁸ The landowner specifies precisely what the holder is allowed to enter the land to take. Once the landowner has granted a profit he or she must respect its terms. The profit holder can sue if the owner deals with the land in a way that detracts from the rights of the profit holder. Indeed, the holder of a profit à prendre can sue anyone who interferes with the profit.¹¹⁹

A profit à prendre document is designed to outlive the landowner—and perhaps even the profit holder. In creating a profit à prendre, it is thus essential to consider potential conflicts between a landowner and a holder and to describe the parties' intentions exactly in the document itself. To protect the profit holder if the land is subsequently sold—indeed to protect the profit holder at all—the profit must be registered in the Land Register. If the proper procedures have been followed, the profit holder can lease, sell, give away or bequeath the profit to someone else. A

¹¹⁶ To help ensure its legal validity, a profit à prendre designed to facilitate conservation should be used only where the protected interest is something that can be taken from the land—e.g., timber, fish, pasture, or something similar. Otherwise, it is possible a court would construe the document as an easement and thus apply the far much more restrictive rules governing easements. However, despite this limitation it may nonetheless be possible to use a profit à prendre to protect things that are not included in these categories of removable items. For instance, a landowner could protect spotted owls by granting a profit à prendre to a conservation organization for the harvest of timber.

¹¹⁷ Registered Land Ordinance § 95(1).

¹¹⁸ *Id.* at § 95(2).

¹¹⁹ Conversely, the profit à prendre holder must respect the rights of the landowner. The landowner can sue the profit à prendre holder if the holder interferes with the landowner's rights.

profit holder can also terminate a profit à prendre by granting a written release to the landowner, which would then be registered in the Lands Register.¹²⁰

D. Equitable Servitudes

The primary modern tool for enforcing private land use restrictions is the equitable servitude.¹²¹ An equitable servitude is a promise concerning the use of land that (1) benefits and burdens the original parties to the promise and their successors and (2) is enforceable by injunction. The usual remedy for violation of an equitable servitude is an injunction, which often provides more effective relief for conservation purposes than compensatory damages.

Under traditional common law rules,¹²² for the *burden* of an equitable servitude to bind the original promisor's successors four elements must be met: (1) the promise must be in a writing that satisfies the Statute of Frauds or implied from a common plan;¹²³ (2) the original parties must intend to burden successors; (3) the promise must “touch and concern” land; and (4) the successor must have notice of the promise. In contrast, the traditional common law only required three elements to be met for the *benefit* to run to successors: (1) the promise must be in writing or implied from a common plan; (2) the original parties must intend to benefit successors; and (3) the promise must “touch and concern” the land.

While the British Virgin Islands code does not explicitly discuss equitable servitudes, this widely accepted common law instrument would be recognized under the Registered Land

¹²⁰ Registered Land Ordinance § 96.

¹²¹ There is some doctrinal confusion regarding the difference—if any—between an equitable servitude and a conservation easement. However, under the approach adopted by the Restatement (Third) of Property, easements, profits, covenants—including equitable servitudes, are governed by a single body of law. See Susan F. French, *Highlights of the new Restatement (Third) of Property: Servitudes*, Real Property, Probate and Trust Journal 226, 227 (2000).

¹²² Traditional common law rules are being distinguished here from the modernized law of servitudes set forth by the Restatement (Third) of Property.

¹²³ If a developer manifests a common plan or common scheme to impose uniform restrictions on a subdivision, the majority of U.S. courts conclude that an equitable servitude will be implied in equity, even though the Statute of Frauds is not satisfied. The common plan is seen as an implied promise by the developer to impose the same restrictions on all of his or her retained lots.

Ordinance as a “restrictive agreement.”¹²⁴ Restrictive agreements allow a proprietor to restrict the building on or other use of his or her land for the benefit of the proprietor of other land. If registered in the Land Registry, the restriction is binding upon subsequent proprietors. Thus, equitable servitudes, in the guise of restrictive agreements, could prove a useful tool for conservationists in the British Virgin Islands.

E. Usufructs

The usufruct is an old, common law tool that allows a landowner to voluntarily transfer the right of use and enjoyment of produce of his property to another. In exchange, the beneficiary, or usufructuary, has the obligation to care for the property and return it upon termination of the contract. Because the Conveyancing and Law of Property Ordinance states that property interests recognized in England in 1885 shall be recognized in the British Virgin Islands, conservationists, in partnership with private landowners, could use the usufruct as a tool enabling them to manage land in an environmentally friendly way. Such an arrangement could be of particular use to conservation organizations headed by non-belongers who, although limited by policies discouraging the ownership of land by non-belongers, could employ the usufruct as a means to protect lands despite ownership restrictions.

F. Trusts

The Trustee Act and the Trustees’ Relief Act authorize a trustee to administer property belonging to another for the benefit of a beneficiary or a charitable purpose. The trust may have any objective, so long as the objective is specific and attainable, respects the law, and functions under the auspices of a designated guardian. The guardian may be the creator of the trust, the

¹²⁴ Provisions concerning restrictive agreements are detailed in the Registered Land Ordinance § 94.

trustee, or the beneficiary. One of the trustees must be a qualified barrister, solicitor, accountant or licensee. Alternatively, the Ministry of Finance may designate a trustee.¹²⁵

In the British Virgin Islands, a land trust could be established for the purpose of protecting the environment; or, a trust established to serve a beneficiary could be designed to meet specific, attainable conservation goals—such as limiting development or prohibiting the felling of trees—managed by a designated NGO. Establishing a trust for conservation purposes in the British Virgin Islands would hold a certain appeal, as trusts are not taxed in the British Virgin Islands and non-resident beneficiaries are exempt from any liability to taxation on income, inheritance, or succession. Furthermore, trust deeds are exempt from stamp duty. There is no requirement for filing annual returns and trust accounts, nor are there any reporting requirements relating to the trust.

G. Condominiums

In Costa Rica and Panama, legal reforms have allowed the creation of condominiums on properties consisting of separate units, usually houses, and large, natural common areas, and the condominium tool has been used for conservation measures. Under a condominium regime, each separate unit is under private ownership, while public areas are under co-ownership. Once property owners have entered into a condominium relationship, the condominium management—usually a board composed of several of the member property owners—is able to impose environmental restrictions on the private areas as well as on community areas. In the British Virgin Islands, the Condominium Ordinance has allowed the development of condominiums primarily for residential and vacation purposes; however, the tool could be employed in the British Virgin Islands, as in other territories, for conservation purposes.

¹²⁵ O’Neal and Webster, *A Lawyer’s Guide to British Virgin Islands*.

V. FEASIBILITY OF INTRODUCING NEW TOOLS

It is feasible that conservation tools used in the United States could be introduced in the British Virgin Islands, bearing in mind that many of them, if passed by the Legislative Council, could be employed only by British Virgin Islanders or by non-belongers who have procured Non-Belonger Land Holding Licenses. But those tools adopted and successfully adjudicated by conservation groups in England seem more likely candidates for introduction to the British Virgin Islands, given the highly persuasive nature of English common law in the islands' courts.

A. Civil Contracts for Conservation

No British Virgin Islands legislation explicitly authorizes civil conservation contracts; however, in other former British dependencies, and in England itself, conservation contracts have been developed between private landholders and the government on an *ad hoc* basis. Such contracts can provide for the types of private conservation incentives lacking in present legislation, such as tax exemptions and government support, and allow the imposition of obligations on the beneficiary, as well as on the landholder. Furthermore, they bypass the requirement of easements and covenants that two tenements be impacted. A potential complication with civil contracts is that they are enforceable only against participating parties; however, legal provisions could be drafted as part of the contract directing that it be enforceable against successors in interest.

In Belize, a former British dependency with a legal code similar to that of the British Virgin Islands, the NGO Programme for Belize employed a civil conservation contract in partnership with the government that enabled the establishment of the Rio Bravo Conservation and Management Area, a flagship project in northwestern Belize. The project combines strict reserve with development areas that produce funds for the project's execution.

In England, civil conservation contracts with landowners who voluntarily participate in

conservation schemes form the backbone of the country's "Environmentally Sensitive Areas" and "Sites of Special Scientific Interest" (SSSI) programs. Landowners promise to manage their land in ways conducive to meeting conservation goals in exchange for monetary payment from the government. Each agreement is negotiated individually with the landowner, or in the case of leased land with the leaseholder. For agreements concerning SSSIs, most restrictions are negative, and the government calculates payments based on profits foregone by the landowner's acceptance of the negative restrictions. While in terms of enrollment, SSSIs have been quite successful—more than 4,000 landowners have enrolled more than 26,000 hectares, and 1,650 of the SSSIs in private hands are owned or managed by private conservation bodies—the SSSIs have also been quite costly. English Nature's 2002–3 budget for payments under SSSI management agreements was more than £8.8 million. These costs, while hard for some to stomach, have been justified by the notion that conservation produces capital-enhancing benefits, such as reversing soil erosion and other environmental degradation harmful to agriculture and development.¹²⁶

B. The Uniform Conservation Easement Act

As noted in the preceding discussion on easements, British Virgin Islands law, like the common law, has generally recognized certain limited types of negative easements; however, it does not recognize easements in gross. Due to doubts over the validity and transferability of negative easements in gross at common law in the United States, many states enacted statutes authorizing conservation easements—both appurtenant and in gross.¹²⁷ Likewise, conservation groups could endeavor to introduce similar provisions to the British Virgin Islands Legislative

¹²⁶ John S. Harbison, *Biodiversity and the Law of Nature Conservation in Great Britain* (Fayetteville, Arkansas: The National Agricultural Law Center, March, 2004) at <http://www.NationalAgLawCenter.org> (last visited August 17, 2004).

¹²⁷ Jesse Dukeminier and James E. Krier, *Property* 856 (4th ed. 1998). Traditionally, courts have disfavored interests conveyed "in gross" and negative easements because they can cloud title and may raise recordation problems—the difficulty being notice to future landholders. However, in the U.S. legislation with proper recordation requirements and limitations upon those who may hold these kinds of interests have largely overcome these objections.

Council, in an effort to lend additional security to the use of the easement as a tool for conservation in the British Virgin Islands. A simple majority vote by the House of Representatives would assure the provision's passage into law. One possible model would be the Uniform Conservation Easement Act.

In order to facilitate the development of state statutes authorizing landowners to create and convey conservation easements and government agencies and nonprofits to hold such easements, in 1981 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA). The Act's primary objective is to enable "private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments."¹²⁸

The UCEA defines a "conservation easement" as "[a] non-possessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archeological, or cultural aspects of real property."¹²⁹

The UCEA has made conservation easements more certain devices by eliminating several common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the

¹²⁸ UCEA, Prefatory Note, 12 U.L.A. 166 (1996). An online copy of the UCEA is available at the following address: <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.htm> (last visited August 17, 2004).

¹²⁹ UCEA, §1(1)—Definitions.

owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.¹³⁰

A unique feature of the Act is the “third-party enforcement right.” Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a holder. Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

C. Tax Incentives for Conservation Easements

What incentive does a private landowner have to convey valuable development rights to either a public or private trustee? In the United States, along with the desire of landowners to preserve undeveloped land, the answer is often money—received in the form of tax benefits (e.g., income, property, gift and estate taxes) or cash payments. For instance, U.S. landowners who donate conservation easements that satisfy requirements of the Internal Revenue (IRS) Code can take advantage of federal income and estate tax benefits. To satisfy the relevant section of the Internal Revenue Code, a conservation easement must be granted—

1. to a governmental entity or charitable organization that meets certain public support tests; and
2. exclusively for conservation purposes, which include (a) the preservation of open space for scenic enjoyment pursuant to a clearly delineated governmental conservation policy; (b) the preservation of land for outdoor recreation; (c) the protection of the natural habitat of wildlife or plants; and (d) the preservation of historically important land or a certified historic structure.¹³¹

If a conservation easement satisfies these requirements, the grantor may then receive a charitable deduction for the difference in property’s value before the easement was granted

¹³⁰ § 4, 12 U.L.A. 179.

compared to the property's value after the granting of the conservation easement. This is often referred to as the "before and after" test.¹³² In addition to federal tax incentives, U.S. landowners can frequently take advantage of a variety of state tax incentives. Because British Virgin Islanders are subject to both income and land taxes, favorable tax provisions, if introduced to and passed by the Legislative Council, could provide an incentive for British Virgin Islanders to dedicate lands to conservation purposes.¹³³

D. Purchased Development Rights

In the United States, purchased development rights (PDR) are voluntary legal agreements that allow owners of land meeting certain criteria to sell the right to develop their property to local governmental agencies, a state government, or to a nonprofit organization. A conservation easement is then placed on the land. This agreement is recorded on the title to permanently limit the future use of the land. A PDR is thus an interest in real property that is non-possessory and entitles its holder to enforce certain land use restrictions or to enforce certain rights to public use or access upon the holder of the possessory interest.¹³⁴

Under a PDR agreement, the landowner retains all other ownership rights attached to the land. The buyer essentially purchases the right to develop the land and retires that right

¹³¹ IRS Code, § 170(h).

¹³² For federal income tax purposes, this difference in value is a charitable deduction which can be used for a period of up to 5 years to reduce the income tax of the grantor of the easement. The maximum deduction in any year is 30 percent of the grantor's adjusted gross income. For federal estate tax purposes, the grant of the easement results in a lower valuation of the property—and thus, a lower valuation of the estate to which the federal estate tax will be applied. Under the Farm and Ranch Protection Act (1997), IRS Code § 2031.c, landowners can receive an exclusion from federal estate taxes for up to 40 percent of the value of their land under a conservation easement. Only easements granted in perpetuity are eligible for federal tax benefits.

¹³³ Land tax rates are discussed in the "Ownership of Private Property" section above. Income tax rates are as follows: 3 percent on the first \$2,500 of income; 6 percent on the next \$5,000 of income; 10 percent on the next \$7,500 of income; 15 percent on the next \$10,000 of income; and 20 percent on income exceeding \$25,000.

¹³⁴ At common law PDRs closely resemble negative easements in gross. With the exception of commercial easements in gross, easements in gross were not transferable and expired with the holder. These common law and statutory impediments to the use of PDRs have been addressed in those states that have enacted the UCEA. In addition to providing protection against being extinguishment, for PDRs drafted as conservation easements under its provisions, the UCEA provides the basis for claiming both federal and state income and estate tax benefits. See Maureen Rudolph

permanently, thereby assuring that development will not occur on that particular property. Used strategically, a PDR program can be an effective tool to help maximize a community's conservation efforts. Financial support for PDR programs can be raised through a variety of mechanisms—including bond initiatives, private grants and various taxation options.

While the British Virgin Island's code does not explicitly recognize PDRs, such rights might be suitably similar to restrictive agreements. However, the viability of PDRs in the British Virgin Islands is questionable, given the British common law's distaste for restraints on land use and alienability. Those restrictions pertaining to the ownership of land by non-belongers, including licensing requirements, would most likely pertain to PDRs, as well.

E. Leases, Leaseback Agreements, and Reserved Life Interests

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another potential method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can be met by including land use limitations in the lease agreement.¹³⁵ In the British Virgin Islands, long-term leases must be registered, and are subject to non-belonger licensing requirements.

A "leaseback" agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions

and Adrian M. Gosch, Comment, A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications, 4 Great Plains Nat. Resources J. 143, 146 (2000).

¹³⁵ Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the landowner (or his or her heirs) to terminate the lease. This arrangement

designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable the landowner to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon the his or her death.

VI. CONCLUSION

Those legal tools already in existence in the British Virgin Islands, particularly easements, covenants and trusts, seem to offer the surest success for those wishing to establish private land conservation reserves in the British Virgin Islands under the current rendition of the legal code, particularly for those who qualify as belongers. Civil conservation contracts in the nature of those employed in Belize and in England could be used to great effect in the British Virgin Islands. For those who wish to employ easements for conservation purposes, a statutory conservation easement would lend a level of security that at present does not exist, but the passage of such a measure would require significant investment in terms of legislative effort. Providing funding and management expertise to National Parks Trust efforts might be the most plausible and efficient means for non-belongers, whether individuals or organizations, to participate in conservation efforts under the guise of a legally recognized, authoritative institution.

would provide the landowner with ongoing control over land use while providing some security of tenure to the conservation NGO.

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