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CONSERVATION EASEMENTS AT THE CLIMATE CHANGE CROSSROADS

JESSICA OWLEY*

I

INTRODUCTION

The use of conservation easements has reached a crossroads. Conservation easements are nonpossessory interests in land restricting a landowner's activities with the hopes of yielding a conservation benefit. Usually perpetual and static, conservation easements preserve land by locking in today's land uses and preferences. However, land-management literature explains that preserving working lands without active management may be inadequate. The model of leaving land in its current state, hoping to gain conservation benefits, will not offer the protection needed to ensure viable ecosystems.

Land conservation must incorporate adaptive management and establish a framework for responding to both the changing world and evolving information about the world. There must be room to react to changes in ecosystems and to update policies when scientific understanding of the world and of conservation measures improves. Conservation easements have lacked this flexibility.

This article examines the conundrum that occurs when climate change leads to a landscape that conflicts with conservation easement terms. In facing the challenge of a disconnect between conservation easements and a changing world, there are two main tacks. First, conservationists can make conservation easements fit the changing landscape. Second, conservationists can change the landscape to fit the conservation easements. Both of these options present challenges and conflict with the essence of the conservation easement tool. A conservation easement that is too changeable endangers the perpetual protection that is the cornerstone of conservation easements. But, forcing the landscape to fit a conservation easement requires active management, something more often associated with fee-simple ownership. The solution to using conservation easements in a changing world lies somewhere between these two extremes, with the most important level of analysis being an assessment of *when* to use conservation easements.

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This article is also available at <http://www.law.duke.edu/journals/lcp>.

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This article addresses these issues by first examining the potential impacts of climate change on conservation easements. Part II presents examples of climate-change impacts on the landscape, followed by an analysis of how landscape changes could create conflicts with conservation easements. Such conflicts are likely to arise with respect to two aspects of conservation easements. First, in many conservation easements, the purpose sections state goals that will no longer be possible or will be harder to fulfill than the original parties contemplated. Second, individual restrictions or obligations within the conservation easements may no longer be possible (or may hamper adaptation efforts).

Where climate change leads to conflicts between the written conservation easements and the landscapes they burden, it is not clear what the implications are for the continued viability of conservation easements. Do such conflicts terminate a conservation easement? Do they serve as a justification for amending a conservation easement? Part III examines these questions. If conservation easement purposes are no longer fulfillable, the essential benefit of the tool is lost. If it becomes impossible or impractical to comply with the conservation easement restrictions or obligations, the conservation context will be far different from those contemplated by the original parties to the conservation easement. Whenever conservation easement terms are at inherent odds with the world around them, the entire conservation easement is at risk. Exploring the available judicial remedies enriches examination of the potential impacts of these inconsistencies. It is not clear which laws courts will apply to conservation easements. Conservation easements are creatures of property law, but look like contracts, and implicate charitable-trust principles. Uncertainty in judicial reaction to environmental changes challenges the long-term viability of conservation easements in the face of climate change.

Part IV explores possible responses to this challenge. First, conservationists may decide that the best way to address this problem is to head it off in the drafting phase. Parties may draft the agreements to avoid significant amendment or termination of conservation easements. This could occur by including multiple purposes or drafting broader purposes in the conservation easements. This approach acknowledges that climate change will occur and assesses how conservation easements can accommodate it. However, it does not involve any attempt to mitigate climate change. Instead, it presents a form of adaptation where conservationists change their goals to mirror the changes that have occurred on the land. Second, instead of tackling climate-change concerns by looking at the language of the conservation easement, conservationists could respond to the challenge by focusing on the land. Actively managing the landscape could prevent some of the ill effects of climate change and keep the land in synchronicity with conservation easement terms. This approach may include measures such as assisted migration and plantings. Such measures can increase the likelihood of protecting and facilitating the conservation easement purposes.

Part V explains why the approaches of either broad drafting or active land management are largely unsatisfactory for long-term conservation purposes. Broad drafting of conservation easements or the inclusion of multiple purposes may enable conservation easements to remain on the land, but such agreements may lose much of their conservation value. Drafting conservation easements with multiple purposes acknowledges that some purposes will not be fulfilled and is a pessimistic, unsatisfying approach to land conservation. Although there is a need for flexibility in conservation easements, overly flexible arrangements will not achieve the long-term conservation that is supposedly their aim. Active management of conservation easement properties is also unlikely to be attractive to participants. One of the attractions of conservation easements is that it is largely a hands-off tool. Conservation easements are a way to protect the land without the need for active management or oversight. Active management goes against the grain of the conservation easement paradigm.

This suggests another option: avoiding some of the problems with climate change and conservation easements by being strategic with placement and use of conservation easements. Conservationists can identify which purposes are more likely to be viable in the long term and which properties are less likely to be subject to severe climatic impacts. To avoid climate-change disruption to conservation easements, conservationists may decide to confine use of the tool to those properties. Narrowing the use and placement of conservation easements appears the most viable option for long-term viability of the tool. Unfortunately, this approach will reduce the usefulness and availability of the tool for conservation purposes. The most viable conservation easements are (1) those unlikely to be impacted by climate change, and (2) those protecting broad goals like scenic values and open space—potentially the areas in less need of protection. Limited use of conservation easements will rob the tool of much of its power, but such an outcome seems inescapable.

II

THE EFFECT OF CLIMATE CHANGE ON CONSERVATION EASEMENTS

A. Landscape Change

The warming of the climate system is unequivocal.¹ In 2008, the Intergovernmental Panel on Climate Change (IPCC) released a report regarding the existence and impacts of global climate change.² The report noted that “[t]he resilience of many ecosystems is *likely* to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification) and other global change

1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: SYNTHESIS REPORT 7 (2008).

2. *Id.*

drivers (e.g. land-use change, pollution, fragmentation of natural systems, over-exploitation of resources).³ Changes in weather and climate can affect vegetation structure, microclimates, ground cover, soil nutrients, and other ecosystem elements.⁴

Climate change is also likely to cause major alterations in ecosystem structure and function, yielding shifts in species interactions and ranges.⁵ Scientists have already identified several habitats and key species that will likely suffer.⁶ As the climate changes, ranges for ecosystems and viable species habitats will shift.⁷ With sea-level rise, many areas will become inundated.⁸ Wetlands will shrink,⁹ and erosion will increase.¹⁰

Two habitat types can serve as examples of these processes: grasslands and temperate forests. Scientists have identified grasslands as one of the terrestrial habitats most vulnerable to climate change.¹¹ The IPCC predicts that temperatures will increase and precipitation regimes will change in grassland regions. In some areas (including the western United States), precipitation in grasslands will increase.¹² This increase may alleviate some problems associated with higher temperatures but will likely increase nutrient cycling, leading to a spread of non-native invasive species.¹³ Increased intensity of weather events in the forms of floods and droughts will result in soil erosion and nutrient loss.¹⁴ In other areas (including the Great Plains), precipitation is likely to decrease.¹⁵ Less water will lead to more fires, an increase in non-native, invasive species, outbreaks of pests and diseases, and species loss.¹⁶

3. *Id.* at 48.

4. C.R. Margules & R.L. Pressey, *Systematic Conservation Planning*, 405 NATURE 243, 248 (2000).

5. IPCC, *supra* note 1, at 48.

6. See, e.g., J.M.J. Travis, *Climate Change and Habitat Destruction: A Deadly Anthropogenic Cocktail*, 270 PROC. OF ROYAL SOC'Y B: BIOLOGICAL SCI. 467, 472 (2003) (indicating that the tropics are a high risk area because of the combination of climate change and habitat destruction).

7. IPCC, *supra* note 1, at 48.

8. Stefan Rahmstorf, *A Semi-Empirical Approach to Projecting Future Sea-Level Rise*, 315 SCIENCE 368, 368 (2007).

9. W. Carter Johnson et al., *Vulnerability of Northern Prairie Wetlands to Climate Change*, 55 BIOSCIENCE 863, 864 (2005).

10. See, e.g., Cynthia Rosenzweig et al., *Attributing Physical and Biological Impacts to Anthropogenic Climate Change*, 453 NATURE 353, 353 (2008).

11. Osvaldo E. Sala et al., *Global Biodiversity Scenarios for the Year 2100*, 287 SCIENCE 1770, 1771-72 (2000).

12. IPCC, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 211, 224-26 (Martin L. Parry et al. eds., 2007).

13. Jonathan L. Gelbard, *Grasslands at a Crossroads: Protecting and Enhancing Resilience to Climate Change*, in BUYING TIME: A USER'S MANUAL FOR BUILDING RESISTANCE AND RESILIENCE TO CLIMATE CHANGE IN NATURAL SYSTEMS 15, 21 (L.J. Hansen et al. eds., 2003).

14. Brian Walker & Will Steffen, *An Overview of the Implications of Global Change for Natural and Managed Terrestrial Ecosystems*, 1 CONSERVATION ECOLOGY 2 (1997).

15. Cynthia Rosenzweig, *Crop Response to Climate Change in the Southern Great Plains: A Simulation Study*, 42 PROF. GEOGRAPHER 20, 25-26 (1990).

16. Gelbard, *supra* note 13, at 21-22.

With a warmer climate, precipitation patterns in forests will also change. Scientists expect some forest regions to expand and others to contract.¹⁷ Changes include increased fire intensity and frequency along with increased susceptibility to insect damage and disease.¹⁸ Temperate forests are likely to decline as their ranges shift.¹⁹ Climate changes will force species to migrate at the rate of one to three miles a year.²⁰ This is too rapid for many species.²¹ Some forest types, such as the maple, beech, and birch forests of Appalachia and the red-pine spruce forests of the Northeast, may disappear entirely.²²

Ecosystem changes due to climate change will be many and widespread. Such changes will affect nearly all ecosystems in certain areas, such as grasslands and forests, experiencing significant landscape change. Such changes necessarily affect legal institutions and current land-protection strategies.

B. Impact on Conservation Easement Terms

When the landscape changes, conservation easements may run into problems. In some circumstances, the landscape changes will create conflicts with conservation easement purposes. In other circumstances, the landscape changes will create conflicts with specific conservation easement restrictions. Additionally, measures to combat the ill effects of climate change may conflict with individual restrictions.

1. Conservation Easement Purposes

Conservation easements set forth their purposes.²³ Purposes can be specific (to protect a certain species) or more general (to conserve the land). They can relate to ecological goals or focus on open-space and aesthetic goals. The landowner and conservation easement holder negotiate the goals when first creating the conservation easement. The goals dictate allowable activities, guide monitoring, and serve as a potential basis for changing the conservation easement's terms.

Both state and federal law establish guidelines and requirements for conservation easement purposes. The Uniform Conservation Easement Act sets forth acceptable purposes in its definition of "conservation easement":

"Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural

17. Jennifer Biringer, *Forest Ecosystems Threatened by Climate Change: Promoting Long-Term Forest Resilience*, in *BUYING TIME: A USER'S MANUAL FOR BUILDING RESISTANCE AND RESILIENCE TO CLIMATE CHANGE IN NATURAL SYSTEMS* 43, 46 (L.J. Hansen et al. eds., 2003).

18. *Id.*

19. *Id.* at 53.

20. *Id.*

21. *Id.* (excepting those whose migration is driven by birds carrying seeds).

22. *Id.* at 54.

23. *See, e.g.*, ME. REV. STAT. tit. 33, § 477-A(1) (2009) (requiring that conservation easements "include a statement of the conservation purposes of the easement").

resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.²⁴

Twenty-one states have adopted this Uniform Act in some form,²⁵ generally retaining this language but sometimes adding small changes. For example, Alabama adds that the protection of forests can be for silvicultural purposes (emphasizing the protection of working forests) and includes paleontological resources.²⁶ Some statutes identify narrower purposes that conservation easements must fulfill. For example, Hawaii's statute lists only four possible purposes:

- (1) Preserve and protect land predominantly in its natural, scenic, forested, or open-space condition;
- (2) Preserve and protect the structural integrity and physical appearance of cultural landscapes, resources, and sites which perpetuate indigenous native Hawaiian culture;
- (3) Preserve and protect historic properties as defined in section 6E-2, and traditional and family cemeteries; or
- (4) Preserve and protect land for agricultural use.²⁷

All conservation easement purposes must align with state requirements. Additionally, whenever the donor of a conservation easement seeks a federal income-tax deduction, the conservation easement's purposes must align with the Internal Revenue Code:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is—
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (iv) the preservation of a historically important land area or a certified historic structure.²⁸

Although conservation easements only need to meet the minimum state and federal requirements, most contain more-specific purposes, tailored to the individual property. For example, conservation easements may contain broad

24. UNIF. CONSERVATION EASEMENT ACT § 1(1) (2007).

25. National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet—Conservation Easement Act*, <http://www.nccusl.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited Nov. 16, 2010). Additionally, the District of Columbia and the U.S. Virgin Islands have adopted some form of the Act. *Id.*

26. ALA. CODE § 35-18-1(1) (2010).

27. HAW. REV. STAT. § 198-1 (2010).

28. I.R.C. § 170(h)(4)(A) (2006). For a full discussion of the charitable tax deduction for conservation easement donation, see Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29 (Fall 2011).

purposes—such as seeking to preserve open space and scenic values—or narrow purposes—such as protecting a specific species or habitat type—or both. For example, the Land Trust for Santa Barbara County holds a conservation easement on land owned by the Midland School. Midland is a private school in a modest building surrounded by over two thousand acres of rolling hills, wildlife habitat, and oak woodlands.²⁹ The conservation easement protecting the property specifies that one of its purposes is “to preserve and protect in perpetuity the oak woodland and wildlife habitat condition of the [Area] as identified in the Baseline Inventory Report.”³⁰ A baseline-inventory report is, as its name implies, an assessment of the property and its environmental amenities at the time of conservation easement creation.³¹ Note how specific this purpose is. The conservation easement names a specific habitat type and protects land characteristics in place at the time of the arrangement’s creation. The Midland School Conservation Easement is typical in that regard. Another example of this approach is the Ozaukee Washington County Land Trust in Wisconsin. In a conservation easement protecting twenty-two acres in the Town of Polk (Polk Conservation Easement), the identified purposes include preserving the hardwood forest.³²

As climate change causes landscape change, it may be harder to fulfill some conservation easement purposes. A conservation easement specifically protecting oak woodlands or hardwood forests may be inappropriate if those habitats are no longer viable on the subject property. In California—the site of the Midland School Conservation Easement—oak woodlands are already in decline and further threatened by climate change.³³ In Wisconsin—the site of the Polk Conservation Easement—pests, pathogens, and invasive species are likely to negatively affect hardwoods as the climate warms.³⁴ Thus, it would not be surprising if both the Midland School and Polk conservation easements were unable to fulfill their stated purposes. Such issues are common with conservation easements. For example, conservation easements over agricultural land in California often contain provisions protecting the Swainson’s hawk,³⁵ yet climate and agricultural changes endanger the hawk.³⁶

29. Land Trust for Santa Barbara County, *Midland School*, <http://www.sblandtrust.org/midlandschool.html> (last visited Nov. 18, 2010).

30. Deed of Conservation Easement Midland School 4 (Dec. 30, 2008), *available at* <http://www.landprotect.com/files/38448764.pdf>.

31. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 100 (2d ed. 2005).

32. Conservation Easement Protecting the Curtes Property in the Town of Polk 3, *available at* <http://www.landprotect.com/files/41018817.pdf> [hereinafter Polk Conservation Easement].

33. James M. Lenihan et al., *Climate Change Effects on Vegetation Distribution, Carbon, and Fire in California*, 13 *ECOLOGICAL APPLICATIONS* 1667, 1667, 1674, 1679 (2003).

34. Jeffrey S. Dukes et al., *Responses of Insect Pests, Pathogens, and Invasive Plant Species to Climate Change in the Forests of Northeastern North America: What Can We Predict?*, 39 *CAN. J. FOREST RES.* 231, 242 (2009).

35. Letter from Michele Clark, Yolo Land Trust, to Helen Thomson, Cnty. Supervisor, JPA Bd. Chair (Apr. 28, 2010), http://www.yoloconservationplan.org/yolo_pdfs/jpa/jpa-2010/2010-05-

The purposes of these two conservation easements are also typical in that they are not the only purposes listed. The Midland School Conservation Easement purposes also include “recreational use, livestock grazing and other agricultural use, [protection of] open space, soil and water quality, and scenic values of the Easement Area consistent with the wildlife habitat condition of the Easement Area; to enable and foster the use of the Easement Area for educational and research purposes.”³⁷ The Polk Conservation Easement’s added purposes are preservation of open space and scenic values and protection of “relatively natural habitat for wildlife and plant communities.”³⁸ Many conservation easements contain broader purposes such as these, including provisions protecting agricultural or scenic values.

Multiple or broad purposes are common strategies for those hoping to protect land in the face of potential landscape change. Landscape changes may create conflicts between conservation easement purposes and on-the-ground conditions. Sometimes these conflicts appear in all of the purposes of a conservation easement. Other times, landscape changes create a conflict in only some of the purposes. This can result in a situation in which some purposes can still be fulfilled and some cannot.

2. Conservation Easement Provisions

After setting forth their purposes, conservation easements detail specific obligations and restrictions. Even where climate change does not create a conflict between the landscape and the purposes of a conservation easement, climate-change impacts may make it difficult or impossible to comply with some of the specific obligations or restrictions. For example, conservation easements often contain complex restrictions and site-specific requirements. In fact, conservation easement restrictions are becoming increasingly complex.³⁹ Examples of such restrictions include dictated grazing regimes and vegetation management.⁴⁰ Climate change may make it hard for landowners to comply with such specific restrictions.

Rangeland conservation easements provide an interesting example of the implications of climate change on conservation easement restrictions. Some of these conservation easements include detailed requirements that indicate the amount of dry matter landowners must leave on the ground (residual dry matter or RDM).⁴¹ RDM is a proxy for assessing the level of animal grazing

03_AgendaItem9-attachmnt.pdf (last visited Nov. 18, 2010) (describing acquisition of conservation easements to protect the Swainson’s hawk).

36. California Climate Change Center, Potential for Adaptation to Climate Change in an Agricultural Landscape in the Central Valley of California, CEC-500-2009-044-D (2009), <http://groups.ucanr.org/jacksonlab/files/66086.pdf> (last visited Feb. 22, 2011).

37. Deed of Conservation Easement Midland School, *supra* note 30, at 4–5.

38. Polk Conservation Easement, *supra* note 32, at 3.

39. Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND & ECOLOGY MGMT. 167, 170 (2010).

40. *Id.* at 171.

41. *Id.* at 170–71.

during a growing season. It measures the combined effects of forage production and vegetation reduction due to grazing and other losses.⁴² RDM requirements in conservation easements generally serve to help landowners assess how many animals they can graze on the land without dictating specific animal species or numbers.

RDM requirements are a good example of a specific requirement that could conflict with a climate-changed landscape. For example, climate may become the most significant factor in determining the amount of vegetation left on the ground. Changes in precipitation regimes—as predicted by the IPCC⁴³—could alter the species compositions of rangelands and cause soil erosion and nutrient loss. Climate, not landowner actions, may be the determinant for RDM. A landowner may find herself unable to meet RDM requirements even if she ceases grazing operations or implements active-management programs. Thus, changing landscapes may create challenges for complying with specific conservation easement terms.

3. Conflicts with Adaptation Strategies

Climate change can create conflicts with conservation easements in yet another way. Battling the impacts of climate change may at times directly conflict with conservation easement restrictions. For example, many conservation easements prohibit altering watercourses or engaging in activities that might cause erosion.⁴⁴ It is common to see conservation easements restricting (1) alteration of the landscape, (2) introduction of new species of vegetation, or (3) activities that involve turning over the soil.⁴⁵ These restrictions may directly conflict with climate-change mitigation and adaptation strategies.

An example conservation easement from Anne Arundel County, Maryland shows some common restrictions in forest protection:

2. No cutting or removing of vegetation or grading, filling or other activities shall be permitted upon the Easement except as permitted under a Forest Conservation Plan, or a Buffer Management Plan, or a Bog Protection Plan approved by the County.
3. The general topography of the Easement shall be maintained in its present condition and no excavation, filling, or other topographic changes [may be] made.⁴⁶

An example forest conservation easement provided by the nonprofit environmental-law firm WildLaw contains other common provisions:

42. University of California Division of Agriculture and Natural Resources, *California Guidelines for Residual Dry Matter (RDM) Management on Coastal and Foothill Annual Rangelands*, 8092 RANGELAND MONITORING SERIES 8 (2002).

43. IPCC, *supra* note 12.

44. Deed of Conservation Easement Midland School, *supra* note 30, at 11.

45. Conservation easement attorney James L. Olmsted maintains a website with examples of conservation easement documents, all containing restrictions along these lines. Conservation & Preservation Counsel, LLC, *Conservation Easements Explained*, http://www.landprotect.com/Conservation_Easements.html (last visited Nov. 19, 2010).

46. Deed of Easement and Agreement of Anne Arundel County's Forest Conservation Easement 2 (May 31, 2007), available at <http://www.aacounty.org/PlanZone/Resources/ForestConserveEasement.pdf>.

3.5. Alteration of Wetlands, Watercourses, and Ponds. The alteration, manipulation, draining, filling, dredging, or diking of wetland areas, watercourses, or ponds described in Exhibit B, including any enlargement thereof, or the cultivation or other disturbance of soil within _____ feet of the thread of any watercourse, whose location is indicated on Exhibit B, is strictly prohibited.

...

3.10. Non-native Species. The Grantors shall not introduce any non-native plant or animal species.⁴⁷

The restrictions in both of these conservation easements appear consistent with long-term conservation of forestland. However, climate-change-adaptation strategies may conflict with such restrictions. For example, to combat some of the problems of climate change, land managers may want to plant new or additional species. In some cases, the most appropriate species in a changed landscape are those that are not native to the site. This would violate section 3.10 of the WildLaw conservation easement. Additionally, addressing landscape changes may require removing vegetation in a way not contemplated by county-approved plans mentioned in section 2 of the Anne Arundel County conservation easement. Introduction of new species, erosion-control efforts, and assisted-migration efforts may require topographic changes and therefore conflict with section 3 of the Anne Arundel County conservation easement. Indeed, use of water and directions of watercourses may be important elements of climate-change-adaptation plans. Yet, section 3.5 of the WildLaw conservation easement could hamper such efforts. Thus, measured responses to climate-change impacts may run headlong into conservation easement restrictions like these.

Climate-change mitigation also includes efforts to promote alternative-energy sources. Conserved lands are attractive areas for many renewable-energy technologies including wind turbines. Prohibitions on erection of structures often encompass the building of wind turbines. Thus, conservation easement restrictions can hamper efforts at both adaptation and mitigation in response to climate change.

III

IMPACT ON CONSERVATION EASEMENT VIABILITY

Understanding that climate change may cause conflicts with conservation easement provisions is the first step in understanding the impact of climate change on conservation easements. The next step to explore is what such conflicts mean for the long-term viability of conservation easements. If climate change thwarts conservation easement purposes, courts might not enforce them. While some courts might choose to terminate conservation easements, other courts could modify them, seeking to maintain the desires of the original

47. WildLaw, *Example of a Conservation Easement*, <http://www.wildlaw.org/easements/sample.html> (last visited Dec. 28, 2010).

parties. When climate change only affects some purposes or a few provisions, courts could choose to enforce the remaining terms of the conservation easements.

One of the confusing aspects of conservation easement law is that multiple legal doctrines apply. Property law, contract law, and charitable-trust law are all relevant. Thus, parties seeking amendment or termination must consider principles and requirements of all three areas of law. Without taking a position on which should dominate the discussion or courts' deliberations, this article analyzes all three areas to provide an insight into the potential obstacles and opportunities.

A. Property Law (The Common Law of Easements)

In most jurisdictions, conservation easements are subject to traditional laws of easements with respect to termination and amendment.⁴⁸ Section 2(a) of the Uniform Conservation Easement Act (UCEA) explains that conservation easements may be "released, modified, terminated, or otherwise altered or affected in the same manner as other easements."⁴⁹ The comments following section 2 indicate the drafters of the UCEA intended conservation easements to adhere to state law regarding traditional easements except for common-law impediments to negative easements in gross.⁵⁰ Several states have adopted this language outright.⁵¹ Thus, to determine the rules for conservation easement modification and termination, one must look to state laws regarding traditional easements. Generally, easements can be terminated by agreement of the parties, release, abandonment, merger, estoppel, prescription, transfer to a bona fide purchaser without notice, foreclosure, condemnation, fulfillment of purpose, or impossibility.⁵²

Two methods of easement dissolution are pertinent to a discussion of climate change. First, the doctrine of impossibility is salient here. Where climate change alters the landscape, making a conservation easement's purposes no longer viable, the conservation easement may terminate under the doctrine of impossibility.

Second, several doctrines (such as release and abandonment) enable an easement holder to change or dissolve an agreement. Where climate change

48. *See, e.g.*, UNIF. CONSERVATION EASEMENT ACT § 2(a) (2007); MINN. STAT. § 84C.02(a) (2010).

49. UNIF. CONSERVATION EASEMENT ACT § 2(a).

50. *Id.* § 2 cmt.

51. *See, e.g.*, ALA. CODE § 35-18-2(a) (2010); ALASKA STAT. § 34.17.010(a) (2010); ARIZ. REV. STAT. ANN. § 33-272(A) (2011); ARK. CODE ANN. § 15-20-404 (2010); DEL. CODE ANN. tit. 7, § 6902(a) (2010); IDAHO CODE ANN. § 55-2102(1) (2010); IND. CODE § 32-23-5-5(a) (2010); KAN. STAT. ANN. § 58-3811(b) (2010); KY. REV. STAT. ANN. § 382.810(1) (2010); MINN. STAT. § 84C.02(a) (2010); NEV. REV. STAT. § 111.420(1) (2009); N.M. STAT. ANN. § 47-12-3(A) (2010); OKLA. STAT. tit. 60, § 49.3(A) (2010); OR. REV. STAT. § 271.725(2) (2010); S.C. CODE ANN. § 27-8-30(A) (2010); TEX. NAT. RES. CODE ANN. § 183.002(a) (2009); W. VA. CODE § 20-12-4(a) (2011).

52. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.18 (M. Wolf gen. ed., Matthew Bender, 2010).

makes a conservation easement or its specific provisions undesirable from a conservation standpoint, conservation easement holders can turn to common-law easement methods of amendment and termination. The ability of holders to alter or release conservation easements is unsettled because few courts have considered the issue. Although courts appear inclined to enforce conservation easements when conservation easement holders and public agencies pursue violators, there is little indication that courts would be critical of modifications or releases when conservation easement holders and landowners agree. Even though termination by release or abandonment likely involves an active decision by the conservation easement holder, the doctrines of prescription or estoppel, described below, could arguably lead to conservation easement change or dissolution based on inaction by a holder. Thus, in states where conservation easements are subject to the law of easements, there may be multiple avenues for conservation easement dissolution or change.

1. Impossibility

Under the doctrine of impossibility, an easement terminates when it becomes impossible to fulfill its purposes. Often, this occurs upon the destruction of either the servient or dominant estate.⁵³ In property law, the dominant estate is the parcel benefited by the easement; the servient estate is the parcel burdened by the easement. Though conservation easements involve a servient estate, they have no dominant estate. This suggests that applications of the impossibility doctrine will offer little guidance for conservation easements. Yet, it is easy to envision how climate change could trigger the impossibility doctrine. Where a protected species goes extinct or migrates from a protected property, a conservation easement's purpose related to protecting that species may become impossible or impracticable. Thus, where habitat types or land uses change, conservation easement purposes can conflict with the reality of the landscape.

There have not yet been any easement-impossibility cases regarding climate change, but two older cases hint at how such legal disputes might emerge and resolve. In the 1891 case of *Weis v. Meyer*,⁵⁴ the easement holders sought use of the Mississippi River based on an easement originally associated with their lot (the dominant estate) that was a quarter mile from the water. The defendant's property (the servient estate) was located between the dominant estate and the river. When environmental changes washed away both the dominant and servient estates, the easement holder still sought rights to use the water. In deciding against the easement holder, the court explained that once the dominant estate washed away, the appurtenant easement went with it. This case indicates that sea-level rise (and possibly other environmental changes to the land) may be grounds for terminating easements. Unfortunately, *Weis* does not

53. Edwin H. Abbot Jr., *Extinguishment of Easements by Impossibility of User*, 13 COLUM. L. REV. 409, 415 (1913).

54. 17 S.W. 339 (1891).

give clear guidance for whether environmental changes will serve as grounds for terminating *conservation* easements.

The facts in *Weis* differ from conservation easement scenarios because there is no appurtenant dominant estate in a conservation easement. Appurtenant dominant estates exist where the benefited parcel (the dominant estate) is adjacent to the burdened parcel. Most state laws require easements to have appurtenant dominant estates. Conservation easement statutes explicitly recognize that conservation easements need no appurtenant dominant estate for their legitimacy. However, without case law addressing either climate change or the doctrine of impossibility in the context of conservation easements, courts will need to look to easement cases such as *Weis* for guidance. Thus, the essence of the doctrine may govern: When changes to the burdened property make purposes unfulfillable, courts should modify or terminate conservation easements.

The North Carolina Supreme Court later dealt with the opposite problem. In *Atlantic & North Carolina Railroad Co. v. Way*,⁵⁵ submerged land became dry land. Because the court found the property right at issue to be an easement in submerged land, it held that the easement extinguished when that land became dry. The easement's purposes—having to do with building wharves—were specific to submerged lands. The court considered the landscape changes to be permanent and held that “[a]n easement may be lost by a permanent change in the condition of the estate so as to render its enjoyment impossible as in this case.”⁵⁶ The court's opinion reflects a judicial willingness to hold that landscape changes trigger the doctrine of impossibility. As the court reflected, “Where the change in the land or tenement is of such decisive and conclusive a nature that the easement can no longer be enjoyed, it is extinguished”⁵⁷ This case indicates that landscape changes can terminate easements, but the permanence of those changes will be an important factor.

Both of these cases involve relatively straightforward examples of easement purposes. Each easement had a single purpose: access to the water in one, and building wharves in the other. Conservation easement purposes are unlikely to be so narrow, and most conservation easements have multiple purposes. There are no cases demonstrating what happens when one conservation easement purpose has become impossible but others remain functional. Some easement cases indicate that when part of an easement has become impossible, that part of the easement can be extinguished.⁵⁸

55. 90 S.E. 937, 939 (N.C. 1916)

56. *Id.*

57. *Id.*

58. *See, e.g., Post v. McHugh*, 920 N.E.2d 898 (Mass. App. Ct. 2010) (holding that partial obstruction of an easement only extinguished part of the easement).

2. Release

While climate change may cause landscape changes leading to basic conflicts between conservation easement purposes and the surrounding world, conflicts may arise even when the purposes have not become impossible. In some cases, measures to adapt to or mitigate environmental harms conflict with conservation easement restrictions or obligations. In such cases, conservation easement holders may believe amending or terminating the easement will increase environmental benefits by facilitating protection of other land. Parties have a few common-law doctrines to invoke in such circumstances.

Easement holders can terminate an easement by releasing it.⁵⁹ In the context of conservation easements, a conservation easement holder might choose to end the conservation easement if it felt the restriction no longer provided a benefit. When a land trust holds a conservation easement, it will need to ensure that the release does not create more than an incidental private benefit, which would endanger the land trust's nonprofit status.⁶⁰

3. Abandonment

Easements can also terminate via abandonment.⁶¹ When the conduct of an easement holder manifests an intention to stop exercising her rights related to the easement, a court will deem the easement abandoned. This method of termination is not recognized in all jurisdictions, and the requirements for showing abandonment differ even in those jurisdictions that do recognize it. Generally, one must demonstrate both cessation of use and conduct inconsistent with intent to continue using the easement. Words alone and simple nonuse are inadequate.⁶²

Terminating conservation easements via abandonment may be challenging because of the proof required. Conservation easements do not generally involve active use of the land by the easement holder. To prove cessation of use, it might be necessary to demonstrate that protection of the parcel is no longer providing a conservation benefit. A landowner seeking termination would also have to demonstrate that the conservation easement holder no longer intended to make use of the conservation easement. Such a demonstration would likely include evidence regarding lack of monitoring, enforcing, or complying with any affirmative duties in the conservation easement. Climate-change effects alone would not qualify as abandonment. But a holder might seek to abandon a conservation easement under this theory if maintenance of the conservation easement was no longer in the holder's interest due to a change in the conservation value of the parcel, or even a change in the holder's priorities.

59. 4 POWELL, *supra* note 52, § 34.20[1].

60. Nancy A. McLaughlin & Benjamin Machlis, *Amending and Terminating Perpetual Conservation Easements*, 23 PROB. & PROP. 52, 54–55 (2009) (discussing the variety of laws that must be considered when contemplating amendments to a conservation easement such as the charitable-trust principles and prohibitions on private inurement).

61. 4 POWELL, *supra* note 52, § 34.20[2].

62. *Consol. Rail Corp. v. MASP Equip. Corp.*, 490 N.E.2d 514, 516 (N.Y. 1986).

Again, land-trust holders will need to avoid complications relating to private benefit.

4. Prescription

Many jurisdictions allow termination of easements by prescription (also called adverse possession).⁶³ Adverse use of an easement property for the prescriptive period can end an easement. Adverse use is a use incompatible or irreconcilable with the authorized right of use. It often involves blocking access to easement routes or erecting structures on easement-encumbered land in a way that interferes with the use of the servient estate. The conduct must be something actionable by the easement holder.

In the context of conservation easements, adverse use may be harder to demonstrate. However, if a landowner erected prohibited structures and those structures remained in place for the prescriptive period, a court might terminate a conservation easement on prescription grounds. Akin to release or abandonment, a conservation easement holder could choose not to enforce an easement and eventually lose title to it through prescription. It would be challenging to obtain termination based on climate-change effects because it would be difficult to prove adverse use. Landscape changes may cause conflicts with conservation easement purposes, but without hostile, adverse use by the party seeking termination, a court is unlikely to find termination by prescription.

5. Estoppel

Akin to prescription is the doctrine of termination by estoppel. When an easement holder knows of a landowner's adverse use and does not take action, a court might estop the holder from taking action later.⁶⁴ Although there is no case law regarding it, termination of a conservation easement by estoppel could hypothetically occur when a holder was not diligent in monitoring or restricting the terms of the conservation easement.

These common-law easement doctrines demonstrate that there may be ways for conservation easement holders to terminate—wholly or partially—agreements that seem to conflict with conservation purposes. These doctrines are not unique to the climate-change context and could arguably apply whenever a conservation easement holder decides the burden of a conservation easement outweighs its benefits.

B. Property Law (Change of Conditions)

Although many state statutes indicate that the common law of easements will apply to conservation easements, other statutes are silent on that point. Where the legislature has not instructed courts on which law to apply, courts may still find the law of easements useful and apply some of the doctrines

63. 4 POWELL, *supra* note 52, § 34.21[1].

64. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.6 (2000).

mentioned above. Additionally, as nonpossessory interests in land, conservation easements are a type of servitude, and laws pertaining to servitudes may prove instructive.

Easements are not the only type of servitude. The two other main servitudes are real covenants and equitable servitudes. Real covenants are promises regarding the land that run with the land and are enforceable at law. A burden or benefit runs with the land when it remains in place even if ownership changes. Real covenants are akin to contracts regarding land. As with easements, these agreements burden a particular parcel and traditionally benefit another parcel. Equitable servitudes are covenants running with the land that are enforced in equity. As their name implies, equitable servitudes are enforced with equitable remedies (such as injunctions) while courts have traditionally enforced real covenants with damages. Without case law indicating which servitude doctrines courts will apply to conservation easements, the best approach is to consider all the possibilities when deciding whether to use conservation easements.

Two related, common-law doctrines that courts have applied to real covenants and equitable servitudes are the doctrine of changed conditions and the change-of-neighborhood doctrine. Both are similar to the impossibility doctrine. Changes to the landscape from climate change and other events could trigger either of these doctrines.

The doctrine of changed conditions is triggered when a change “makes it impossible as a practical matter to accomplish the purpose for which the servitude was created.”⁶⁵ Courts apply this doctrine to terminate real covenants. The most common application arises in an economic context when certain land-use or business restrictions no longer make sense in a changed real estate market or zoning context.

It is not clear whether conservation easements are subject to the doctrine of changed conditions. At common law, only real covenants—and later, equitable servitudes—were subject to this doctrine. It was not extended to easements.⁶⁶ The comments to the UCEA indicate that the drafters took no position on whether the doctrine should apply. Instead, they left it to the states to determine. In states where conservation easements follow the law of easements, conservation easements may not be subject to the doctrine of changed conditions because it was not historically applied to easements. Where state statutes do *not* instruct treating conservation easements like other easements, it is also unclear whether the doctrine will apply. Most state conservation easement statutes do not mention the applicability of the doctrine of changed conditions.⁶⁷ Although there are some statutes instructing courts to apply the

65. *Id.* § 7.10.

66. *Id.*

67. *But see* ALA. CODE § 35-18-3(b) (2010) (“This chapter does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity applicable to other easements and specifically including the doctrine of changed conditions.”); IOWA

law of easements to conservation easements, there are no state statutes asserting that the laws of real covenants or equitable servitudes apply. If a court determines that the laws governing real covenants are more appropriate, the doctrine of changed conditions would apply to conservation easements.

The federal tax laws governing conservation easements acknowledge that state courts might apply the doctrine of changed conditions to conservation easements. The regulations acknowledge that a court could terminate conservation easements if “a subsequent unexpected change in the conditions surrounding the [burdened] property” makes use of the property for conservation “impossible or impractical.”⁶⁸ While not mandating application of the doctrine, the regulations allow tax deductions for conservation easements that might one day be subject to the doctrine. Thus, the treasury regulations consider a conservation easement perpetual even if it could be extinguished by judicial proceedings, as long as the proceeds of any sale go to the conservation easement holder to be used for conservation purposes.⁶⁹

Where the doctrine of changed conditions applies to conservation easements, climate and landscape changes could lead to termination or modification of agreements. If a court finds that the purposes of a conservation easement can no longer be fulfilled, the court would likely dissolve the agreement. The doctrine of changed conditions generally results in termination of servitudes. The Restatement (Third) of Property asserts that courts will first examine whether modification will bring a servitude in line with current conditions while meeting its purposes.⁷⁰ When modification is not possible, courts will terminate the servitude. In some jurisdictions, the doctrine serves only to terminate—not modify—servitudes whose purposes have been thwarted. Generally, when changed circumstances lead to extinguishment of a conservation easement, holders are entitled to the proceeds equivalent to the released value upon any subsequent sale of the property.⁷¹

Whether climate change should constitute a changed condition is another debate. When determining whether to apply the doctrine of changed conditions, courts consider, among other things, the original intent of the parties and the foreseeability of the change. Arguably, climate change is foreseeable. Though there is debate regarding the degree and exact nature of its impact, studies on climate change are becoming increasingly sophisticated—the availability of information regarding likely effects on the landscape is growing. When a conservation easement filed today covers land that several studies say will be

CODE § 457A.2(1) (2010) (“A conservation easement shall be perpetual unless expressly limited to a lesser term, or unless released by the holder, or unless a change of circumstances renders the easement no longer beneficial to the public.”); ME. REV. STAT. tit. 33, § 477(3)(B) (2009) (“[A] conservation easement is unlimited in duration unless . . . [c]hange of circumstances renders the easement no longer in the public interest as determined by the court . . .”).

68. 26 C.F.R. § 1.170A-14(g)(6)(i) (2011).

69. *Id.*

70. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10.

71. 26 C.F.R. § 1.170A-14(g)(6)(ii).

significantly drier (more arid) in ten years, the conditions have arguably not changed. They have simply continued on their current trajectory, and the parties entering into the agreement today should have expected such changes to occur.

Although state law may be unclear on this point, conservation easement drafters sometimes include provisions regarding the doctrine of changed conditions. The Midland School Conservation Easement, for example, includes an extinguishment provision (even though it is a California conservation easement requiring perpetuity), stating that “[i]f circumstances arise in the future which render the purpose of this Easement impossible to accomplish, this Easement may be terminated or extinguished, whether in whole or in part, only by judicial proceedings in a court of competent jurisdiction.”⁷² The language of the Polk Conservation Easement is nearly identical.⁷³ Other conservation easements are silent on this issue or take other approaches. For example, a conservation easement held by the Weeks Bay Foundation in Fairhope, Alabama, states that it will be valid even if circumstances change.⁷⁴ However, the agreement specifies that the contemplated changed circumstances are economic and land-use change. Left unsaid is whether ecological change would be a justification for terminating the conservation easement.

Courts may also choose to terminate conservation easements whose purposes have been thwarted by climate change under the change-of-neighborhood doctrine. Courts have traditionally applied this doctrine to equitable servitudes, and they could extend it to conservation easements. Based on changes in the neighborhood (or surroundings), courts determine whether it is equitable to enforce equitable servitudes.⁷⁵ Equitable servitudes lapse when the restrictions applied to the general vicinity (not just a few parcels) become outmoded or lose their usefulness.⁷⁶ The change must be radical and permanent in nature.⁷⁷

C. Charitable Trust Law

There is a lot of support for the proposition that charitable-trust principles apply to conservation easements. In some ways, donated conservation easements are like any charitable asset acquired for a particular charitable

72. Deed of Conservation Easement Midland School, *supra* note 30, at 20.

73. Polk Conservation Easement, *supra* note 32, at 11.

74. Weeks Bay Foundation Inc., Weeks Bay Foundation Conservation Easement 3 (Dec. 29, 2009), available at <http://www.landprotect.com/files/38407813.pdf>.

75. *Lincoln Sav. & Loan Ass'n. v. Riviera Estates Ass'n.*, 7 Cal. App. 3d. 449, 460 (Cal. Ct. App. 1970).

76. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 447 (1989).

77. *Keller v. Branton*, 667 P.2d 650 (Wyo. 1983) (citing 7 THOMPSON ON REAL PROPERTY § 3174 (1962)).

purpose.⁷⁸ In such cases, termination or significant modification of conservation easements must adhere to charitable-trust principles and involve an equitable cy pres proceeding.

Under the doctrine of cy pres, courts may amend or terminate conservation easements when the continued use for a specified purpose has become impossible or impractical. Once a court determines that some change to a conservation easement is necessary based on changed circumstances, the court must come as close as possible to fulfilling the purposes of the agreement. If the donor's intention was to protect a specific parcel of land, the doctrine of cy pres would likely operate to keep the restrictions in place on that parcel regardless of land-use changes. If the donor's intent appeared to be promotion of a conservation agenda or protection of a specific species, the cy pres proceeding might result in termination of the conservation easement and protection of another parcel instead.

It is not clear whether courts would extend these principles to cover conservation easements protecting federal land or those created by sale, condemnation, or exaction.⁷⁹ Cy pres proceedings would only be triggered where a party sought termination or significant modification of a conservation easement.⁸⁰ Whenever proposed amendments are consistent with the purposes of the conservation easement, no proceeding is necessary and the parties to the agreement are free to modify the terms consistent with state property and contract law.

D. Contract Law

Many courts view conservation easements under the lens of contract law. In such situations, determining what will occur on a burdened property turns on the language of the conservation easement. Courts use contract-law principles to interpret the agreements.⁸¹ Many conservation easements contain terms regarding amendment, termination, and changed conditions. Under a contract-law theory, these provisions should determine how these processes play out. The challenge becomes following contract-law, property-law, *and* charitable-trust-law principles in the process.

Where conservation easements are silent on key issues—for example changed conditions—it is less clear how courts will interpret them. One option is to follow traditional contract-law principles. A court would look at the intent of the parties, but also construe the document against the drafter, and possibly consider extrinsic evidence. Some conservation easement terms may prove

78. See, e.g., Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 678–81 (2007).

79. *Id.* at 702 (arguing that the doctrine should extend to all nonfederal conservation easements to avoid compromising public support of or faith in the tool).

80. *Id.* at 681 n.27.

81. See, e.g., *McCulloch v. Town of Milan*, 907 N.Y.S.2d 19, 21 (N.Y. App. Div. 2010); *Zagrans v. Elek*, No. 08CA009472, 2009 WL 1743203, at *3 (Ohio Ct. App. June 22, 2009).

tricky in a contract-law analysis. For example, it is not clear whether a court would consider climate change a force majeure (act of god). Most conservation easements contain provisions requiring landowners to restore damaged property unless the alteration was due to a force majeure or an unforeseen event. Although it is increasingly difficult to credit an argument that climate change is unforeseen, it is beyond the control of a single landowner.

When climate changes the landscape and thereby creates conflicts with purposes or restrictions within a conservation easement, contract law may provide an unsatisfying route for resolution. Generally, when the purposes of a contract are impossible, the contract is simply invalidated. Such conditions could form a justification for breach of contract. However, conservation easements are creatures of property law—not solely contract law—precisely because of a legislative desire to keep the agreements in force longer than had been possible under contract law alone. While courts often use contract-law principles to parse the provisions of a conservation easement, it seems improbable that a court would draw upon traditional contract-law principles, such as frustration of purpose, to terminate a conservation easement.

IV

METHODS OF ADDRESSING CLIMATE CHANGE

Climate change is likely to affect many conservation easements either by creating conditions that conflict with their purposes and restrictions, or by creating situations where their restrictions hamper adaptation strategies. A challenge to the land-conservation community is to minimize the possibility that a changing climate will disrupt conservation easements. The first step in meeting this challenge is preventing or minimizing the expected climate changes. This, of course, is a global struggle. The land-conservation community can take part in these efforts by engaging in activities like preventing development and managing land for carbon sequestration. Despite any such efforts, however, there will be land-use changes and other impacts on conserved land due to climate change. Beyond mitigation efforts, conservation easement holders should consider ways to adapt or respond to climate-change impacts.

For adaptation strategies, there are two paths. First, adaptation can occur in the conservation easement. Drafters can change conservation easement terms to make the agreements more flexible, ensuring that they remain in place regardless of climate-induced changes to the ecosystem. Second, adaptation can occur on the land. Conservationists can work to ensure the land conditions continue to match the provisions of the conservation easements. This can occur through active land-management techniques such as assisted migration and irrigation.

A. Drafting Solutions

In adapting conservation easements to the realities of a changing world, conservation easement drafters could tailor the purposes and restrictions to avoid likely conflicts. Alternatively (or additionally), drafters could add provisions specifically addressing likely changes and indicating how parties should respond to such changes.

1. Draft Goals Broadly

One way to avoid problems associated with climate-change disruption of conservation easements is to include broad goals. If the purposes of conservation easements are broad, they are more likely to remain effective regardless of landscape change. For example, the purpose of preventing development is less likely to run into conflicts than the purpose of protecting the Swainson's hawk. Protecting ecosystem services is broader than protecting oak woodlands. It is harder to argue that the doctrines of impossibility or changed conditions require termination when conservation easements have broad goals.

Many conservation easement drafters are already employing this strategy. Drafters often include broad goals (such as open-space protection) precisely to ensure long-term protection. Reframing the goals in this way makes conservation easements less vulnerable to climate change because the essential purposes of the easements will not be disrupted. Having broad purposes removes fuel for those seeking to break conservation easements. Subsequent landowners will have more trouble arguing that changed circumstances serve as adequate grounds for amending or terminating the conservation easement. For jurisdictions following the *cy pres* doctrine, courts will examine conservation easements with an eye toward fulfilling their goals. When the goals or purposes are broadly stated, there will be little or no circumstances justifying removal of encumbrances.

2. Include Multiple Purposes

Akin to the idea of drafting broad purposes in conservation easements is the approach of including multiple purposes. When landscape changes hamper the fulfillment of one purpose (for example, protection of a particular species or habitat), other purposes would remain in place and prevent dissolution of the conservation easement.

In jurisdictions where impossibility of a particular purpose calls into question the viability of an entire agreement, conservation easements could contain specific provisions addressing the issue. For example, many conservation easements contain severability provisions, explaining that when

one purpose cannot be fulfilled, the conservation easement should remain in place to protect the remaining purposes.⁸²

This approach can combine with broad drafting. A conservation easement may contain multiple purposes and—in an effort to ensure some level of restriction remains in place—one of them could be broad. This, in fact, seems to be the current approach of many conservation easement drafters.

3. Include Amendment Provisions

Instead of focusing on the purposes sections of conservation easements, drafters may include provisions to increase flexibility and enable response to climatic changes. One common approach is to outline requirements and procedures for amending conservation easements. Allowing amendment of these perpetual agreements may present a technique for bringing agreements into line with changes in the landscape or societal needs.

Before including procedures for amendment in a conservation easement, drafters must look to state and federal law to determine whether such provisions are permissible. States have different approaches to amendment. Almost every state either explicitly allows or silently appears to permit conservation easements to set forth their methods for amendment. But amendment procedures are often unclear because amendment provisions within state statutes were not written in thoughtful ways, and legislators did not contemplate issues like climate change and enforcement challenges.⁸³

Whenever landowners have donated conservation easements and seek federal tax benefits, the conservation easements must be perpetual.⁸⁴ Although the Internal Revenue Code requires conservation easements to be perpetual to qualify for charitable tax deductions, the code is silent on the issue of amendment. The treasury regulations do not mention amendment either, but offer some guidance. First, the regulations acknowledge that changed circumstances could trigger a court proceeding to dissolve a conservation easement.⁸⁵ Further, the regulations prohibit any provisions or actions that would hamper or conflict with the conservation purposes of the conservation easements.⁸⁶ Read together, the statute and regulations hint that some amendments are acceptable as long as the changes do not interfere with or diminish the conservation purposes of a conservation easement. However, because neither the Internal Revenue Code nor IRS regulations directly address this, it is not clear. Even if amendment were permissible for these

82. Ann Taylor Schwing, *Climate Change and Conservation Easement Clause Databank: (May 15, 2009, last edited August 5, 2010)* 9, <http://www.landprotect.com/files/41018552.pdf> (last visited Nov. 23, 2010).

83. Presentation at the Land Trust Alliance Rally in Portland, Oregon: Conservation Easements in a Changing World: Balancing Flexibility with Permanence (Oct. 13, 2009).

84. I.R.C. § 170(h)(5)(A) (2006).

85. 26 C.F.R. § 1.170A-14(g)(6) (2011).

86. *Id.* § 1.170A-14(e)(2).

donated conservation easements, the amendments should not involve changes to conservation purposes.⁸⁷

If a property is in a state that permits amendment and the landowner is not seeking a charitable tax deduction for creation of the conservation easement, the drafters of the agreement could seek to avoid some of the problems that might arise with climate change by addressing the issue head-on. The conservation easements could include rules for amending when climate change causes conflicts with the conservation easement's purposes, obligations, or restrictions. Older conservation easements rarely contemplated amendment and usually did not have any provisions regarding amendment.⁸⁸ Today, many land trusts have amendment policies that include ensuring conservation easements contain clear amendment provisions. Amendment provisions usually state that amendments have to be approved by all involved parties and cannot result in any diminution in conservation value or conflict with the conservation easement purposes. To ensure amendment provisions will be applicable in climate-change situations, the provisions could address that issue directly. For example, drafters could include specific impacts predicted by climate models and set forth acceptable changes should those impacts be realized.

A few states have language that could arguably prohibit amendment. California,⁸⁹ Hawaii,⁹⁰ and Florida⁹¹ all require conservation easements to be perpetual. It is not clear whether amending a conservation easement conflicts with its perpetual nature, and the states requiring perpetuity do not address amendment in their statutes. How comprehensive can amendments be before altering the essential nature of the easement? It is not clear how much one can change the terms of a perpetual agreement before that agreement has been effectively terminated.

An Illinois court examined this issue in *Bjork v. Draper*.⁹² The court dismissed the idea that allowing amendment could affect the perpetuity aspect of a conservation easement, explaining that the general purposes of the agreement—not the specific individual requirements—must be upheld in perpetuity.⁹³ Thus, a conservation easement holder could amend an easement, but only if the proposed amendments did not conflict with any other provision of the agreement. Arguably, such a limitation will make it hard to amend a

87. *Id.* The IRS requires annual reporting of amendments when land trusts submit their 990 charitable-organization forms.

88. Land Trust Alliance Rally in Portland, Oregon: Workshop on Amendment (Oct. 13, 2009).

89. CAL. CIV. CODE § 815.2 (West 2010) (stating that conservation easements must be perpetual, but allowing the characteristics of a conservation easement to be defined in the text of the agreement).

90. HAW. REV. STAT. § 198-2 (2010) (stating that conservation easements must be perpetual, but allowing the characteristics of a conservation easement to be defined in the text of the agreement).

91. FLA. STAT. § 704.06 (2010) (stating that conservation easements may be released, but not mentioning modification, termination, or other actions of that ilk).

92. 886 N.E.2d 563 (Ill. App. Ct. 2008).

93. Despite the holding, however, the Illinois court did not permit the proposed development because it conflicted with other provisions in the conservation easement. *Id.*

conservation easement for climate change because holders would often seek to change a purpose or refine a restriction.

4. Include Provisions on Termination and Release

Taking the amendment-provision option a step further, conservation easements could also include termination and release provisions. The preferred response to climate-change impacts on conservation easements may be to end the arrangement. Conservation easement holders may determine that the conservation easements are no longer worth the effort that goes into monitoring and enforcing them. In some cases, the land may become so valuable that selling the development rights will enable protection of ten times the amount of land elsewhere, or may provide needed funding to purchase identified strategic parcels. Thus, parties to conservation easements may assess what circumstances will lead to acceptable termination and then specifically identify those circumstances in the conservation easements. Explicit termination provisions may run directly counter to state requirements of perpetuity or the IRS's perpetuity requirement for conservation easements associated with charitable tax deductions. Thus, this option may not be available in all states or for all types of conservation easements.

5. Include Climate-Change Provisions

Instead of seeking to cure the ills of climate change through other drafting routes, the best approach may be to directly address climate change in the conservation easement. Perhaps efforts to draft conservation easements better in the face of climate change should include provisions that explicitly address climate change. Few conservation easements currently include such language, but several practitioners have suggested provisions at meetings of the Land Trust Alliance.

Karin Marchetti Ponte, General Counsel of the Maine Coast Heritage Trust, suggests adding language specifically addressing sea-level rise where applicable. In drafting conservation easements, she sometimes includes language allowing changes to restrictions regarding placement of buildings if sea-level rise inundates originally designated sites.⁹⁴ Ann Taylor Schwing, a California attorney, suggests a similar approach but does not limit the possible climate impacts to sea-level rise. Schwing maintains a database of suggested conservation easement clauses that also address issues regarding renewable energy and carbon credits.⁹⁵

James L. Olmsted, a conservation easement attorney on the west coast, presents the most creative and comprehensive suggestions for addressing

94. Karin Marchetti Ponte, Draft Conservation Easement for the Maine Coast Heritage Trust, presented at Land Trust Alliance Rally 2010 (copy on file with author and available through Land Trust Alliance's learning center).

95. Ann Taylor Schwing, *Conservation Easement Paragraph Databank*, <http://www.bbklaw.com/?t=40&an=3775&format=xml> (last visited Jan. 18, 2011).

climate change in conservation easements.⁹⁶ He recommends specifically stating that global-warming effects cannot serve as a basis for modification or termination of the agreement. He also presents language indicating desires to protect emerging ecosystems and environmental benefits. Olmsted suggests language for dire scenarios and to address various possible climate-change impacts. All of his language contemplates that the conservation easement will continue to encumber the land despite changes.⁹⁷

B. Active-Management Solutions

Active management of conserved land could also prevent conflicts between conservation easements and a changing landscape. Active land management would involve assessing the likely climate-change impacts and taking affirmative action to protect the landscape from those impacts.

Active management can take many forms. Common active-management strategies for combating climate-change problems include assisted migration, reintroduction of species, control of pest and disease outbreaks, control of fires (including prescribed burning and fuel reduction), control of invasive species, and decreasing nutrient-enhanced runoff.⁹⁸ Through these techniques, conservationists could work to ensure the purposes and provisions of conservation easements will remain in place.

In grasslands and forests, for example, scientists have proposed a few strategies beyond land protection. To combat climate-induced degradation in grasslands, scientists advocate implementation of specific grazing practices, active fire management, and implementation of restoration projects.⁹⁹ In forests, actively managing for pests, controlling fire regimes, implementing assisted migration programs, and changing silvicultural techniques can reduce some climate impacts.¹⁰⁰

Active management is not something conservation easement holders generally consider part of their mission, but the holder is probably the entity best suited to coordinate any such projects. Conservation easements could require active management actions by landowners, but even in that context, the conservation easement holders would have a key role to play in determining the appropriate actions and monitoring compliance.

96. James L. Olmsted, *Provisions for Global Warming Era Conservation Easements*, <http://www.landprotect.com/files/41032109.pdf> (last visited Jan. 19, 2011).

97. In this volume, Adena Rissman also presents suggestions for creating more flexible agreements such as using adaptive terms and referencing management plans, but she acknowledges that conservation easements are not ideally suited for adaptive land management. Adena Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145 (Fall 2011).

98. Lara Hansen & Jennifer Biringer, *Building Resistance and Resilience to Climate Change*, in BUYING TIME: A USER'S MANUAL FOR BUILDING RESISTANCE AND RESILIENCE TO CLIMATE CHANGE IN NATURAL SYSTEMS 9, 11–13 (L. J. Hansen et al. eds., 2003).

99. Gelbrand, *supra* note 13, at 26–28.

100. Biringer, *supra* note 17, at 55–60.

V

SOLUTIONS CONFLICT WITH CONSERVATION EASEMENT ORIGIN STORIES

A. Drafting

Improving the resilience of conservation easements through changes in drafting is attractive for its simplicity. It can also yield other significant benefits. When seeking to retain as many acres as possible, flexible language will increase the likelihood that conservation easements continue to encumber the land even in the face of significant landscape change. Ecosystem change does not necessarily mean that the changed landscape is less worthy of protection. Many conservation biologists urge protecting as much land as possible. Even if the endangered species mentioned in the conservation easement has migrated (or gone extinct), or the contemplated crop types lose their economic viability, there can be value in preventing subdivision and conversion of the land.

Drafting conservation easements to remain in place regardless of climate change will likely lead to agreements with broad or multiple purposes. If parties draft broadly to avoid climate-change invalidity concerns, it may be harder to obtain the desired conservation. Embedded in a decision to draft more broadly or with multiple purposes is the idea that the real goal is keeping a particular parcel under conservation easement—not meeting a broader conservation goal.

Conservation organizations that embrace protecting specific parcels may lose sight of achieving larger conservation goals. At some point, conservation easements could become so vague as to lose meaning. Such a move would contradict the essence of conservation easements as site-specific, tailored arrangements yielding meaningful protection in perpetuity. Conservation easements arose in large part because government agencies were not protecting to the level the public felt was necessary. Broad or vague drafting, or drafting with increased ability to modify or dissolve conservation easements, may yield the same concerns and similarly fail to achieve land protection goals.

The Land Trust Alliance, an umbrella organization for land trusts and author of the standards and practices many land trusts adopt, has done much to urge against broad or vague drafting. At the same time, however, the Alliance acknowledges that the changing world and the aging population of conservation easements will increase the practices of amendment and termination.¹⁰¹ The *Conservation Easement Handbook* published by the Alliance also advises against vague or ambiguous terms, asserting that detailed terms are superior because they “reduce the risk of conflicting interpretations.”¹⁰² Thus, many conservation easement holders understand that broad drafting can hamper conservation goals and they argue against it.

101. Land Trust Alliance, *Land Trust: Standards and Practices*, <http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf> (last visited Dec. 1, 2010).

102. BYERS & PONTE, *supra* note 31, at 295.

Including multiple purposes within a conservation easement whenever a holder acknowledges that some of the purposes' viability will be threatened by climate change may be a pragmatic approach to conservation, but it is also a pessimistic one. Parties to these conservation easements are acknowledging that one or more of their conservation easement's purposes may become impossible.

The precautionary principle calls for erring on the side of caution and choosing environmentally beneficial policies even in the face of uncertainty. Such a principle can apply here as well. A desire to proceed cautiously can conflict with the need of urgency and the feeling of crisis surrounding climate change, land conservation, and environmental issues generally. An urge to act quickly and comprehensively may trump the need to act carefully and correctly. It may be easier to reevaluate already-conserved land in the future than to deal with already-converted land. Today's land managers and conservationists may not be able to make accurate assessments regarding viable conservation methods, but efforts to protect current environmental benefits may serve as the best option in a constrained world.

B. Active Management

Active management of conservation easements also appears at odds with their fundamental nature. Conservation easements protect the status quo and enable land protection without heavy-handed government regulation.¹⁰³ Conservation easements were supposed to reduce government involvement and leave the landowner in peace. Requiring intensive, active management of the land to combat climate-induced changes does not fit in this narrative. Such intensive land management is usually an activity associated with fee title ownership of land.

Despite a proclivity against active management, some conservation easement holders have recognized the need for it. The hands-off approach to conservation (embodied by conservation easements) has not yielded hoped-for environmental benefits. For this reason, some conservation easement holders have begun to acknowledge the need for active management and are incorporating management plans into their conservation easements. Some land trusts require landowners to manage their land in conjunction with established adaptive-management plans. Adaptive-management plans are active management regimes that include iterative processes and change requirements overtime as the land changes and as our information about land management and ecology evolve.¹⁰⁴ These plans can then change without needing to amend the conservation easement. Other conservation easement holders act as the land managers and carry out activities on the encumbered land. Some conservation easements refer to management plans that take effect only if

103. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 313 (2004).

104. Emma L. Tompkins & W. Neil Adger, *Does Adaptive Management of Natural Resources Enhance Resilience to Climate Change?* 9 ECOLOGY & SOC'Y, no. 2, 2004, art. 10, at 2, 4.

certain landscape changes occur. Usually, these adaptive-management plans recognize that the world is a changing place and seek to acknowledge and incorporate those changes. This approach differs from active management that would serve to combat the changes and keep the land in its initial condition.

The incorporation of active management into conservation easements is a relatively new, but growing, phenomenon. While sophisticated and accredited land trusts and government agencies with staff expertise may find these principles easy to incorporate into their conservation strategies, others may find this approach directly at odds with the conservation easement paradigm. Many holders do not want any active-management requirements in their conservation easements for several reasons. Requiring active management adds to the monitoring and enforcement burden. If conservation easement holders wanted to exert that level of control over the land, they would have invested in fee title. Moreover, many conservation easement holders will not have the staff time or expertise to put together successful active-management programs. Finally, requiring active management of conservation easements goes against the nature of conservation easements; their hands-off nature was one of the main reasons that both holders and landowners found them attractive.

Active management may not be the best way to cope with a changing world. Instead of fighting ecological change by increasing inputs (of money, ecological matter, efforts, and emotion), the better choice may be to adapt to the change. In such cases, increasing irrigation or importing more at-risk species may be undesirable. To adapt to climate change, conservation easement holders may want to encourage species previously considered invasive or allow some land uses that previously seemed at odds with the ecological composition of the parcel.

C. Improved Decisionmaking

Perhaps the best way to address climate-change impacts is to assume that such impacts will occur, and use that as a starting point for determining where to place conservation easements and what provisions those conservation easements should include. One outcome of this approach may be a shift in how conservationists use conservation easements and a corresponding reduction of how often they are used.

Conservation easements that focus on protecting specific landscapes, ecosystems, habitats, species, and land uses are more likely to run into climate-change-caused conflicts. In a changing world, conservation easements may work best when they protect broad goals like open space and scenic values. The decision to use conservation easements to meet ecological-protection and land-management goals introduces a complication that was not present with conservation easements protecting open space and scenic values.¹⁰⁵

105. A.M. Merelender et al., *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 70 (2004).

Conservation easements protecting open space—those prohibiting development—will likely remain effective and meaningful even with climate change. When the goal of a conservation easement is to prevent sprawl or preserve islands of open space, these goals are likely to retain salience even when ecosystems change. When goals focus on functioning ecosystems or other nature-based purposes, climate change will be a greater obstacle. Conservationists could identify the types of conservation goals that are going to be viable longer and confine use of conservation easements to achieving those goals.

VI

CONCLUSION

The essence of a conservation easement as a static, perpetual restriction is coming into conflict with the understanding that the world is a changing place. This demonstration is nowhere more dramatic than in the context of global climate change. In response to this conflict, users of conservation easements face the decision of either (1) changing conservation easements to fit the landscape or (2) changing the landscape to fit the conservation easements. Both of these options present benefits and challenges in implementation. When a conservation easement holder's ultimate goal is to protect a maximum number of acres from development, flexible conservation easements may present a viable and attractive method of protection. When a specific conservation value or habitat is the concern, active management of the land may be more appropriate. As a further complication, both of these options are at odds with the essential nature of conservation easements. These conflicts lead to a third option: making different decisions about where and how to use conservation easements.

With climate-change studies increasing in number and quality, conservationists have better information regarding which lands will be most sensitive to change and regarding the manner of that change. Because of the inherent uncertainty in the future of those landscapes, conservation easements should be placed on them cautiously. Furthermore, some conservation easement purposes are more resilient to climate-change impacts than others. Working to preserve open space, for example, is more likely to persist than protection of a particular habitat type or land use. Even without a thorough, data-filled analysis (which is a subject for another day), there are some circumstances where conservation easements are more likely to remain in place, and remain meaningful, than others.

This approach involves determining which conservation tools offer the most appropriate protection. A likely conclusion is that conservation easements are desirable only in a narrow category of purposes. This is of course dismaying to champions of conservation easements. Unfortunately, ensuring the long-term

viability of conservation easements may entail omitting the very features that give conservation easements their strength.