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ENHANCING CONSERVATION OPTIONS: AN ARGUMENT FOR STATUTORY RECOGNITION OF OPTIONS TO PURCHASE CONSERVATION EASEMENTS (OPCES)

Federico Cheever and Jessica Orwley***

Land conservation transactions have been the most active component of the conservation movement in the United States for the past three decades. Conservation organizations have acquired property rights—mostly conservation easements—to protect roughly 40 million acres of land nationwide. However, climate change threatens this vast edifice. Climate change means that the resources that land conservation transactions were intended to protect may not persist on the land protected. Options to purchase conservation easements (“OPCEs”) have long played a modest but important role in conservation law practice. In the world climate change is creating, with its substantial uncertainties and shifting windows of opportunity, OPCEs can serve more complicated and strategic purposes. This potential would be significantly increased if state legislatures amended current conservation easement enabling statutes to: (1) specifically recognize OPCEs, (2) immunize OPCEs from a range of potential common law challenges, and (3) integrate OPCEs into the burgeoning body of conservation easement law. These statutory amendments would do for OPCEs what conservation easement statutes have done for conservation easements: transform them into an essential multi-purpose tool for conservation in a changing world.

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INTRODUCTION

Land conservation transactions have been the most active component of the conservation movement in the United States for the past three decades.¹ Practitioners use real estate tools to preserve habitat, scenery, and historically significant places. Sometimes these tools are used by government entities, but they often involve nonprofit land conservation organizations known as land trusts. Land trusts buy and accept donations of land and conservation easements encumbering land. According to the Land Trust Alliance’s 2010 National Census, more than 1,700 land trusts (local, state, and national) are active in the United States.² These organizations are supported by almost 5 million

1. While this is an impossible claim to verify, the evidence is strong. The number of acres encumbered with conservation easements is still growing rapidly. *See infra* notes 8–13 and accompanying text. In contrast, federal environmental laws have generally remained static since the Clean Air Act Amendments of 1990. WILLIAM H. RODGERS, ENVIRONMENTAL LAW viii–ix (2d ed. 1994). The quantity of land held in fee by the federal government for conservation purposes has remained roughly stable, with a slight downward trend. *See* ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 15–16 (2012) (explaining that from 1990 to 2010, total federal lands declined by more than 18 million acres, or 2.8%); The Trust for Public Land, CONSERVATION ALMANAC, <http://perma.cc/99VF-CLMP>. The only potential competition for conservation dynamism has been the National Wilderness Preservation System. *See* Don Gourlie, *The Wilderness Act at 50*, 44 ENVTL. L. 285, 285 (2014) (stating that wilderness designations have protected over 109 million acres of land). But because these areas are subject to some level of protection as federal public domain before being designated by Congress as “wilderness,” the actual impact of wilderness designation is difficult to gauge. The Wilderness Act of 1964, 16 U.S.C. § 1131 (1964) (providing that only federally owned lands may be designated as “wilderness areas”).

2. KATIE CHANG, LAND TRUST ALLIANCE, 2010 NATIONAL LAND TRUST CENSUS REPORT 5 (2011) [hereinafter “2010 LAND TRUST CENSUS”]. According to the Land Trust Alliance, a “land trust is a nonprofit organization that, as all or part of its mission, actively works to

people.³ While growth in the number of U.S. land trusts has leveled off in the last decade, the vast majority of these organizations did not exist before 1980.⁴

Conservation easements are among the primary types of land conservation transactions. A conservation easement is a non-possessory property right through which a government entity or nonprofit land trust restricts a landowner's use of a parcel of land with the goal of yielding a conservation benefit.⁵ According to the Land Trust Alliance, state and local land trusts have protected more land by conservation easements than by fee simple ownership since 1994.⁶ State and local land trusts surveyed by the Land Trust Alliance in 2010 held conservation easements encumbering more than four times as much land as they owned outright.⁷ The explosion in the number of conservation easements has made them one of the most important legal institutions in land-use planning, tax law, and environmental law.

The National Conservation Easement Database estimates that conservation easements encumber approximately 40 million acres of land in the United States.⁸ For size comparison, the state of Washington contains a little more than 42 million acres of land⁹ and the National Park System, including Alaska, includes nearly 80 million acres of land.¹⁰ Unlike either the state of Washington

conserve land by undertaking or assisting in land or conservation easement acquisitions, or by its stewardship of such land or easements." *Id.* at 4.

3. *Id.* at 8.
4. See Richard Brewer, *Land Trusts and The Land Trust Movement*, RICHARDBREWER.ORG, <http://perma.cc/U94Q-5LLG> (describing the boom in land trusts from 1980 to 2005).
5. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 14–22 (2d ed. 2005).
6. 2010 LAND TRUST CENSUS, *supra* note 2, at 6.
7. *Id.* at 5 (noting that state and local land trusts owned more than 2,144,000 acres of land outright and held conservation easements encumbering more than 8,833,000 acres). While the Land Trust Alliance's numbers are helpful for understanding the relative amount of land held in fee compared with the amount held in conservation easements, they are misleading for estimating the national total amount of land conservation. The Land Trust Alliance's survey is unlikely a complete picture of all land trusts and, even more significantly, it does not include the vast acreage held by federal, state, or local government entities or by tribes. See *id.* at 4.
8. *Completeness*, NATIONAL CONSERVATION EASEMENT DATABASE, <http://perma.cc/8UBB-2NJ7>. The National Conservation Easement Database is the first national database for conservation easement information. This public-private partnership is an initiative of the U.S. Endowment for Forestry and Communities. It partners with the Conservation Biology Institute, Defenders of Wildlife, Ducks Unlimited, NatureServe, and The Trust for Public Land, and collaborates with the U.S. Geological Survey's National Gap Analysis Program. *About the NCED*, NATIONAL CONSERVATION EASEMENT DATABASE, <https://perma.cc/9BYH-ZAAA>. As of July 2015, the database contained basic information on roughly 115,000 conservation easements in the United States encumbering more than 23 million acres of land. NATIONAL CONSERVATION EASEMENT DATABASE, <https://perma.cc/VY7S-5R7S>. There is also an effort to document publicly and privately protected areas on an international scale called the "World Database on Protected Areas," which is a joint project of the International Union for Conservation of Nature and United Nations Environment Programme. See *About*, PROTECTED PLANET, <http://perma.cc/KAR3-JH6B>.
9. *Mineral and Surface Acreage Managed by the BLM*, BUREAU OF LAND MANAGEMENT, <http://perma.cc/Y67D-DFUW> (listing total state acreage for several states, including Washington).
10. GORTE ET AL., *supra* note 1, at 9.

or the National Park System, however, the number of acres encumbered by conservation easements is growing rapidly.¹¹ The vast majority of the conservation easements included in the National Conservation Easement Database were created after 1990.¹²

During the same decades in which land conservation transactions emerged as the most active aspect of conservation in the United States, our ability to actually conserve natural resources has been called into doubt by a new threat: climate change. Climate change will destabilize many aspects of the natural world.¹³ Two obvious and (almost) undeniable effects of climate change are species extinction and sea-level rise.

The prospect of climate change diminishes the value of most real estate tools currently used by proponents of land conservation transactions. These traditional tools are—by their nature—stationary.¹⁴ A conservation easement, once transferred and recorded, binds only the parcel of land described. However, what scientists know of climate change suggests a natural world in motion; there is no guarantee that the things people value on specific parcels of land will continue to be there in fifty or one hundred years.

To assess the work and attitudes of land trust professionals toward climate change, professors at six universities around the United States conducted a “distributed graduate seminar” in 2011.¹⁵ We examined 269 conservation easements and conducted seventy-three interviews of staff members with land conservation organizations.¹⁶ Not surprisingly, we discovered that many land trust professionals were concerned about the threat of climate change, but few had formulated plans to address that threat. In the years since the initial seminar, we have considered a range of responses to the challenge of private land conservation under climate change. This Article outlines one meaningful potential response: a reinvigorated use of real estate options.

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11. 2010 LAND TRUST CENSUS, *supra* note 2, at 5 (“Total acres conserved by state, local and national land trusts grew to 47 million as of year-end 2010—an increase of about 10 million acres since 2005 and 23 million since 2000.”); JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 7 (2005) (“The extraordinary attractiveness of conservation easements is demonstrated by their explosive growth in recent years. When calculating the numbers, however, perhaps the most important point is that no one knows, even approximately, how many there are. . . . New land trusts are born at the rate of about two per week. Land Trust Alliance President Rand Wentworth has estimated a doubling every four years of the number of acres under conservation easement held by local and regional land trusts alone.” (emphasis omitted)).
 12. *All States and All Easements*, NATIONAL CONSERVATION EASEMENT DATABASE, <http://perma.cc/8M22-9P6Z>.
 13. *See, e.g.*, THOMAS E. LOVEJOY & LEE HANNAH, CLIMATE CHANGE AND BIODIVERSITY 7–11 (2005).
 14. *See* Jessica Owley, *Property Constructs and Nature’s Challenge to Perpetuity*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64 (Keith Hirokawa ed., 2014) (discussing the inherent mismatch between static property tools and the changing world).
 15. Jessica Owley & Adena R. Rissman, *Distributed Graduate Seminars: An Interdisciplinary Approach to Studying Land Conservation*, 2 PACE ENVTL. L. REV. ONLINE COMPANION 88, 88 (2011) (describing the distributed graduate seminar).
 16. Adena R. Rissman et al., *Adapting Conservation Easements to Climate Change*, 8 CONSERVATION LETTERS 68, 69 (2015) (describing data gathering).

Options to purchase conservation easements (“OPCEs”) have long played a modest but important role in conservation law practice.¹⁷ In real estate transactions, an option is the contractual right to purchase or lease something without the obligation to do so. With OPCEs, the option holder gains the right to purchase a conservation easement encumbering a specific parcel of land. Such rights can be purchased (or “donated” with nominal consideration) and give the holder of the option flexibility in deciding whether and when to enter into a conservation easement agreement. Currently, some land trusts use OPCEs to gain additional time to generate financing for important transactions or to assemble the series of parcels needed to achieve a conservation goal.¹⁸ The currently used OPCEs rarely last more than two years.¹⁹ We envision something more.

In the world climate change is creating, with its substantial uncertainties and shifting windows of opportunity, OPCEs can serve more strategic purposes. For example, if a private land trust or government entity expects a particularly valuable species habitat to migrate over time, but does not know exactly where or when it will migrate, the organization could choose to purchase options to preserve that habitat along a number of potential migration pathways. The group could then purchase conservation easements along only one pathway once the actual migration pattern emerges. Similarly, an entity committed to preserving coastal habitats and aware that sea level will rise, but unable to determine how far it will rise and how it will affect coastal configuration and usage, might purchase options across a broad zone of shoreline. This organization could eventually purchase conservation easements to create new shoreline habitat preserves and storm buffers once it has learned enough to know where that shoreline will be.

The ability of OPCEs to serve important roles in protecting land in the context of uncertainty would be significantly increased if state legislatures amended current conservation easement enabling statutes²⁰ to: (1) specifically recognize OPCEs, (2) immunize OPCEs from a range of potential common law challenges, and (3) integrate OPCEs into the burgeoning body of conservation easement law.

Part I describes the current relationship between the land trust community and climate change, then introduces OPCEs and discusses how they could fit into a conservation strategy. Part II examines the advantages OPCEs could

17. See *infra* Part I.B.

18. Telephone Interview with Karin Marchetti Ponte, Gen. Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass’n (Dec. 3, 2014).

19. Telephone Interview with Karin Marchetti Ponte, *supra* note 18; Telephone Interview with Vanessa Johnson-Hall, *supra* note 18. *But see* E-mail from Ann Taylor Schwing, Of Counsel, Best Best & Krieger LLP, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Dec. 2, 2014) (on file with authors) (“There was one option, extended several times, that lasted over 30 years because there were so many separate parcels to assemble.”).

20. See ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES (2010). The only state without a permanent conservation easement enabling statute is North Dakota. *Id.* at 4.

provide in the shifting world climate change is creating, and addresses some potential objections. Part III describes problems with the common law and the corresponding virtues of statutory recognition of OPCEs.

I. NEW PROBLEMS, OLD TOOLS

A. *New Problems*

1. *Climate Change-Induced Extinctions and Sea-Level Rise*

The Intergovernmental Panel on Climate Change's ("IPCC") Fifth Assessment Report paints a dire picture of both the present and future.²¹ As Working Group II's *Summary for Policymakers* observes, the impact of climate change is already all around us.²² Increasing rates of species extinction, shifting migration patterns, and rising sea levels are among the most severe risks that climate change models anticipate.²³

Many species are at risk of extinction as a result of climate change-related impacts, including ecosystem shifts, habitat modifications, and introductions of invasive species including diseases.²⁴ In 2004, a group of prominent scientists predicted that 15–37% of species on Earth were "committed to extinction."²⁵ While only a few recent extinctions are directly attributed to climate change,²⁶ scientists agree that climate change is an obstacle to slowing the already accelerated extinction rate caused by other human activities such as habitat conversion.²⁷ How climate change will affect species extinction is not entirely understood by scientists. There are many factors at issue including climate change's effects on food availability and species interactions.²⁸ Moreover, the harm from climate change is likely to be magnified as it "interacts with other stressors, such as habitat modification, over-exploitation, pollution, and inva-

21. WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY (2014), <http://perma.cc/R86Z-3BZC>.

22. WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 1, 4 (2014) [hereinafter IPCC WORKING GROUP II, *Summary for Policymakers*], <http://perma.cc/W59H-WZ4U> ("In recent decades, changes in climate have caused impacts on natural and human systems on all continents and across the oceans.")

23. *Id.* at 4, 15–17, 23.

24. *See id.* at 6, 14–15.

25. Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145, 146 (2004).

26. *See id.*

27. *See, e.g.*, Jessica C. Stanton et al., *Warning Times for Species Extinctions Due to Climate Change*, 21 GLOBAL CHANGE BIOLOGY 1066, 1075 (2015).

28. *See* Abigail E. Cahill et al., *How Does Climate Change Cause Extinction?*, 280 PROC. ROYAL SOC'Y B 1, 4–6 (2012).

sive species.”²⁹ As a result, some scientists suggest that current predictions may underestimate species extinctions due to climate change.³⁰

Besides biodiversity loss, climate change is likely to result in a world that looks very different from our current one. The IPCC reports with “high confidence” that many species have already “shifted their geographic ranges, seasonal activities, migration patterns, abundances, and species interactions in response to ongoing climate change.”³¹ For example, scientists have already found species shifting to higher latitudes and elevations.³²

While scientists agree that many species are shifting their ranges, they also acknowledge that individual species vary greatly in their migration rates.³³ Researchers still struggle to predict patterns of species dispersal and migration under climate change.³⁴ Programs to protect species will need to be flexible to account for multiple future scenarios. Currently protected areas may be poorly suited for building ecological resilience in the face of climate change, particularly where the conservation plan is based on static assumptions about habitats and climate stability.³⁵ Shifting ranges require a shifted approach to land conservation.

The IPCC also predicted rising sea levels throughout the twenty-first century and beyond, warning that “coastal systems and low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding, and coastal erosion . . .”³⁶ Sea level rise will also cause subsidence,³⁷ loss of coastal wetlands,³⁸ and habitat loss.³⁹ Such climatic impacts will likely cause economic and social impacts related to displacement⁴⁰ and casualties.⁴¹ Although scientists

29. IPCC WORKING GROUP II, *Summary for Policymakers*, *supra* note 22, at 14–15.

30. Mark C. Urban, Josh J. Tewksbury & Kimberly S. Sheldon, *On a Collision Course: Competition and Dispersal Differences Create No-Analogue Communities and Cause Extinctions During Climate Change*, 279 *PROC. ROYAL SOC'Y B* 2072, 2078–79 (2012) (suggesting that current effects of climate change on biodiversity are underestimated because they do not account for interactions among species that have not historically been found together).

31. IPCC WORKING GROUP II, *Summary for Policymakers*, *supra* note 22, at 4.

32. I-Ching Chen et al., *Rapid Range Shifts of Species Associated with High Levels of Climate Warming*, 333 *SCI.* 1024, 1024 (2011).

33. *Id.*

34. *See, e.g.*, Terence P. Dawson et al., *Beyond Predictions: Biodiversity Conservation in a Changing Climate*, 332 *SCI.* 53, 53 (2011); Damien A. Fordham et al., *Plant Extinction Risk Under Climate Change: Are Forecast Range Shifts Alone a Good Indicator of Species Vulnerability to Global Warming?*, 18 *GLOBAL CHANGE BIOLOGY* 1357, 1357 (2012).

35. Carla M. Sgrò, Andrew J. Lowe & Ary A. Hoffman, *Building Evolutionary Resilience for Conserving Biodiversity Under Climate Change*, 4 *EVOLUTIONARY APPLICATIONS* 326, 332–33 (2011) (suggesting protecting areas with a range of habitats, gradients, and refugia, and not focusing solely on connectedness); *see also* Lee Hannah et al., *Protected Area Needs in a Changing Climate*, 5 *FRONTIERS IN ECOLOGY & ENV'T* 131 (2007) (objecting to the current mode of fixed protected areas).

36. IPCC WORKING GROUP II, *Summary for Policymakers*, *supra* note 22, at 17.

37. *Id.*

38. Matthew L. Kirwan et al., *Limits on the Adaptability of Coastal Marshes to Rising Sea Level*, 37 *GEOPHYSICAL RES. LETTERS* 23401, 23401 (2010).

39. IPCC WORKING GROUP II, *Summary for Policymakers*, *supra* note 22, at 25.

40. *See, e.g.*, Francesco Bosello et al., *Economic Impacts of Climate Change in Europe: Sea-Level Rise*, 112 *CLIMATIC CHANGE* 63, 63–64 (2012); Robert J. Nicholls et al., *Sea-Level Rise and*

agree that some degree of sea-level rise is inevitable, there is uncertainty regarding the rate of coastal loss and local impacts.⁴² The location and impacts of storm surges and catastrophic events are particularly challenging to predict.⁴³

2. Current Land Trust Responses

The website of the Land Trust Alliance—an umbrella organization for local, state, and regional land trusts in the United States—now contains a page entitled “How Does Climate Change Affect Land Trusts?”⁴⁴ The website and its subsidiary pages “Plan for Climate Change” and “Adopt Land Trust Practices to Promote Resilience in a Climate Changing World” offer excellent advice for managing lands for “resilience” in the face of climate change.⁴⁵ The Land Trust Alliance emphasizes “Scenario Planning,” which encompasses three steps:

1. Identify the relevant variables or future conditions. For example, relevant variables for land trusts would include anticipated development patterns or the potential spread of invasive species.
2. Develop scenarios for each of these variables. These scenarios are essentially stories or predictions about what would happen if different future conditions came to be. For example, if a particular invasive species reaches a land parcel, how would that impact the value of that piece of land?
3. Select a plan based on the scenarios. Since it is not possible to predict how future conditions will unfold, planners should select the

its Possible Impacts Given a 'Beyond 4°C World' in the Twenty-First Century, 369 PHIL. TRANSACTIONS ROYAL SOC'Y A 161, 161 (2011).

41. See, e.g., Gregg Greenough et al., *The Potential Impacts of Climate Variability and Change on Health Impacts of Extreme Weather Events in the United States*, 109 ENV'TL HEALTH PERSPECTIVES (SUPPLEMENT 2) 191, 191 (2001).
42. See, e.g., Robert J. Nicholls & Anny Cazenave, *Sea-Level Rise and Its Impact on Coastal Zones*, 328 SCI. 1517, 1517 (2010); Rebecca K. Runting, Kerrie A. Wilson & Jonathan R. Rhodes, *Does More Mean Less? The Value of Information for Conservation Planning Under Sea Level Rise*, 19 GLOBAL CHANGE BIOLOGY 352, 352–54 (2013) (addressing the challenge of choosing which coastal lands to protect for climate change adaptation when budgets are limited).
43. See Francis W. Zwiers et al., *Climate Extremes: Challenges in Estimating and Understanding Recent Changes in the Frequency and Intensity of Extreme Climate and Weather Events*, in CLIMATE SCIENCE FOR SERVING SOCIETY 339 (Ghassem R. Asar & James W. Hurrell eds., 2013); Ning Lin et al., *Physically Based Assessment of Hurricane Surge Threat Under Climate Change*, 2 NATURE CLIMATE CHANGE 462, 463–65 (2012).
44. *How Does Climate Change Affect Land Trusts?*, LAND TRUST ALLIANCE, <http://perma.cc/TVB4-SNWQ>.
45. “Resilience is the capacity of a system to absorb disturbance and reorganize so as to retain essentially the same function, structure, and feedbacks—to have the same identity. Put more simply, resilience is the ability to cope with shocks and keep functioning in much the same kind of way.” BRIAN WALKER & DAVID SALT, RESILIENCE PRACTICE: BUILDING CAPACITY TO ABSORB DISTURBANCE AND MAINTAIN FUNCTION 3 (2012). Resilience is an important concept in natural resources law and policy in the twenty-first century. See John M. Anderies et al., *Aligning Key Concepts for Global Change Policy: Robustness, Resilience, and Sustainability*, 18 ECOLOGY & SOC'Y 8, 8–15 (2013).

plan that is most resilient under a variety of scenarios. For example, land trust planners might choose to protect the parcel of land that is both easiest to protect from invasive species and least likely to be negatively impacted by future development patterns.⁴⁶

However, the website does not grapple with the problem of what happens when the resources a conservation easement was intended to conserve are no longer present on the protected land. State conservation easement laws⁴⁷ and federal Internal Revenue Service (“IRS”) regulations⁴⁸ contemplate termination of conservation easements through judicial action in the face of changed conditions. Well-crafted conservation easements often contain a provision governing division of assets upon termination.⁴⁹ However, providing for the termination of a conservation easement does not resolve the broader question of how to protect the underlying resource. This deficiency reflects the limitations of the current land trust approach that focuses on preserving conservation values only on particular pieces of land.

The Nature Conservancy—the world’s largest and most sophisticated land trust—has assiduously incorporated climate change strategies into its analysis of land acquisitions around the world, including both mitigation (reducing greenhouse gas emissions) and adaptation (preserving conservation values in the face of climate change).⁵⁰ While The Nature Conservancy urges preserving larger portions of important ecosystems to adapt to the impacts of climate change,⁵¹ it has not adopted an overarching approach for dealing with the effects of climate change on its conservation strategy.

The positions of the Land Trust Alliance and The Nature Conservancy are advanced, but representative of the broader land trust community. Conservation professionals and volunteers recognize the threat of climate change and are knowledgeable about its potential impacts on their landscapes. The interviews we conducted with land trust professionals in 2011 as part of our distributed seminar reinforce this impression.⁵² Eighty-eight percent of the participants reported that they were concerned that climate change will likely

46. *Scenario Planning*, LAND TRUST ALLIANCE, <http://perma.cc/CK4S-5UJG>.

47. See LEVIN, *supra* note 20.

48. 26 C.F.R. § 1.170A-14(g)(6)(i) (“If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds . . . from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.”).

49. BYERS & MARCHETTI PONTE, *supra* note 5, at 189–97.

50. See *Climate Change*, THE NATURE CONSERVANCY, <http://perma.cc/8P4C-MQG4>.

51. See *Climate Change: Our Priorities*, THE NATURE CONSERVANCY, <http://perma.cc/TX4C-KNDV>.

52. See Owley & Rissman, *supra* note 15 (explaining the distributed graduate seminar’s structure). Researchers interviewed more than seventy representatives from the land conservation community, including both nonprofit land trusts and government conservation agencies, and reviewed more than 250 conservation easements. See Rissman et al., *supra* note 16, at 69 (describing data collection).

affect their region.⁵³ A third of the participants believed that it is likely or very likely that climate change will negatively affect the goals of their conservation easements.⁵⁴ Twenty-two percent stated that climate change already was affecting their conservation work.⁵⁵

While the majority of interviewees believed their conservation easements were flexible enough to deal with climate change,⁵⁶ their responses expressed a clear sense that more work could be done. Only 8% said that their organizations had either changed their conservation easement language or conservation easement acquisition policies to better deal with climate change, and just 17% stated that their land conservation organizations were actively considering how to respond to climate change.⁵⁷ In the 9% of answers that discounted climate change, most relied on procedural or lack-of-information-based arguments.⁵⁸ By far the most common response was that their organizations were doing “nothing” to prepare for climate change.⁵⁹

Individual land trusts have created programs and policies seeking to respond to the changes they see coming in their communities. The Atlantic Coast Conservancy is the first (and perhaps the only) land trust whose mission is explicitly to respond to climate change, seeking to conserve “critical natural resources in the face of a changing climate focusing on the Southeastern United States with specific utilization of geographic information systems applications in land conservation, ecosystems services, carbon sequestration and conservation biology.”⁶⁰ The group features research and climate change discussions prominently on its website and is developing carbon sequestration programs, but its main tool for land protection remains the conservation easement.⁶¹

Elkhorn Slough Foundation—a land trust managing tidal land south of San Francisco, California, where sea-level rise is projected to have significant impacts on the landscape⁶²—is targeting acquisition of property based on the

53. Adena Rissman et al., Presentation at Land Trust Alliance Rally in Milwaukee, WI: Conservation Easements in a Changing Climate (Oct. 15, 2011) (on file with authors).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* However, in a Land Trust Alliance webinar for coastal land trusts, thirty-three of forty-three respondents stated that their land trust was doing some type of climate change adaptation planning (but with ninety-nine participants on the webinar, the majority of participants did not respond). Land trusts identified barriers to adaptation planning as just being too busy with other efforts, “lack of focus” on the issue, and uncertainty with how to proceed both programmatically and with respect to expected climate change impacts. *Coastal Land Trusts and Climate Change Adaptation*, LAND TRUST ALLIANCE [hereinafter Land Trust Alliance Webinar], <http://perma.cc/DER9-397X>.

60. ATLANTIC COAST CONSERVANCY, <http://perma.cc/4EBJ-VFK2>.

61. *Id.*

62. See Joanna L. Nelson & Erika S. Zavaleta, *Salt Marsh as a Coastal Filter for the Oceans: Changes in Function with Experimental Increases in Nitrogen Loading and Sea-Level Rise*, 7 PLOS ONE 1, 9 (2012).

IPCC's sea-level rise predictions.⁶³ Fee simple purchase and conservation easements are the organization's primary tools.⁶⁴ The Nature Conservancy's South Carolina office has been working to respond to sea-level rise but found that the models it has are useful at the landscape level but problematic for understanding what occurs at the parcel level.⁶⁵

Emily Bateson, Conservation Director for Highstead (a New England-based land trust with a focus on forest protection), expressed a common sentiment when she stated, "I don't know if [our] approach is the complete answer, but at least we are finally asking the climate question and having the conversation we have been ignoring for years."⁶⁶

B. *Old Tools: Options to Purchase Conservation Easements*

Land trusts have been grappling with climate change, but one tool remains underused: options to purchase conservation easements. A conservation easement is a negative servitude allowing the holder to prevent the possessory owner of a piece of land from undertaking certain specified activities.⁶⁷ The Land Trust Alliance describes a conservation easement as a "legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values."⁶⁸ By encumbering a piece of land with a conservation easement, a landowner transfers certain specific rights from the possessory owner's "bundle of rights" to a governmental entity or private land trust for the purpose of preserving the land in its current state.⁶⁹ The landowner retains certain rights, generally the right to possess and use the property in a manner that does not disrupt the conservation purposes for which the conservation easement was established.⁷⁰

In general, an option is the right to purchase something without the obligation to purchase it. For example, I (the option holder) might receive from you (the optionor) the right to purchase something you have the right to sell. If I exercise my option—consistent with its terms—you have a contractual obliga-

63. *Elkhorn Slough Salt Marshes: Past, Present and Future*, ELKHORN SLOUGH FOUNDATION, <https://perma.cc/RD8H-WBDM>.

64. Land Trust Alliance Webinar, *supra* note 59. One of the group's concerns is protecting key infrastructure projects that control water levels and thereby protect habitats. With sea-level rise, some structures will become ineffective. *Id.*

65. *Id.*

66. Emily Bateson, Conservation Director, Highstead, Presentation at the National Land Conservation Conference in Providence, RI: Climate Resilience for Biodiversity (Sept. 19, 2014).

67. UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 174 (1981).

68. *Conservation Options*, LAND TRUST ALLIANCE, <http://perma.cc/K3GY-39JY>. Conservation easements need not be permanent, however, unless they are in one of the three states requiring easements in perpetuity or are associated with federal charitable income tax donations. Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 163–164 (2011). Indeed, North Dakota prohibits perpetual conservation easements. N.D. CENT. CODE § 47-05-02.1(2) (restricting conservation easements to ninety-nine years).

69. See UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 174 (1981).

70. BYERS & MARCHETTI PONTE, *supra* note 5, at 9–21.

tion to sell the subject of the option to me. Often, real estate options are rights to purchase a parcel of real estate in fee simple. For example, I might pay you \$5,000 for a one-year option to purchase your house for \$500,000. At any time during that year (the option period), I could exercise my option. At the end of the year, the option would lapse, and I would no longer have any rights regarding your house and you would have no obligations to me. Plus, you would keep the \$5,000.

Naturally, an OPCE is an option to purchase a conservation easement from someone who has the right to sell it—generally the possessory owner of the land that would be subject to the conservation easement. The mechanism is the same. For instance, suppose I paid you \$20,000 for a 10-year option to purchase a conservation easement from you to encumber land you own. At any time during that decade (the option period), I could exercise my option. At the end of the period, the option would lapse, and I would no longer have any rights regarding your land. You would keep the \$20,000.

“Options to purchase” can be used in a bewildering range of contexts in commercial real estate transactions. Options can structure their time of expiration in a variety of creative ways. The parties to the agreement can set the price for prospective exercise of the option based on an almost infinite number of factors, including appraised value.⁷¹ Rolling options (a series of options that mature in an agreed sequence)⁷² may create option interests in a broad category of properties, parcels in a real estate development, or, potentially, adjacent habitat areas.⁷³ Options are often coupled with leases through which the current holder of an interest in real property has the right, at a certain time for a certain price, to expand her ownership interest.⁷⁴

Using options in land conservation endeavors is not new, but the true potential of the tool as a method to combat and adapt to climate change has not yet been realized. This Part examines how land trusts currently use and describe OPCEs to help lay the groundwork for our proposal for increased and improved use of OPCEs.

If you plug “options” and “conservation easements” into your favorite search engine, you will turn up a wealth of brochures—primarily from the Northeast—describing “land conservation options” for various classes of landowners. Conservation Options: A Guide for Maine Landowners, published by

71. See, e.g., *AGA Gas v. Manufacturers & Traders Trust Co.*, 98 F. Supp. 2d 904, 906 (N.D. Ohio 2000).

72. Rolling options include any series of options in which the exercise of a first option empowers the option holder to exercise further options, and so forth. For example, if a real estate developer holds one hundred lots for sale, she may grant an option holder the right to purchase Lot 1 and, only if the option holder has purchased Lot 1, the right to purchase Lot 2. The sequence of options may be structured in any way, effectively providing order and predictability to the process of acquisition. See Gregory Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP. PROB. & TR. J. 129, 164 (2000).

73. *Id.* (“The resulting constellation of rolling option fundamentals typically includes the following requirements: (1) the option holder must be committed to a sequence of options, (2) the options must be related to each other for a common sequence of development, and (3) the failure of any option destroys all future options.”).

74. *Id.* at 175–77.

the Maine Coast Heritage Trust in 2003,⁷⁵ is a good example, as is Land Conservation Options: A Guide for Massachusetts Landowners, published by the Essex County Greenbelt Association and The Trustees of Reservation in 2001.⁷⁶ Both brochures contain brief references to OPCEs. The Maine brochure writes:

If a conservation organization does not have funds for an immediate purchase, a landowner may choose to give or sell an option to buy the property. . . . The land cannot be sold to other buyers during the option period, giving the conservation group or agency time to raise the necessary purchase funds.⁷⁷

Similarly, the Massachusetts brochure states that options can be used where “funds are not readily available to allow an immediate purchase,” and can give the buyer “a specific amount of time in which to exercise the option and complete the purchase.”⁷⁸

Both statements offer a roughly accurate, but extremely narrow, introduction to a well-established body of land trust law. The narrowness of the approach to “options to purchase”—recommending them only as a method to keep land available until a land trust can raise the funds to purchase full title to the land or a conservation easement—is not a function of novelty. Land trusts have used options as a tool to protect conservation property until adequate financing or an appropriate “conservation buyer” becomes available for many decades.⁷⁹

Our correspondences with land trust professionals indicated that they have used options primarily for limited purposes similar to those sketched out in the

75. ME. COAST HERITAGE TR., CONSERVATION OPTIONS: A GUIDE FOR MAINE LANDOWNERS (Forest Dillion et al. eds., 5th ed. 2003), <http://perma.cc/9KT2-SJD4>.
76. ESSEX COUNTY GREENBELT ASSOCIATION & THE TRUSTEES OF RESERVATION, LAND CONSERVATION OPTIONS: A GUIDE FOR MASSACHUSETTS LANDOWNERS (Wesley T. Ward ed., 5th ed. 2001), <http://perma.cc/CQL3-2DB5>.
77. ME. COAST HERITAGE TR., *supra* note 75.
78. ESSEX COUNTY GREENBELT ASSOCIATION & THE TRUSTEES OF RESERVATION, *supra* note 76, at 16. The Massachusetts brochure also says: “Typically, during the option period, the land cannot be sold to other buyers, giving the conservation group or agency time to raise the necessary funds.” *Id.*
79. *See, e.g.*, *Pesky v. United States*, No. CIV. 1:10-186 WBS, 2013 WL 3457691 (D. Idaho 2013) (“On April 2, 1993, The Nature Conservancy paid \$50,000 to acquire an option to purchase the Ketchum Property for approximately \$1.6 million (‘Option’). The Project Resolution presented to, and subsequently passed by, The Nature Conservancy’s Board of Governors provided that The Nature Conservancy would obtain the Option while simultaneously raising the purchase price of \$1.6 million or ‘locating an individual willing to purchase it for a single home site,’ who ‘would then contribute all of the development rights on the 30 acres to [The Nature Conservancy] through a conservation easement or other mechanism.’”); *Irby v. Comm’r*, 139 T.C. 371, 388 (2012) (“The Option Agreements for the Purchase of Conservation Easement, dated September 26, 2003, in which Irby Ranches, LLC, received cash consideration totaling \$20 for its granting Colorado Open Lands the option to purchase the conservation easements.”); *see also* STORY CLARK, A FIELD GUIDE TO CONSERVATION FINANCE (2007); Eve Endicott, *Preserving Natural Areas: The Nature Conservancy and Its Partners*, in LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS 17, 18–20 (Eve Endicott ed., 1993).

brochures above: to provide the purchasing conservation organization with additional rights in the face of potential uncertainties with the transaction. In December 2014, we contacted the members of the National Land Trust Listserv requesting information about how land trusts used options.⁸⁰ All of the substantive responses to our inquiry were from correspondents who occasionally used options to purchase conservation easements.⁸¹ Some used options regularly, while others used them infrequently. In every case, options were purchased only when the conservation organization intended to purchase a conservation easement on the land subject to the option, not when the organization was uncertain as to whether it wanted to complete the purchase. In most cases, options lasted no longer than two years. In one case, however, a correspondent remembered a renewed option that lasted thirty years.⁸²

In contrast, the Pennsylvania Land Trust Association offers a broader analysis of “purchase options.”⁸³ It suggests that options can be used for (1) “buying time,” (2) “reducing risk” when “a land trust may tentatively identify a property as too important to lose but cannot risk purchase before a thorough investigation determines that it is a sound conservation investment,” (3) “assembling parcels” when a particular conservation process depends on the acquisition of multiple parcels, (4) “handling messy ownership situations” allowing conservation organizations to acquire the right to purchase rights to a single piece of land separately from multiple owners, (5) “incentivizing action” using the limits of the option to motivate donors to act before the opportunity created by the option passes, (6) “compensating for lost opportunity” when a landowner must be compensated for keeping her land off the market, and (7) “controlling outcomes,” for example, “a land trust that transfers property to a local government may want an option to reacquire the property for a nominal or below-market value if the government’s promises to use the land only for conservation and outdoor public recreation are not kept.”⁸⁴

The Maine Coast Heritage Trust has been kind enough to post online a form for an option to purchase a conservation easement.⁸⁵ The document is brief and well drafted, and provides an excellent basis for describing the basic

80. E-mail from Jessica Owley, Associate Professor, SUNY Buffalo Law School, to National Land Trust Listserv (Dec. 2, 2014) (on file with author).

81. Telephone Interview with Karin Marchetti Ponte, General Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Grant Ellis, Special Projects Manager, Edwards Aquifer Prot. Program, Office of East Point & Real Estate, City of San Antonio (Dec. 11, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass’n (Dec. 3, 2014); E-mail from Annette Naegel, Conservation Program Manager, Georges River Land Tr., to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Dec. 3, 2014); E-mail from David J. Ennis, Realtor, Pittstown, N.J., to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Dec. 2, 2014).

82. E-mail from Ann Taylor Schwing, Of Counsel, Best Best & Krieger LLP (“There was one option, extended several times, that lasted over 30 years because there were so many separate parcels to assemble.”).

83. *Purchase Options: Gaining the Rate Without the Obligation to Acquire Property Interests*, PA. LAND TRUST ASS’N, <http://perma.cc/T2NC-9FUS>.

84. *Id.*

85. *Purchase Option Agreement, Conservation Easement*, ME. COAST HERITAGE TR., <http://perma.cc/8L92-GVNS>.

elements of any OPCE. While the provisions of individual OPCEs may differ significantly, almost all effective option agreements should have a number of core provisions. We outline some key provisions below and then return back to these terms in Part III.A.2 when we address issues frequently facing OPCEs.

The Maine Coast Heritage Trust document begins by identifying the parties, option grantors (optionors) and holders, and the amount paid for the option.⁸⁶ It then indicates that the grantor is conveying “an exclusive right and option to purchase a perpetual conservation easement” on the land described.

Next, the form provides that “Grantors and Holder agree that they will have agreed to the final terms of the Conservation Easement, on or before the date of the exercise of this Option by Holder.”⁸⁷ The form requires parties to complete and attach a conservation easement to the option agreement, but allows them to negotiate relatively minor changes to the agreement regarding land management terms or other issues.⁸⁸ However, the form expressly prohibits modifying the OPCE in a way that would increase development within the identified natural areas.⁸⁹

The form then describes the property to be encumbered by the potential conservation easement,⁹⁰ and identifies the price to be paid for the conservation easement if the option is exercised.⁹¹ The document specifies the option period and gives the option holder the unilateral right to extend the option period upon the payment of an additional option price.⁹²

Following these entries, a boilerplate section provides that optionors “agree that the property shall remain in substantially the same existing condition until closing, except as otherwise permitted herein and in the conservation easement.”⁹³ The optionor must both “prevent and refrain from any use of the property for any purpose or in any manner which [is] inconsistent with the terms of the conservation easement.”⁹⁴ This paragraph frames one of the fundamental problems associated with expanding the use of OPCEs over time. While a landowner may agree, at little or no cost to a land trust, to preserve a piece of land in its current state for the year or two during which an option traditionally runs, the same landowner is unlikely to tolerate a similar inability to change the land over decades for the same price. We explore this issue in Part II.B.

86. *Id.*

87. *Id.* ¶ 1.

88. *Id.*

89. *Id.* ¶ 4.

90. *Id.* ¶ 2.

91. *Id.* ¶ 3.

92. *Id.* ¶ 4. In practice, OPCEs sometimes allow for automatic renewal of the option period upon the payment of a previously negotiated price, but these renewals are generally confined to only one or two additional periods, limiting the overall life of the option. Telephone Interview with Karin Marchetti Ponte, General Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass'n (Dec. 3, 2014).

93. *Id.* ¶ 10.

94. *Id.*

The final numbered paragraph of the Maine Coast Heritage Trust option agreement confirms the assignability of the agreement to any eligible governmental entity or land trust “with the prior written consent of the grantors which shall not be unreasonably withheld.”⁹⁵ Though modest, this six-page form agreement could be used to draft an OPCE that is designed to mitigate the uncertainties associated with climate change.

C. *Visions of a Strategy*

What role might OPCEs play in helping conservation organizations counter the potential ineffectiveness of their traditional tools in the face of climate change? Real estate options generally allow parties investing in real estate to mitigate risks associated with a lack of knowledge about the future by allowing them to have the right to purchase without the need to purchase now. A more extensive use of OPCEs would offer conservation organizations a proven tool to deal with an uncertain future. Consider the following examples.

1. *Scenario One: Shifting Habitats*

Imagine that a conservation organization is committed to preserving a localized species whose survival depends on a particular plant. The conservation organization knows that the range of the plant will migrate over time, but does not know how fast or along what path it will migrate. OPCEs could enable the conservation organization to purchase the right to preserve lands along a variety of potential migratory corridors for the species’ habitat. The conservation organization could then exercise options as the habitat moves, or as studies clarify where it will move. In some cases, conservation organizations may wish to exercise their options before gaining certainty about the species’ migration to allow time for restoration of habitat that had been degraded.⁹⁶

An example may help explain this concept. In September 2014, the National Audubon Society released a comprehensive report on the impact of climate change on North American bird species.⁹⁷ The Audubon model predicted that 314 North American bird species face the risk of extinction before the end of the twenty-first century.⁹⁸ Audubon separated species into two groups: climate threatened (which may lose over 50% of their current range by 2080) and climate endangered (which may lose over 50% of their current range by 2050).⁹⁹ The threats to bird species documented in the Audubon report involve both the

95. *Id.* ¶ 17.

96. In some cases, OPCEs could work in tandem with other conservation instruments (such as conservation leases or term conservation easements) to preserve habitat values on the land subject to the option to purchase. We discuss this idea in greater length in Parts II.A.4 and II.B.

97. Nat’l Audubon Soc’y, *THE CLIMATE REPORT*, <http://perma.cc/8TMW-2JGP>.

98. *Id.*

99. *Id.*

shifts in habitat and the sea-level rise discussed in the 2014 IPCC report.¹⁰⁰ The online version of the Audubon report offers alarming animations of these shifting habitats. Migratory species like the American Avocet may be forced north out of their traditional ranges.¹⁰¹ Shorebirds like the American Oystercatcher and Black Oystercatcher may be forced north and inland as seacoasts change.¹⁰²

Since birds are among the most popular and ubiquitous types of wildlife, land trusts will likely spend significant resources to mitigate the climate impacts documented in the 2014 National Audubon Society report. According to the Land Trust Alliance's 2010 National Land Trust Census, conservation of "[i]mportant natural areas or wildlife habitats" is the priority most often rated as "very" or "extremely" important by regional, state, and local land trusts in the United States.¹⁰³ This finding is supported by our 2011 study of conservation easements, which found that 57% of conservation easements drafted after 2000 listed protection of a specific species as one of the conservation easement's purposes and 58% of them listed protection of a specific natural community as a purpose.¹⁰⁴ According to the Land Trust Alliance's 2010 census, "[o]f the 829 land trusts which indicated that they plan to actively pursue land or easement acquisitions in 2011, 70% responded that they have a strategic conservation plan that lists or maps priority areas for conservation."¹⁰⁵ In decades to come, many land trust boards will debate how best to use their resources to preserve bird habitat in a world transformed by climate change. In many cases, OPCEs may prove the most effective tool in this struggle.

As a specific example, this Article uses the American white pelican (*Pelecanus erythrorhynchos*), one of our favorite birds. The pelican is one of North America's largest birds; they can be five feet long, weigh sixteen pounds, and have a wingspan of up to nine feet.¹⁰⁶ American white pelicans engage in "cooperative foraging,"¹⁰⁷ herding fish in groups and scooping them up with their bills.¹⁰⁸ Historically, flocks of these majestic birds could be found in lakes and

100. See *supra* Part I.A.

101. Nat'l Audubon Soc'y, *American Avocet*, THE CLIMATE REPORT, <http://perma.cc/HF7H-C95R>.

102. Nat'l Audubon Soc'y, *American Oystercatcher*, THE CLIMATE REPORT, <http://perma.cc/62WY-KB8Z>; Nat'l Audubon Soc'y, *Black Oystercatcher*, THE CLIMATE REPORT, <http://perma.cc/ZAA4-GUA4>.

103. 2010 LAND TRUST CENSUS, *supra* note 2, at 11.

104. Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Land Uses*, 51 LAND USE POL'Y 76, Supp. Table A.3 (2016). Most conservation easements list multiple purposes, so it is likely that there is a high level of overlap between these two groups. This trend is increasing over time. Conservation easements recorded before 2000 listed specific species 41% of the time and specific natural communities 30% of the time. *Id.*

105. 2010 LAND TRUST CENSUS, *supra* note 2, at 10.

106. See Nat'l Audubon Soc'y, *American White Pelican*, THE CLIMATE REPORT, <https://perma.cc/EQ7H-5V26>; *Guide to Boreal Birds: American White Pelican*, BOREAL SONGBIRD INITIATIVE, <http://perma.cc/75EC-TM43>.

107. Blair F. McMahon & Roger M. Evans, *Foraging Strategies of American White Pelicans*, 120 BEHAVIOUR 69, 69 (1992).

108. *Guide to Boreal Birds: American White Pelican*, *supra* note 106.

lagoons across the United States.¹⁰⁹ They traditionally winter in Southern California, Texas, Florida, and Mexico, and summer in the Great Plains of the United States and Canada.¹¹⁰ In the twentieth century, American white pelicans suffered significant population declines as a result of habitat degradation and human disturbance,¹¹¹ though they have since made a comeback.¹¹²

Although the American white pelican can be found across the dry interior of the United States in the summer,¹¹³ it is a waterfowl that requires water bodies in both its summer and winter ranges.¹¹⁴ Audubon characterizes the American white pelican as a “climate endangered” species¹¹⁵ because it projects their winter and summer habitats contracting and moving north.¹¹⁶ Today, the work of land trusts in preserving rivers, lakes, and streams protects white pelican habitat. However, which waterways will serve as habitats in the future?

2. Scenario Two: Sea-Level Rise

Imagine a conservation organization committed to preserving the specific resources of a beach ecosystem, aware that sea levels will rise but unaware how far and how fast they will rise. The purchase of OPCEs in the zone above the current shoreline would offer the organization an opportunity to preserve future shorelines. The organization could purchase OPCEs reaching onto dry land, and then exercise or release OPCEs as the shoreline shifted. Such an approach may be particularly salient as a response to catastrophic weather events, where both damaged and threatened areas can change rapidly without notice.

Again, an example may help. The Hudson River extends from its headwaters in the Adirondack Mountains through Albany, New York down past Manhattan. Called the “river of tides” by original inhabitants of the area,¹¹⁷ the Hudson’s fluctuations bring concerns about sea-level rise and storm surges even to areas not directly on the Atlantic Coast.¹¹⁸ The Hudson River Valley includes urban and rural areas as well as major transportation corridors. For example, the Hudson Line of the Metro-North commuter rail runs along the eastern shore of the river north of New York City.¹¹⁹ During “Superstorm Sandy” in October 2012, half of the Hudson Line was under water.¹²⁰ A photo-

109. *Id.*

110. *Id.*

111. Chet McGaugh et al., *American White Pelican*, BUREAU OF LAND MGMT. IN CALIFORNIA, <http://perma.cc/NP7Q-9D6G>.

112. *Id.*

113. See *American White Pelican*, *supra* note 106.

114. *Id.*

115. *Id.*

116. *Id.*

117. See, e.g., JOSEPH BRUCHAC, *RIVER OF TIDES* act 1, sc. 2.

118. See *The Hudson Estuary: A River that Flows Two Ways*, N.Y. ST. DEP’T OF ENVTL. CONSERVATION, <http://perma.cc/L9AK-HK3B>; *Sea Level Rise*, SCENIC HUDSON, <http://perma.cc/ASQ2-A3RR>; see also N.Y. ST. DEPT. OF ENVTL. CONSERVATION, HUDSON RIVER CLIMATE RESILIENCE CASE STUDIES, <http://perma.cc/6MGA-LGU4>.

119. *Metro-North Railroad Map*, MTA, <http://perma.cc/L5XA-FJTT>.

120. *Metro-North Continues to Restore Infrastructure*, MTA, <http://perma.cc/4LC3-PHVE>.

graph of a large pleasure boat sitting astride the Hudson Line tracks near Metro-North's Ossining Station became one of the iconic images of the storm's damage.¹²¹

Land trusts like Scenic Hudson had been working to protect the Hudson River's shores for their scenic views, but now realize the importance of the river for increasing resiliency and buffering against sea-level rise.¹²² Scenic Hudson identifies its lack of high-resolution topographical data as one of the biggest challenges to the organization's efforts to respond to climate change, and describes its models and maps as "based upon cobbled together data with relatively crude elevation estimates."¹²³ Additionally, the location of the parcels near New York City means that land and conservation easement costs can be quite high. Moreover, local governments might decide that areas with important infrastructure need protection, obviating the need to invest private conservation dollars in those properties.

Uncertainty about sea-level rise, expensive real estate, and unpredictable political decisions can complicate land protection strategies. How far from the current shoreline should we purchase land or conservation easements?

3. *OPCEs to the Rescue*

In both of the scenarios above, OPCEs could add to the repertoire of land trusts and other organizations working to protect important species and lands. Developed in commercial real estate transactions, real estate options allow conservation organizations to mitigate three distinct uncertainties associated with climate change: (1) the rate of change over time, (2) the development of our capacity to predict change, and (3) the nature of changing landscapes. An option that gives a conservation organization the right to purchase habitat over a relatively broad time period mitigates uncertainty about the rate of the impact of climate change. If climate change is more rapid than expected, then the conservation organization may choose to exercise the option or agree not to enforce it early in the option period. If climate change is slower than expected, the conservation organization may make this decision late in the option period. The option also mitigates uncertainty in our capacity to predict change. If predictive models allow a conservation organization to pinpoint the future habitat needs of the American white pelican with certainty, it may choose to exercise the option or let it lapse early in the option period. If predictive models do not effectively pinpoint future habitat needs, the conservation organization may

121. Roseanne Salvatore & Kathryn Kattalia, *Hurricane Sandy Two Years Later: Remember the Historic Storm and Its Aftermath*, DAILY NEWS (Oct. 20, 2012), <http://perma.cc/2699-E79F>.

122. Kirsten Feifel, *Scenic Hudson Land Trust: Prioritizing Lands in Light of Sea Level Rise*, CLIMATE ADAPTATION KNOWLEDGE EXCHANGE, <http://perma.cc/8NTV-U5BA>. Mohawk Hudson Land Conservancy is also working to protect the area, and larger organizations like The Nature Conservancy and the Land Trust Alliance identify it as an area of climate action. See *id.*; *Land Conservancy, Current Projects*, MOHAWK HUDSON LAND CONSERVANCY, <http://perma.cc/XPL2-WW8V>; *New York: Hudson River Restoration Project*, THE NATURE CONSERVANCY, <http://perma.cc/N2RC-T5QB>.

123. Feifel, *supra* note 122.

make this decision late in the option period. The same option mitigates against uncertainty about the nature of changing landscapes.

OPCEs would allow a land trust to protect American white pelican habitat more effectively because a land trust could purchase options along a large number of waterways. Once evidence emerged that pelicans will frequent some of the waterways, the land trust could convert some options into conservation easements and allow other options to lapse. OPCEs would allow land trusts to spread their limited resources to protect a broader range of potential habitat. If American white pelicans do not occupy a particular lake in the future, the conservation organization holding the option to protect that lake need not exercise the option. The resources that might otherwise have been committed to purchasing the conservation easement and protecting that lake—minus the option purchase price—can be used elsewhere.

In the context of sea-level rise, a land trust could secure OPCEs over multiple upland acres while waiting to see how the shoreline fluctuates in response to storm surges, rising tides, and development patterns. OPCEs could allow land trusts to preserve habitat for relatively long periods—perhaps even fifty years—until either scientific modeling or actual climate change impacts made it clear that exercising the OPCE would increase the resiliency of the Hudson River Valley and estuary. However, if local land use laws prohibit development along a shoreline in response to sea-level rise, a land trust may determine that the added protection from a conservation easement is unnecessary and use its funds to protect more vulnerable parcels.

II. THE PROMISE AND PERIL OF OPCEs

A. Recognized Benefits of OPCEs

We can sketch the utility of clarified and reinforced OPCEs by borrowing from, and expanding, the Pennsylvania Land Trust Association's excellent primer.¹²⁴ The uncertainties caused by climate change present a number of challenges to conservation organizations. The many advantages of OPCEs, six of which are listed below, can help conservation organizations better respond to these uncertainties.

Needless to say, these examples only scratch the surface of possible uses of OPCEs in the face of climate change. The great strength of private land conservation has always been that landowners and conservation organizations work out effective strategies in the contexts of specific landscapes and specific real estate markets. We hope that this list of examples piques your interest and suggests that additional, creative use of OPCEs might lead to more, and more effective, conservation in the face of climate change.

Indeed, strategic use of OPCEs might become so attractive that conservation organizations allocate more resources to obtaining options than securing

124. *Purchase Options: Gaining the Rate Without the Obligation to Acquire Property Interests*, *supra* note 83.

conservation easements. By doing so, conservation organizations might avoid increasing the pressure to amend existing conservation easements or liberalize the rules associated with conservation easement extinguishment.¹²⁵

1. *Buying Time*

OPCEs allow conservation organizations time to marshal funding or arrange government acquisition. This function may become much more important in the age of climate change.

Both government and private conservation money often becomes more accessible after climate-related disasters. From 1980 to 2013, the United States suffered 151 severe weather events that each caused over \$1 billion in damages.¹²⁶ Disaster relief cost the federal government around \$136 billion from 2011 to 2013 alone.¹²⁷ Hurricanes Katrina and Rita affected 90,000 square miles of land and flooded over 80% of New Orleans.¹²⁸ Within the first week after Katrina hit, the federal government approved over \$61 billion in aid.¹²⁹ As restoration efforts began, the government granted the U.S. Fish and Wildlife Service \$162 million to restore wildlife refuges, and the National Park Service received \$74 million to repair parks.¹³⁰ Hurricane Sandy also prompted federal government funding. In an effort to repair the battered coast, the government granted agencies like the Bureau of Ocean Energy Management millions of dollars to restore the coastal environment.¹³¹ After heavy rains flooded Colorado in 2013, organizations injected money into restoration and conservation efforts. For instance, the Natural Resources Conservation Service allotted nearly \$12 million in emergency watershed protection funds to finance projects geared toward restoring land through conservation measures, such as protecting stream banks from further erosion.¹³²

125. See LAND TR. ACCREDITATION COMM'N, ACCREDITATION REQUIREMENTS MANUAL: A LAND TRUST'S GUIDE TO UNDERSTANDING KEY ELEMENTS OF ACCREDITATION 49 (2015); *Conservation Easements: Perpetual and Flexible*, VT. LAND TR., <http://perma.cc/E4Y3-9JL4>.

126. *Billion-Dollar Weather and Climate Disasters: Table of Events*, NOAA, <http://perma.cc/M9M5-ADUT>.

127. Daniel J. Weiss & Jackie Weidman, *Disastrous Spending: Federal Disaster-Relief Expenditures Rise Amid More Extreme Weather*, CTR. FOR AM. PROGRESS (Apr. 29, 2013), <http://perma.cc/P9CD-JB6W>.

128. DEP'T OF STATE, HURRICANE KATRINA: WHAT GOVERNMENT IS DOING (2016).

129. Kevin Robillard, *10 Facts About the Katrina Response*, POLITICO (Oct. 3, 2012), <http://perma.cc/VV6B-YQYM>.

130. DEP'T OF STATE, *supra* note 128.

131. BUREAU OF OCEAN ENERGY MGMT., *BOEM Response to Hurricane Sandy: Progress on Recovery Assistance* (2015). The Bureau of Ocean Energy Management's restoration efforts included environmental monitoring and restoring beaches and sand dunes. *Id.*

132. *Natural Resources Conservation Services Provides Flood Recovery Assistance for Colorado*, USDA NATURAL RESOURCES CONSERVATION SERVICE COLORADO (Nov. 25, 2013), <http://perma.cc/EM4E-7BEX>.

In the decades ahead, when many scientists anticipate more extreme weather events as a result of climate change,¹³³ having conservation plans for areas that are prone to these events can facilitate more effective conservation efforts. OPCEs should be part of these plans. If conservation organizations acquire OPCEs in areas where conservation easements might mitigate similar future disasters, post-disaster funding could be used to exercise existing OPCEs. This would put in place property-based protections to preserve natural resources and protect against future extreme weather events. Land subject to predictable flooding or fire could be preserved undeveloped subject to conservation easements purchased with disaster relief money. In particularly disaster-prone areas, funds released after the first flood or fire could be used to purchase OPCEs. Funds after subsequent catastrophes could be used to exercise specific options to purchase conservation easements to mitigate additional future events.

For example, a Hudson River land trust might purchase OPCEs along particularly vulnerable parts of Metro-North's Hudson Line. By their terms, these OPCEs could only be exercised if Metro-North ceased to use the line as a railroad. If, after some future storm, Metro-North determined to abandon or reroute parts of the Hudson Line, the land trust could use a modest amount of disaster funding to exercise its options, purchase conservation easements, and encourage the development of a wetland storm buffer along the east bank of the Hudson River.

2. *Reducing Risk*

Land trusts sometimes purchase conservation easements on land even when there is no obvious threat of development. Brochures boast that these lands are "saved," but what are they saved from? These purchases of conservation easements give conservation organizations the authority to control development should a threat emerge. However, their ability to control development is limited to the terms of their conservation easements that were negotiated before a development threat materialized. Further, should the conservation organization determine that the development might actually be beneficial to the community's overall conservation goals, the terms of their conservation easements prevent them from allowing it. As time goes on, the chances of these conservation easements becoming ineffective conservation tools and draining the resources of the conservation organization are significant.

OPCEs can serve the same purpose—protecting against future threats of development—without generating the same dangers. Once the development threat emerges, the option can be exercised. To a limited degree, the terms of the conservation easement purchased as a result can better anticipate the actual

133. See IPCC WORKING GROUP II, *Summary for Policymakers*, *supra* note 22, at 12 ("Climate-change-related risks from extreme events, such as heat waves, extreme precipitation, and coastal flooding, are already moderate (high confidence) and high with 1°C additional warming (medium confidence). Risks associated with some types of extreme events (e.g., extreme heat) increase further at higher temperatures (high confidence).")

development threat. Should the land subject to an option no longer be valuable for conservation purposes, the conservation organization has no obligation to exercise the OPCE.

3. *Assembling Sufficient Parcels*

Habitat corridors cannot function without sufficient concentrations of protected habitat.¹³⁴ OPCEs might be essential tools in broad habitat acquisition deals as part of climate change adaptation strategies. These deals might be designed to preserve species migration corridors or larger, more resilient blocks of protected habitat. They might be used to assemble contiguous parcels or a dense network of noncontiguous parcels in a particular area.

Imagine, for example, that habitat for a particular species existed only on 100 identified parcels of private property in a single geographical area. Scientists determined that habitat preservation to prevent extinction of the species would require protecting 60 of the parcels. Purchasing options from willing optionors among the owners of the 100 parcels would allow a conservation organization to avoid actually purchasing conservation easements until it became confident that enough habitat could be protected to preserve the species in that area. If the organization were able to purchase options to protect 60 parcels with conservation easements, it could then exercise those options and create an effective habitat reserve. If, on the other hand, the conservation organization were only able to purchase options on 30 parcels, it could allow those options to lapse, saving the cost of actually purchasing the conservation easements. This strategy could assist American white pelicans or any one of the thousands of species forced to shift their habitat because of climate change.

4. *Buffering Conservation Areas*

OPCEs might be used to mitigate potential threats to existing conservation areas by granting option holders some power to prevent harmful types of development on adjacent lands. The existence of a clearly enforceable OPCE might be enough to shift development elsewhere. Because they are not qualified holders of conservation easements, private developers should not be valid holders of OPCEs and could not purchase them in advance to eliminate the possibility of their exercise.¹³⁵ Once the threat of immediate development emerged in one area, a conservation organization would have the option of exercising the existing OPCEs or allowing the development to go forward, effectively rendering the OPCE irrelevant.

Consider, for example, an existing pelican habitat corridor along a river. Undeveloped upland abuts the corridor, but is not worth managing for its

134. See MALCOLM L. HUNTER & JAMES GIBBS, *FUNDAMENTALS OF CONSERVATION BIOLOGY* 235–38 (3d ed. 2007) (describing basic concepts of reserve design, including minimum patch sizes and a preference for large areas of protected habitat).

135. See, e.g., *infra* note 216.

habitat values. However, unwise development on the upland could contaminate groundwater running into the corridor and pollute the river at its heart. A conservation organization could purchase OPCEs in this upland “buffer.” If the owner of an upland parcel wished to engage in development that would not damage the habitat corridor, a conservation organization could allow its OPCE on the developer’s land to lapse. If the developer threatened to damage the corridor’s habitat values and was unwilling to mitigate those effects, the conservation organization could exercise its OPCE, purchase a conservation easement, and preclude that development. In many cases, the existence of OPCEs alone would be a sufficient incentive for upland owners to make their development consistent with the continued existence of the habitat corridor.

5. *Crafting Lease-to-Buy Protection*

As in many commercial real estate transactions, OPCEs might be used in conjunction with conservation leases or fixed-term conservation easements, allowing conservation organizations to determine whether perpetual protection of the land is warranted during or after the original term.

For example, a conservation organization might lease a parcel of land for fifty years to preserve its habitat values. In conjunction with the lease, the landowner could grant the organization an option to purchase a perpetual conservation easement on the parcel with an option period coterminous with the lease. The conservation organization could thus ensure that the land is protected for fifty years while reserving the right to determine that the land should continue to be protected in perpetuity.

6. *Encouraging Good Governance*

As the Pennsylvania Land Trust Association suggests, options may tip the balance of power in favor of the option holder and therefore can be used to counter misconduct by ostensible conservation partners who fail to fulfill their conservation obligations.¹³⁶ Rather than sue a public agency, a private conservation organization could exercise a preexisting OPCE to buy the conservation land at a below-market price. This basic idea suggests a range of possible uses of OPCEs as governance tools in complex conservation transactions.

For example, a rural county might purchase a piece of land to preserve a meadow as “green infrastructure”¹³⁷ to prevent flooding. The county might grant an OPCE to a private conservation organization as part of the purchase, either to satisfy the requirements of a funding entity or because the members of

136. See *Purchase Options: Gaining the Rate Without the Obligation to Acquire Property Interests*, *supra* note 83.

137. A conservation tool defined as “an interconnected network of natural areas and other open spaces that conserves natural ecosystem values and functions, sustains clean air and water, and provides a wide array of benefits to people and wildlife.” MARK A. BENEDICT & EDWARD T. MCMAHON, *GREEN INFRASTRUCTURE: LINKING LANDSCAPES AND COMMUNITIES* 1 (2006).

the board of county supervisors might fear that the next election would sweep in new supervisors uninterested in green infrastructure. Because the OPCE would be intended as a deterrent for government conduct inconsistent with the intent of the original green infrastructure plan, the option price would be set very low. If subsequent county governments failed to maintain the meadow, the private conservation organization would have the authority to exercise the option to purchase, pay the modest option price, and step in to manage the area consistent with the terms of the conservation easement.

Employing an OPCE in place of an actual conservation easement might achieve this governance goal at a lower cost to the conservation organization. In recent years, Great Outdoors Colorado—the primary state funding mechanism for open space in Colorado—encouraged public entities that purchase conservation lands to donate conservation easements to separate private conservation organizations.¹³⁸ These conservation easements are explicitly intended to act as a check on government conduct. However, they also burden conservation organizations with the costs of stewardship associated with a conservation easement. The holder of a conservation easement has specific stewardship requirements under federal law, state law, and the practices of the conservation organization.¹³⁹ In contrast, the stewardship obligations for holding an OPCE might be considerably less extensive.

B. Anticipating Objections to OPCEs

There are a number of relatively easy-to-anticipate objections to an expanded use of OPCEs. First, some land trust professionals have asserted that long-term options would likely cost as much as actual conservation easements and therefore are not cost effective.¹⁴⁰ This cost objection is based on the traditional view of the function of OPCEs as buying time for a conservation organization to put together the financing for a conservation easement that it would like to obtain. Both the optionor and option holder fully expect the transaction to go forward. Accordingly, it makes sense for the option price to be a significant portion of the final price of the conservation easement, as a down payment. In contrast, OPCEs for climate change adaptation would be purchased not as down payments for desired land, but as risk management devices that have a low probability of being exercised. Landowners should therefore be will-

138. See *Stewardship Policy for Land Conservation Projects*, GREAT OUTDOORS CO., <http://perma.cc/WJW7-2T6D> (“[Great Outdoors Colorado (“GOCO”)] prefers the use of conservation easements to achieve the permanent protection of open space properties it funds. When GOCO funds are used to purchase fee title to an open space property, GOCO will require that a conservation easement (or other use restriction) be placed over the property to ensure its permanent protection.”).

139. BYERS & MARCHETTI PONTE, *supra* note 5, at 143–68.

140. E-mail from Ann Taylor Schwing, Of Counsel, Best Best & Krieger LLP, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with authors); E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with author).

ing to grant options at relatively low prices, because an option's value should be discounted by the probability that it will never be exercised. It is also worth noting that, in the experience of some land trust professionals, options are often sold for far less than their reasonable value.¹⁴¹

This traditional cost-based skepticism regarding purchasing OPCEs rather than conservation easements ignores another significant cost of conservation easements: stewardship. As the amount of land subject to conservation easements in the United States has continued to increase and as the private conservation process has matured—with new landowners taking the place of the original grantors on land subject to conservation easements—it has become clear that the costs of monitoring conservation easements and responding to violations when they occur can be extremely burdensome. Because an option is no more than a right to purchase in the future, OPCEs generally do not provide an option holder with any rights to manage activities on the ground. The absence of management rights limits an option holder's responsibilities and, therefore, its potential stewardship costs.

Second, and most significantly, OPCEs by themselves may not protect conservation values on the land before the option is exercised. A landowner might destroy the values an OPCE was intended to preserve with impunity. It is important to admit that this is absolutely true. OPCEs alone will not solve this problem. In the absence of some interim protection, perfectly permissible actions by the landowner could render an OPCE completely valueless and completely useless for conservation. If a conservation organization holds an OPCE to preserve a specific parcel as agricultural land and the landowner builds an apartment building on it, the OPCE becomes valueless. No court is likely to require a landowner to demolish an apartment building to satisfy the terms of a conservation easement that was not in place when the building was built. This will give some OPCEs a "use it or lose it" quality. Even if a conservation organization does not know whether a particular lake will provide habitat for American white pelicans in the future, the conservation organization may be forced to decide whether to preserve that lake (exercise an OPCE) by the actions of a landowner that threaten future habitat values.

Freely admitting that this problem exists does not deprive OPCEs of all value. Neither does it indicate that the problem is enormous or that the problem is insoluble. It is, however, a problem best dealt with in the context of particular transactions. Because OPCEs must be voluntarily granted, it is likely that the initial landowner subject to the option—individual, corporation, or public entity—is sympathetic to its purpose. The same conditions that led them to grant the option will lead them to preserve the conservation values it was intended to protect. In situations in which a landowner is less sympathetic or land changes hands, options may need to be reinforced with other interim protections.

141. E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Federico Cheever, Law Professor, University of Denver Sturm College of Law (Aug. 15, 2014) (on file with author).

As discussed above in Part II.A.5, conservation options could be coupled with other forms of protection—conservation leases, term conservation easements, or even zoning—to preserve baseline habitat values. The short-term forms of protection, no matter how structured, would be more flexible than a perpetual conservation easement. The broad body of existing law regarding lease-to-buy arrangements—wherein a commercial or residential tenant purchases an option to buy the property when they enter into the lease—is well established and would support conservation easement lease-to-buy arrangements.¹⁴² The established law coupling options to purchase with leasehold interests might support the presumption that a conservation lease and an option to purchase a conservation easement encumbering the same land are transferred together.

Further, by destroying the habitat the OPCE was designed to preserve, the landowner would destroy any possibility of the option being exercised, and thereby eliminate any possibility of being paid and receiving a tax benefit for the conservation easement. In situations in which development value far exceeds conservation value, this would be no protection. However, in situations in which conservation value and development value were similar, the presence of an OPCE would make landowners think twice before destroying habitat.

We do not mean to minimize the significance of this objection. OPCEs alone may not protect habitat values or historic places. In most cases, if the threat of immediate destruction were imminent, then a conservation easement—rather than an OPCE—would be the better conservation tool. However, when an organization does not believe that the destruction of conservation values is imminent, OPCEs may be more cost-effective.¹⁴³

142. *See, e.g.*, *North Grand Mall Assocs. v. Grand Ctr., Ltd.*, 278 F.3d 854 (8th Cir. 2002); *Kelley v. Burnsed*, 805 So. 2d 1101 (Fla. Dist. Ct. App. 2002); *Venture Stores, Inc. v. Pac. Beach Co.*, 980 S.W.2d 176 (Mo. Ct. App. 1998); *Coomler v. Shell Oil Co.*, 814 P.2d 184 (Or. Ct. App. 1991).

143. In this Article, we have assiduously avoided the “other body” of conservation easement law concerning the creation of state or federal tax benefits. We believe our analysis is challenging enough without adding this additional dimension. Still, we recognize that some might object to the use of OPCEs on the ground that OPCEs, unlike normal conservation easements, do not receive preferential federal tax treatment under Internal Revenue Code § 170(h). Section 170(h) authorizes charitable deductions for the transfer of a “qualified real property interest” to a “qualified organization” for “exclusively conservation purposes.” 26 U.S.C. § 170(h) (2012). A qualified real property interest can include “the entire interest, a remainder interest [or] a restriction (granted in perpetuity).” *Id.* By its terms, § 170(h) does not apply to a contractual option to purchase such a property interest. Because this tax incentive for conservation easements does not apply at the time of purchase for OPCEs, critics may argue that this limitation reduces the financial attractiveness of OPCEs as conservation tools. However, § 170(h) would still apply if and when an OPCE is exercised, because using the option would prompt the transfer of a “qualified real property interest.” Thus, transferring an OPCE that is later exercised instead of transferring a conservation easement only delays accrual of a § 170(h) benefit.

Additionally, the delay of a § 170(h) deduction may be more of an advantage than a disadvantage. Unlike the transfer of conservation easements, the transfer of OPCEs could not easily be abused as a tax shelter. *Cf. Elizabeth MacDonald, Land Trust Scams on the Rise*, FOX BUSINESS (Jan. 21, 2013), <https://perma.cc/5A4M-QLZ2>.

And options to purchase property are subject to another potentially large tax incentive under Internal Revenue Code § 1234(a): while money received for an option that is never

In the final analysis, there is little “downside” to clarifying and reinforcing the power to grant options. The “upside” may be difficult to predict, but in the absence of anticipated negative impacts, there is no reason not to offer an enhanced tool to the creative architects of voluntary conservation transactions.

III. UPDATING THE LAW

The traditional common law of options creates issues that may limit the utility of OPCEs as tools for conservation in the face of climate change. In Part III.A, below, we identify some of these problems. In Part III.B, we offer a solution in the form of statutory amendments to reinforce and clarify OPCEs.

A. Problems with the Common Law of OPCEs

1. Real Estate Options: Contract or Real Estate Interest?

Confusion surrounding the use of OPCEs results in large part from whether parties and courts think of the option primarily as a contract or real estate interest. Historically, options to purchase have been more commonly characterized as contractual interests.¹⁴⁴ As a result, for example, title insurance companies may refuse to insure option interests.¹⁴⁵ At the same time, courts sometimes apply real estate rules to real estate options. For example, options to purchase and memoranda of option rights may be recorded against title.¹⁴⁶ Indeed, some courts have held the grant of an option to be an “equitable conveyance” of title, thereby transferring to the option holder equitable rights and responsibilities associated with ownership.¹⁴⁷

exercised is categorized as regular taxable income, money received for an option that is subsequently exercised through purchase of property is considered a capital gain. STORY CLARK, A FIELD GUIDE TO CONSERVATION FINANCE 56 (2007). During an option period, it is unclear how payment for the option should be taxed; payment for the option may be considered taxable income when it is received or when it is exercised, depending on whether the option lapses or is exercised. The longer the period between the sale of an option and its exercise, the greater the potential benefit of deferred taxation can be for sellers of OPCEs.

144. Gosfield, *supra* note 72, at 138–39 (“For the real estate professional who with laughter and glee treats all agreements that control the disposition of real estate essentially as interests in real property, a solemn moment of revelation will occur when the cognitive dissonance caused by that misplaced faith vanishes in the recognition that, traditionally (though not uniformly), states have not considered options as interests in real estate, but as general intangibles similar to agreements to agree. . . . Of course, after exercising the option, the option holder also has all rights of an equitable owner of title.”).

145. *See id.* at 139 n.15 (“[T]he availability of such an [option] endorsement may depend on the existence of a state statute establishing the enforceability of such an option, case law in the jurisdiction that supports such a transaction, or a consideration of other legal and underwriting factors.”) (quoting John C. Murray, *Clogging Revisited*, 33 REAL PROP. PROB. & TR. J. 279, 311 (1998)).

146. *Id.* at 151–53.

147. *See, e.g.,* M.B. Invs. v. McMahon, 903 A.2d 642, 646 (Pa. Commw. Ct. 2006) (quoting *Detwiler v. Capone*, 55 A.2d 380, 383 (Pa. 1947) (“An option to purchase is analogous to a contract for the sale of land; it is in nature an encumbrance on the land pledged. In such case, the [optionor] is a trustee of the legal title for the benefit of the purchaser [qua option

If one thinks of an option primarily as a contract, then the option “is an offer to enter a particular contract to sell which has been made irrevocable.”¹⁴⁸ Creating the contract to hold the offer open for the period specified in the option document requires all of the elements of a valid contract, including some level of consideration.¹⁴⁹ The contract is subject to the statute of frauds (i.e., it must be in writing and signed by the party bound).¹⁵⁰ However, an option contract can also be created through justifiable reliance if necessary to avoid injustice.¹⁵¹

On the other hand, if one thinks of an option primarily as a real estate interest, then its creation requires that certain fundamental material terms be established. These terms include the parties (optionor and option holder), the subject (what can be purchased), the price, and the place and time of closing (when and where the transfer will take place).¹⁵² The statute of frauds still applies, but may not be overcome by justifiable reliance-based interest.¹⁵³

Similar considerations arise in determining whether an option is transferable. Options to purchase have been held subject to the rule against perpetuities and voided if unexercised at the end of the perpetuities period,¹⁵⁴ though the *Restatement (Third) of Property: Servitudes* suggests that the rule should not apply if the option empowers the holder to create a servitude.¹⁵⁵ More significantly, it seems quite clear that options to purchase are subject to general property rules against unreasonable restraints on alienation.¹⁵⁶

holder]. . . Equity regards the person bound to convey as having done what he should have done, i.e., [.] made the conveyance, and treats him as trustee for the [option holder]. Where an option is exercised[,] the title of the [option holder] relates back to the date of the option and his interest is regarded as real estate of that time. . . .”)

148. Ronald B. Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 148 (1987).

149. *Id.* at 148–49, 157.

150. *Id.*

151. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981) (“An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”).

152. Gosfield, *supra* note 72, at 138 (2000).

153. *See, e.g.*, *Saber Healthcare Group v. Starkey*, 2010 WL 1631792, at *3 (Ohio App. Apr. 23, 2010); *McGuirk v. Ward*, 55 A.2d 610, 611 (Vt. 1947).

154. *See, e.g.*, *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (N.Y. App. 1996).

155. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.3 (2000) (“The rule against perpetuities does not apply to servitudes or powers to create servitudes.”).

156. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.3(2) cmt. c (2000) (“Once the [rule against perpetuities] is removed as a limit on the duration of options, they must be constrained to a reasonable time to avoid invalidation as unreasonable restraints on alienation. The rationale is similar to that involving leases to begin on completion of a structure, where courts have removed them from operation of the rule against perpetuities and imposed reasonable time limits.”); *see also, e.g.*, *Atlantic Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1191 (Colo. 2014) (finding that a twenty-five-year option to repurchase a real property interest did not violate the rule against perpetuities and was not an unreasonable restraint on alienation because the option was fully revocable by the party subject to it at any time); *Bauermeister v. Waste Mgmt. Co. of Neb.*, 783 N.W.2d 594, 600 (Neb. 2010) (holding that an option to repurchase land was contractual and therefore not subject to com-

If an option is a contract, the question of transferability is primarily a question of the intent of the parties.¹⁵⁷ Generally, absent a prohibition in the contract creating the option, both the optionor and option holder have the right to assign their respective interests.¹⁵⁸ Thus, an option holder can give someone else the right to exercise the option. However, if the contracting parties' intent is unclear, the option might be considered personal to the contracting parties.¹⁵⁹ Also, courts may invalidate options that are too vague.¹⁶⁰

If an option is a real estate interest, the result is the same for the option holder. However, things get trickier when we talk about binding a subsequent owner of the land encumbered by an option. In theory, when an optionor conveys her interests, the new owner takes the land subject to the option. The optionor can only convey what she has, and she has only a property right subject to an option.¹⁶¹ In practice, however, when the holder of an option seeks to enforce an option encumbering real estate against an assignee of the original optionor, courts often treat the option as a real covenant, subject to the same technical requirements many states still impose on real covenants that restrict the use of land (e.g., "privity" and "touch and concern").¹⁶² Options to purchase are often coupled with lease interests, raising the question of whether the option passes to an assignee when the lease is assigned.¹⁶³

This difference between the contract focus and real estate focus also affects the remedies available for breach of an option agreement. Generally, a breach of contract is remedied "at law" (i.e., with money damages), with specific performance authorized only when damages would be inadequate to protect the expectation of the injured party.¹⁶⁴ On the other hand, a violation of property rights—servitudes in this case—can be enforced in equity (e.g., with specific performance).¹⁶⁵

mon law rule against perpetuities); *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 858–59 (Utah 1998) (holding that an option contained an implied condition that purchaser would complete initial stages of development and exercise the purchase option within a reasonable time, and thus did not violate the rule against perpetuities).

157. *Brown*, *supra* note 148, at 187–88.

158. *See, e.g.*, 2 COLO. PRAC., METHODS OF PRACTICE § 61:27 (6th ed.); 63 TEX. JUR. 3D REAL ESTATE Sales § 324; *Melrose Enters. v. Pawtucket Form Constr.*, 550 A.2d 300 (R.I. 1988); *Scott v. Fox Bros. Enters.*, 667 P.2d 773, 774 (Colo. App. 1983).

159. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.3 (2000); *see also, e.g.*, *Anderson v. Parker*, 351 S.W.3d 827, 831 (Mo. App. 2011) ("A preemptive right that does not specifically provide that it is binding on the heirs and assigns of the parties and does not indicate an intent that it survive beyond the lifetime of the parties is personal to the parties and expires on death.").

160. *Gosfield*, *supra* note 72, at 140.

161. *Id.* at 138–39.

162. *See, e.g.*, *Nolan v. Nolan*, 262 S.E.2d 719, 724–25 (N.C. Ct. App. 1980) ("Ordinarily, an option to purchase land is a covenant running with the land which is binding upon the heirs of the optionor. It is otherwise, however, where from the terms of the option itself, or by necessary implication therefrom, the option is personal and is limited to the parties thereto.").

163. *See, e.g.*, *Jamson v. Poulos*, 168 N.W. 526 (Neb. 1969).

164. RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981).

165. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3 (2000).

Breach of an option could take three general forms. First, an optionor could simply refuse to convey the interest identified in the option agreement when the option holder seeks to exercise the option. Second, an optionor might so change or degrade the subject property that it was no longer what the option holder hoped to obtain, fundamentally changing the agreement. For example, an optionor may cut down all the trees on the property even though the option holder purchased the option to preserve a forest. Third, an optionor might convey the property interest subject to the option to a third party. The remedies available for each type of breach are less than clear.

Generally, if an option is a contract, the appropriate remedy for the first form of breach should be money damages (likely with complicated calculation questions).¹⁶⁶ However, because an option is the right to purchase a unique piece of property, specific performance can be appropriate.¹⁶⁷ With an OPCE that is specifically intended to preserve site-specific conservation values, there is a compelling argument for specific performance.¹⁶⁸

For the second category of breach, the question is even trickier. When the optionor changes the land in contravention of option terms that depend on the property staying in a similar state, what redress is available to an option holder? Often courts just refund the price paid for the option.¹⁶⁹

Finally, if a landowner entered into an option agreement to transfer a conservation easement to one land trust and then endeavored to transfer the underlying conservation interest to another land trust, case law suggests that the option holder could enjoin the sale.¹⁷⁰

As stated above, option interests may be recorded against title. This encumbrance on title gives notice to prospective purchasers and mortgagers that there is a superior claim on the land.¹⁷¹ As with other property interests, recording is not required for the option to be valid between the original contracting

166. *Enzo Investments LP v. White*, 468 S.W.3d 635, 649 (Tex. App. 2015) (“Courts generally will not order specific enforcement of a contract concerning personal property unless a remedy at law is inadequate.”).

167. *See, e.g., Reed Found. Inc. v. Franklin D. Roosevelt Four Freedom’s Park, LLC*, 964 N.Y.S.2d 152, 156 (N.Y. App. Div. 2013) (“[S]pecific performance is appropriate in situations involving unique articles of property ‘having a special and unascertainable quality.’”); *Madariaga v. Morris* 639 S.W.2d 709, 711 (Tex. App. 1982) (“Where, however, the personal property contracted for has a special, peculiar, or unique value or character, and the plaintiff would not be adequately compensated for his loss by an award of money damages, specific performance may be decreed. Similarly, special performance of a contract involving personal property may be granted where the subject matter of the contract is of a special and peculiar nature and value, and damages are not measurable.”).

168. *See, e.g., Bjork v. Draper*, 886 N.E.2d 563, 575 (Ill. Ct. App. 2008).

169. Sometimes parties set termination prices, an amount of money that the optionor can pay the option holder to terminate the option and clear the encumbrance on title.

170. *See, e.g., S.B.R.’s Rest., Ltd. v. Towey*, 515 N.Y.S.2d 573, 575 (N.Y. App. Div. 1987) (in which the right involved was a right of first refusal included in a lease).

171. *See, e.g., Bootery, Inc. v. Cumberland Creek Props. Inc.*, 517 S.E.2d 68, 69 (Ga. 1999) (“When executed with the formality prescribed for the execution of deeds to land, options to purchase land . . . may be recorded The record shall, from the date of filing, be notice of the interest and rights of the parties to the option to purchase in and with respect to the property described in the option to purchase”).

parties. If an optionor validly assigns a real estate interest subject to an option to a third party, recording should protect the rights of the option holder by putting the assignee on notice of the existence of the option encumbering their newly purchased real estate interest.

In sum, although many courts treat real estate options to purchase as creatures of contract law, the exercise of these options affect specific parcels of real property. Therefore, they can run afoul of the more rigid and numerous real property rules.

2. *Options Issues That Are Aggravated for OPCEs*

An OPCE has the same structure as any other real estate option to purchase. The nature of conservation easements, however, adds to the complexity of these transactions. Litigation often arises when one party seeks to exercise an option and the party who is allegedly subject to the option asserts that it is not enforceable. As a result, optionors commonly argue that the option: (1) is too vague to be enforced,¹⁷² (2) constitutes an unreasonable restraint on alienation,¹⁷³ (3) was not intended to burden successors in interest,¹⁷⁴ or (4) was purportedly transferred, but was not transferable.¹⁷⁵ All of these problems are aggravated in the conservation easement context.

a. *Too Vague to Be Enforced*

As the terms of the Maine Coast Heritage Trust form agreement suggest, an option to purchase a conservation easement may be entered into before all of the specific provisions of the conservation easement have been negotiated.¹⁷⁶ Unlike most real property interests, conservation easements offer grantors and grantees an extraordinary range of choices regarding which activities will be allowed and which activities will be prohibited on the encumbered land.¹⁷⁷ The

172. *See, e.g.*, *Marshall v. Floyd*, 664 S.E.2d 793, 795–96 (Ga. Ct. App. 2008) (“Because Floyd sought to compel the Marshalls to sell their property when they were unwilling to do so, he was required to establish that he was the holder of an enforceable option. ‘An option requires: (1) an agreement conferring a right to buy, (2) certain described property, (3) within a fixed period of time, and (4) at a stated price.’”); *Cochran v. DeShazo*, 579 S.W.2d 408, 410 (Mo. Ct. App. 1979) (“It is abundantly clear that the option cannot be enforced by a court of equity unless plaintiffs’ evidence established to the court’s satisfaction the location of the land actually agreed upon by plaintiffs and defendants.”).

173. *See, e.g.*, *Cole v. Peters*, 3 S.W.3d 846, 852 (Mo. Ct. App. 1999).

174. *See, e.g.*, *Beeren & Barry Invs., v. Equity Trustee, LLC*, 2007 WL 6013583, at *2 (Va. Cir. Ct. June 25, 2007) (“The Plaintiff argues that the Option to Purchase is personal to the grantor . . . and therefore does not run with the land and cannot be enforced against anyone other than the grantor. The Defendant AHC argues that the Option is a restrictive covenant, which is binding and enforceable against any successors in interest to the grantor.”).

175. *See, e.g.*, *Shower v. Fischer*, 737 P.2d 291, 295 (Wash. Ct. App. 1987).

176. *ME. COAST HERITAGE TR.*, *supra* note 75 (stating that “Grantors and Holder agree that they will have agreed to the final terms of the Conservation Easement, on or before the date for exercise of this Option by Holder,” and thus allowing that final terms need not be set down at the time of purchase).

177. *See* BYERS & MARCHETTI PONTE, *supra* note 5, at 19–21.

buyer and seller shape the fundamental nature of the property interest in the negotiations before purchase. If a land trust and a landowner enter into an OPCE without setting down in writing all the specifics of the conservation easement, the option may be unenforceable because it is too vague to bind the landowner; courts may treat the OPCE as an “agreement to agree” or “a letter of intent” and refuse to enforce it.¹⁷⁸

This problem is not easily solved. It may not be possible to set all the terms of the conservation easement at the time of the option to purchase agreement.¹⁷⁹ Conditions may change if an option is intended to last for a significant period before eventually being exercised or abandoned, suggesting the need for different language in the conservation easement. Regulatory requirements shaping conservation easements can change when states amend their conservation easement statutes,¹⁸⁰ or when Congress, the Internal Revenue Service, or a federal court changes, reinterprets, or clarifies the requirements for deductibility under Internal Revenue Code § 170(h).¹⁸¹ Physical conditions on the property may change as a result of natural processes (e.g., wildfire, earthquake), requiring a different management regime. New scientific knowledge may suggest different management approaches.

Like the Maine Coast Heritage Trust document,¹⁸² OPCEs may require the landowner to maintain the property in its current state or, at least, to preserve the conservation values articulated in the draft conservation easement. Such language may make it more likely that the land will still be able to serve the conservation goals at the time the option is exercised, but the penalties for violating such requirements are unclear. A contractual obligation to preserve land in its current state for short periods may be workable. However, over longer periods such an obligation could easily become a source of ambiguity and tension between the parties. Natural systems are inherently dynamic. What does it mean to preserve land in its current state for decades? Might this ambiguity render the option unenforceable?

At first glance, the traditional rule that an option to purchase must specify the parties, subject, price, and the place and time of closing appears to provide

178. See Gosfield, *supra* note 72, at 134–35; see also WILLISTON ON CONTRACTS § 70:95 (4th ed. 2015) (discussing agreements to agree).

179. Current land trust practice varies here; some land trusts enter into OPCEs long before they have hammered out the details of land restrictions and permissions, while other organizations require the text of a conservation easement to be attached to an option contract. Telephone Interview with Karin Marchetti Ponte, Gen. Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass'n (Dec. 3, 2014).

180. See LEVIN, *supra* note 20, at 54 (“During the 2000s, in any given year, one or two state legislatures mustered the momentum to amend their enabling statutes. Since 2000, 16 states have enacted substantive amendments, with 11 of those occurring from 2005 on.”).

181. For example, the U.S. Court of Appeals for the Fourth Circuit recently denied the deductibility of conservation easements that contain a provision allowing the parties to substitute one parcel of land for another encumbered by the easement. *Belk v. Comm’r of Internal Revenue*, 774 F.3d 221, 225 (4th Cir. 2014). Parties who entered into an OPCE contemplating such a “swapping” provision might decide not to include such a provision after the court’s opinion.

182. ME. COAST HERITAGE TR., *supra* note 75, ¶ 10.

some solace. However, most cases enforcing options to purchase in the face of vagueness involve options to purchase all of the rights to a piece of land.¹⁸³ We could not find any that involved OPCEs. An option to purchase a servitude may be easier to challenge because any aspect of a detailed conservation easement can be held to be part of “the subject” of the option.¹⁸⁴

b. Unreasonable Restraint on Alienation

While climate change is taking place rapidly on an evolutionary time scale, it is taking place relatively slowly when measured against our usual expectations for real estate transactions. To be effective, an OPCE might need to be in place for an indeterminate number of decades—perhaps five—before the conservation organization that holds it can determine whether its exercise would benefit the resource the OPCE was intended to protect. That does not mean the original option needs to last for half a century. However, it might mean that the option holder may need to be able to extend the option period for that long.

Since at least the 15th century, the Anglo-American system of property law has contained a constellation of rules limiting restraints on the transferability of property rights.¹⁸⁵ While these rules take a variety of forms depending on the nature of the interest being transferred, the nature of the restraint on transfer, and the length of the restraint on transfer, they generally prohibit “unreasonable” restraints on alienation.¹⁸⁶ Allowing an OPCE to remain unexercised for decades raises thorny questions regarding a variety of doctrines designed to further transferability and strike down unreasonable restraints on alienation. *The Restatement (Third) of Property: Servitudes* states “an option to purchase property, other than an option appurtenant to a leasable estate, lasts for a reasonable time.”¹⁸⁷ Although the Restatement is not binding law, this is not a statement designed to calm any conveyancing lawyer. A landowner faced with the execution of an OPCE fifty years after its original agreement would have no difficulty marshaling anti-perpetuity arguments in many states to assert that the option was no longer valid, no matter how clearly it had been drafted.¹⁸⁸

183. See, e.g., *Kyle v. J.A. Fulmer Tr.*, 2008 WL 5156306 (Tenn. Ct. App. Dec. 9, 2008); *White Hen Pantry, Inc. v. Cha*, 574 N.E.2d 104 (Ill. Ct. App. 1991); *Busching v. Griffin*, 542 So. 2d 860 (Miss. 1989).

184. The purposes, reserved rights, and prohibitions in the conservation easement must be considered a single integrated agreement. See BYERS & MARCHETTI PONTE, *supra* note 5, at 14–22.

185. See generally JESSE DUKEMINIER ET AL., *PROPERTY* 208 (7th ed. 2010).

186. See, e.g., 18 MISSOURI PRACTICE, *REAL ESTATE LAW—TRANSACTIONS & DISPUTES* § 2:8 (3d ed. 2006).

187. *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* § 4.3(2) (2000).

188. Some states that allow perpetual easements, including conservation easements, limit contractual limitations on real property—including options to purchase—to short periods. See, e.g., GA. CODE § 44-5-60(b) (2012) (limiting the duration of restrictive covenants to twenty years in zoned areas, but not limiting easements); MASS. GEN. LAWS ch. 184 § 23 (2014) (“[C]onditions or restrictions, unlimited as to time, by which the title or use of real property is affected, shall be limited to the term of thirty years after the date of the deed or other instrument . . . creating them, except in cases of gifts or devises for public, charitable or religious purposes.”).

For example, a federal district court in 1998 upheld a 1905 option to purchase for \$100 per acre “the portion of the land surface necessary to mine and remove . . . coal.”¹⁸⁹ However, the court limited its holding on restraints on alienation to mineral interests, strongly suggesting that other interests would be subject to the period described by the state’s rule against perpetuities (which limited contingent interests to a lifetime plus twenty-one years).¹⁹⁰ In a recent Colorado Supreme Court case, the court upheld a twenty-five year option to purchase oil and gas interests against challenges under both Colorado’s rule against perpetuities and the more general policy against unreasonable restraints on alienation.¹⁹¹ The court upheld the option because the party subject to the option had the power to terminate it at any time. At the same time, the court’s opinion breathed new life into the traditional rule against unreasonable restraints on alienation.¹⁹² These cases suggest that a half-century option to purchase—which might be required to enable OPCEs to deal with the uncertainties of climate change—would be almost unprecedented.

c. No Intent to Bind Successors in Interest

The same long time frames that support restraint on alienation arguments against long-term OPCEs also support arguments against the responsibilities of successors to the original optionor.

American Law of Property states “there is a strong tendency to construe options and rights of first refusal to be limited to the lives of the parties unless there is evidence of a contrary intent.”¹⁹³ However, with options to purchase held for long periods, it would be wise to assume that both the property subject to the option and the option itself will change hands before the option is exercised. Even with option agreements (like the Maine Coast Heritage Trust draft agreement)¹⁹⁴ that clearly express the intent of the parties to bind successors in interest, however, technical property law arguments may allow optionors’ successors to challenge the exercise of options.

Traditionally, scholars of real covenants and equitable servitudes divide these problems into two categories: what is necessary for the “burden to run” and what is necessary for the “benefit to run.”¹⁹⁵ By the “burden to run,” they mean the capacity of an interest (like an OPCE) to bind subsequent holders of the same piece of land. For the “benefit to run,” they mean the ability of the holder of an interest to transfer their rights to another.

189. *Arclar Co. v. Gates*, 17 F. Supp. 2d 818, 820 (S.D. Ill. 1998).

190. *Id.* at 823–24.

191. *See Atlantic Richfield Co. v. Whiting Oil & Gas*, 320 P.3d 1179, 1181 (2014).

192. *Id.* at 1187 (reinterpreting *Atchison v. City of Engelwood*, 463 P.2d 297 (1969), as an unreasonable restraint case because the court in that case struck down a “perpetual” option with no stated termination date).

193. 6 AMERICAN LAW OF PROPERTY § 26.67 (Supp. 1977); *see also* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.3 (2000).

194. ME. COAST HERITAGE TR., *supra* note 75.

195. 9 POWELL ON REAL PROPERTY § 60.04 (Michael Allan Wolf ed., 2015).

Cases from a number of jurisdictions have construed options to purchase as “covenants that run with the land,” but only if they meet the sometimes technical requirements for those covenants.¹⁹⁶ In some jurisdictions, any option that binds successor owners to the land subject to the option must express that intent clearly, “touch and concern” the land in question, and have the parties in “privity” of contract.¹⁹⁷ While an option to purchase a conservation easement would seem to “touch and concern” the land encumbered, “privity” between the optionor’s successor and the option holder could be a significant barrier. Under traditional notions of the privity required for covenants to run with the land, the transfer of an option to a third party would not create the privity necessary to enforce the option. Although the *Restatement (Third) of Property* has rejected these formalities,¹⁹⁸ they are still regularly articulated in the case law of some states.

Clarifying the capacity of OPCEs to bind subsequent possessory owners of the encumbered piece of land would therefore facilitate the development and use of OPCEs. For example, encumbered habitat areas along rivers and lakes might be transferred between a number of owners before it becomes clear whether the OPCEs should be exercised.

d. Non-transferability

Generally, an option holder can assign her interest to another party if the document creating the option indicates that that power exists. As noted above, courts sometimes presume that options to purchase are “personal” to the original parties; therefore, they are not transferable by the option holder.¹⁹⁹ Interestingly, this presumption does not apply when the option to purchase is part of a lease agreement.²⁰⁰ That is, when the option holder is already holding a property interest (making privity with the optionor clear, at least), then the presumption against transferability does not apply. In any case, the intent for the option to be transferable must be clearly stated in the original option agreement

196. *See, e.g.*, *Nolan v. Nolan*, 262 S.E.2d 719, 724–25 (N.C. Ct. App. 1980) (“Ordinarily, an option to purchase land is a covenant running with the land which is binding upon the heirs of the optionor. It is otherwise, however, where from the terms of the option itself, or by necessary implication therefrom, the option is personal and is limited to the parties thereto.”).

197. *See, e.g.*, *Wells Fargo Bank, N.A. v. Michael*, 993 N.E.2d 786, 788 (Ohio Ct. App. 2013); *Beeren & Barry Inv., v. AHC, Inc.*, 671 S.E.2d 147, 150 (Va. 2009).

198. *RESTATEMENT (THIRD) OF PROPERTY: SERVICITUDES* §§ 2.4, 2.6 (2000).

199. *See, e.g.*, *In re Maguire’s Estate*, 466 P.2d 358, 688–89 (Kan. 1970) (holding that the option in question had to be exercised by the specific named option holder). *But see* *El Paso Prod. Co. v. PWG P’ship*, 866 P.2d 311, 315–16 (N.M. 1993) (holding option to purchase assignable under Texas law).

200. *See, e.g.*, *Antler v. Jamaica 163 Location Corp.*, 661 N.Y.S.2d 13, 14 (N.Y. App. Div. 1997) (describing an option contained in a lease as a covenant running with the land and stating the option holder may assign the option along with assigning the lease); *accord* *N. Grand Mall Assocs., L.L.C v. Grand Ctr., Ltd.*, 278 F.3d 854, 859 (8th Cir. 2002). Note that these courts do not suggest that transferring the option can occur separately from transferring the lease. It is not clear whether these courts viewed the option and lease as severable.

(as it is in the Maine Coast Heritage Trust form option agreement²⁰¹). Beyond that, the technical rules regarding the transferability of real covenants may or may not apply depending on the jurisdiction.

The ability to transfer the option to purchase a conservation easement from one conservation organization to another would be enormously important in making OPCEs effective conservation tools in the age of climate change. While many land trusts are stable and well managed, organizations sometimes dissolve, change priorities, or are unable to find hoped-for funding. When it becomes clear that an OPCE should be exercised to create a conservation easement to protect a resource, a transferable OPCE might be shifted to the conservation organization best situated to purchase the conservation easement and engage in the necessary monitoring and stewardship to make that conservation easement effective.

* * *

Our fundamental point is only that the law of options to purchase real estate interests has grown up in conditions dramatically different than those associated with potential options to purchase conservation easements in the face of climate change. Accordingly, as the law currently stands, enforcing OPCEs in the face of climate change will involve uncertainty. As this article discusses in the next section, that uncertainty can be eliminated—or at least dramatically reduced—if state legislatures amend conservation easement statutes to specifically reinforce and clarify options to purchase conservation easements.

B. Statutory Amendments to Clarify and Reinforce OPCEs

As the law currently stands, enforcing OPCEs in the face of climate change will involve uncertainty. That uncertainty can be eliminated—or at least dramatically reduced—if state legislatures amend conservation easement statutes to specifically clarify and reinforce options to purchase conservation easements. Clarifying and reinforcing OPCEs would leave unaltered the broad existing pattern of land conservation in the United States. It would also help guarantee that OPCE law, as it develops, will be consistent with existing conservation easement law.

The history of conservation easement law offers a path for rendering OPCEs more effective tools for conservation in the age of climate change. Conservation easements existed decades before the statutory framework that now supports them. The term “conservation easement” emerged in the late 1950s when journalist William Whyte advocated using private land-use controls to accomplish landscape preservation.²⁰² By the time Whyte coined the term, the property interest he described was already relatively well established. During the 1930s and 1940s, the National Park Service purchased conservation

201. ME. COAST HERITAGE TR., *supra* note 75, ¶ 17.

202. WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 2–14 (1968).

easements encumbering almost 1,500 acres in Virginia and North Carolina to protect scenic vistas along the Blue Ridge Parkway²⁰³ and conservation easements encumbering another 4,500 acres in Mississippi, Alabama, and Tennessee to protect scenic vistas along the Natchez Trace Parkway.²⁰⁴

Much later, state legislatures around the country and the drafters of the Uniform Conservation Easement Act decided conservation easements would be more effective conservation tools if state legislatures passed statutes that both protected them from attack under common law doctrines and limited protection to those conservation easements that would serve the public interest.²⁰⁵ The earliest recognizable conservation easement enabling statutes were enacted by California in 1959²⁰⁶ and New York in 1960.²⁰⁷ By 1979, forty states had enacted some type of conservation easement enabling statute. In 1981, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Conservation Easement Act, which has since been adopted in twenty-four states, the United States Virgin Islands, and the District of Columbia.²⁰⁸

Conservation easements emerged, more or less fully evolved, before state legislatures passed statutes to authorize them. The passage of state enabling statutes provided a framework increasing the prominence and durability of conservation easements.

Options to purchase conservation easements are used today by numerous conservation organizations.²⁰⁹ However, as yet, state enabling statutes do not recognize their existence. Modest amendments to existing conservation easement legislation could reinforce OPCEs in a way similar to what conservation easement enabling statutes did for conservation easements three decades ago.

1. *The Uniform Conservation Easement Act as Precedent*

The Uniform Conservation Easement Act has likely affected every piece of conservation easement legislation passed since it was published in 1981.²¹⁰ It is the dominant conservation easement enabling law in roughly half the

203. Federico Cheever, *The Future of America: Forests and Grasslands: Globalization, Crowded Landscapes, Change, and the National Environmental Policy Act*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 367, 382 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010).

204. *Id.*; see also Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 *DENV. L.J.* 167 (1968).

205. See K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 *UTAH L. REV.* 773, 775 (“The Commissioners’ Prefatory Note explains that the UCEA ‘has the relatively narrow purpose of sweeping away certain common law impediments which might otherwise undermine the easements’ validity, particularly those held in gross.”).

206. 1959 Cal. Stat. 4035–36 (codified at CAL. GOV’T CODE § 6953 (2014)).

207. 1960 N.Y. Laws c.945, § 2 (codified as amended at N.Y. GEN. MUN. LAW § 247 (2014)).

208. See LEVIN, *supra* note 20, at 6–8.

209. See *infra* introduction.

210. Federico Cheever & Nancy McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 *J.L. PROP. & SOC’Y* 107, 117–118 (2015).

states.²¹¹ For the sake of convenience, we use it to show how any state's legislation might reinforce and clarify OPCEs.

Section 5 of the Act specifically applies its provisions to any interest created before the statute's effective date if it "would have been enforceable had it been created after its effective date" and specifically disclaims any intent to invalidate "any interest, whether designated as a conservation or preservation easement or as a covenant, equitable servitude, restriction, easement or otherwise, that is enforceable under other laws of this State."²¹² As the comments to section 5 make clear, the authors of the Act wished to ensure that their model statute would do as little damage as possible to existing conservation restrictions and reinforce them against potential common law challenges.²¹³

In most states, new provisions clarifying and reinforcing OPCEs could be enacted as amendments to existing conservation easement statutes. An amendment strategy would have the advantage of allowing the new provisions regarding OPCEs to take advantage of the definitions of "conservation easement," "holder," and "third party right of enforcement" included in the already-enacted conservation easement statutes.

The first function of our proposed OPCE statutory amendments would be to officially recognize the existence and enforceability of options to purchase conservation easements. While relatively obvious, this function is enormously important. Although conservation easements had existed since the 1930s, the explosion of growth of conservation easements took place only after states enacted authorizing statutes in the 1970s and 1980s.²¹⁴ It is easy to argue that almost everything authorized by state conservation easement statutes could be done before those state statutes passed. However, the passage of conservation easement statutes recognized those possibilities in a way that made them more accessible to both public and private sector decision-makers. Similarly, statutory recognition of OPCEs might increase their use.

Second, statutory amendments should also limit the purposes for which OPCEs could be used. Every state conservation easement statute limits the purposes for which a conservation easement can be created. For example, the UCEA defines a "conservation easement" as

A nonpossessory interest . . . 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 resources, maintaining or enhancing air

211. See Burnett, *supra* note 205, at 775; LEVIN, *supra* note 19.

212. UNIF. CONSERVATION EASEMENT ACT § 5, 12 U.L.A. 174 (1981).

213. *Id.* at 11–12; Burnett, *supra* note 205, at 785.

214. Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RES. J. 65, 71–72 (2006) (describing the long history of conservation easement-like agreements); 2010 LAND TRUST CENSUS, *supra* note 2, at 6 (providing a chart illustrating increasing growth in conservation easements since 1985).

or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.²¹⁵

Rather than re-create a similar definition, OPCE amendments could simply incorporate the conservation purposes currently applied to conservation easements in the state. This would also integrate OPCEs into the growing body of conservation easement case law and allow them to incorporate interpretations of the purposes of conservation easements as those interpretations develop. This is logical. OPCEs should be dedicated to the same purposes as the conservation easements their holders have the right to purchase. As with conservation easements, limiting OPCEs to conservation purposes would limit any negative impact on non-conservation transactions. Any statute—like a conservation easement statute—that creates a special status for particular property rights also creates an incentive to characterize all transactions in ways that obtain that special status. Conservation easement statutes limit their protections and incentives to transactions that create interests for conservation purposes. Similarly, OPCE amendments should limit OPCEs to the conservation purposes described in states' conservation easement statutes.

Third, OPCE amendments should limit potential OPCE holders to the parties capable of holding conservation easements. Conservation easement statutes define qualified holders of conservation easements, generally limiting them to government entities and nonprofit organizations committed to conservation purposes.²¹⁶ OPCE amendments could limit potential OPCE holders to the same groups, described in the same way. This too is logical. If an organization is not qualified to hold a conservation easement under state law, it makes little sense for it to be authorized to hold an option to purchase one. Commercial parties therefore would be unable to use the statutory provisions designed for conservation—and the statutory protections from common law doctrines described below—to purchase OPCEs in advance to eliminate the possibility of their exercise.

At a deeper level, reinforcing and clarifying OPCE rights would limit disputes when a conservation organization exercises an OPCE. Limiting the parties entitled to exercise OPCEs to parties committed to conservation would make the exertion of authority associated with the exercise of the option more tolerable to the general public (if not necessarily to the landowner subject to the option). This logic is similar to the logic that supports limiting conservation easements to conservation purposes and limiting the holders of conservation easements to government entities and private conservation organizations. The enforcement of conservation easements in perpetuity is generally more palatable if the parties are all relatively sure that it serves a public purpose.

Fourth, OPCE amendments could deal with the four potential common law infirmities discussed above in Part III.A.: ambiguity, restraints on alienation, transferability of the burdens of the option to subsequent landowners, and

215. UNIF. CONSERVATION EASEMENT ACT, *supra* note 212, §1(1).

216. *Id.* § 1(2).

transferability of the benefits of the option from one qualified holder to another.

The drafters of conservation easement statutes specifically dealt with similar common law infirmities for conservation easements. Potential users of conservation easements worried about their enforceability over time, particularly through transfers. Because most conservation easements are perpetual, conservation easement users also had to grapple with questions about the rule against perpetuities and restraints on alienation.²¹⁷ While the issues are sometimes different, the statutory structure can be easily adapted.

For example, section 4 of the Uniform Conservation Easement Act is titled “Validity” and states that a conservation easement is valid even if:

- (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 owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch and concern real property; or
- (7) there is no privity of estate or of contract.²¹⁸

The comments accompanying subsection (1) indicate that its purpose is to ensure that a conservation easement’s terms would bind subsequent owners of the encumbered land. An “appurtenant” easement—one that benefits an adjacent or nearby interest in real property—is traditionally sturdier in our common law system than an easement “in gross”—which does not benefit a nearby real property interest.²¹⁹ Accordingly, this provision should be retained in amendments reinforcing and clarifying OPCEs.

Similarly, subsection (2) is intended to ensure that the interest (the “benefit”) created was transferable. This also applies to OPCEs, as discussed in Part III.A.2.c above.

Subsection (3) is a broad antidote to arguments based on traditional common law doctrines. Reinforced OPCEs might be subject to similar arguments. Accordingly, subsection (3) also applies.

Subsection (4), regarding the imposition of negative burdens, and subsection (5), regarding affirmative burdens, are less obviously applicable to OPCEs. However, to the degree an OPCE might impose restrictions on land before the option was actually exercised, they might still be relevant.

217. Beginning in 1984 with Gerald Korngold’s article *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 457, 480 (1984), legal scholars raised the alarm that the creation of private, perpetual restrictions on the use of land might frustrate other public policy goals. In 2002, Professor Julia Mahoney decried the arrogance of current generations in conserving land for the future based on our limited understanding of the preferences of future generations. Julia Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 745 (2002).

218. UNIF. CONSERVATION EASEMENT ACT, *supra* note 67, § 4.

219. 4 POWELL ON REAL PROPERTY § 34.02[d] (Michael Allan Wolf ed., 2013).

Subsections (6) and (7), regarding “touch and concern” and “privity of estate or contract” deal with specific doctrinal limitations on interests that “run with the land,” discussed in Part III.A.1 above. As we discussed, courts that have found that options bind subsequent landowners often characterize them as real covenants “running with land.” Accordingly, these provisions are also relevant to OPCEs.

The majority of the validity provisions in the Uniform Conservation Easement Act, and many conservation easement statutes like it, are relevant to the validity of OPCEs. Accordingly, amendments to reinforce and clarify OPCEs could simply make explicit that the validity sections of conservation easement statutes also apply to options to purchase conservation easements. This would be both effective and efficient. An amendment could be as simple as inserting the words “or an option to purchase a conservation easement” after “conservation easement” in the first line of the Uniform Conservation Easement Act’s section 4. This amendment would also serve the purpose of integrating OPCEs into the growing body of conservation easement law.

2. *Addressing Special OPCE Problems*

The need for supplemental validity provisions regarding OPCEs, distinct from other conservation easements, is largely limited to questions of vagueness and restraints on alienability. As discussed in Part III.A.2.a, OPCEs can prompt vagueness arguments that conservation easements do not because they may create a right to purchase a conservation easement before its terms are fully defined. Similarly, OPCEs create novel issues regarding restraints on alienation. Easements including conservation easements are vested property interests, which are generally recognized not to constitute unreasonable restraints on alienation. On the other hand, as discussed in Part III.A.2.b, options to purchase have been subjected to the rule against perpetuities in some jurisdictions and are potentially subject to other unreasonable-restraint-on-alienation types of analyses.

Conservation easement statutes could be amended to state: “options to purchase conservation easements shall not be void or unenforceable because the terms of the conservation easements to be purchased have not been identified.” Such a “broad brush” provision would not preclude parties from negotiating the terms of a conservation easement in advance and including them in an OPCE. If a state legislature felt that authorizing such an open-ended conservation easement might put landowners at a disadvantage when the OPCE were to be exercised, the statutory amendment could require that the OPCE articulate the conservation purposes of the proposed conservation easement. If the drafters of legislation wish to impose additional limitations, the statute could require a list of rights reserved by the landowner. For example, a statute might state:

An option to purchase a conservation easement shall not be void or unenforceable because the terms of the conservation easement to be purchased have not been identified, provided that the conservation

purposes of the conservation easement have been identified and included in the purchase option agreement and the specific prohibitions and rights reserved by the landowner have been identified and included in the agreement document.

These sorts of provisions would be more readily enforceable if they included a resolution mechanism for any disputes that arise when an option is exercised, such as an arbitration provision for final determination of the easement provisions.

Similarly, conservation easement statutes could be amended to address the unreasonable restraint on alienability issue. A statutory amendment could provide: “options to purchase conservation easements shall not be deemed unreasonable restraints on alienation so long as they do not directly affect the transferability of the land encumbered by the option.”

If this language seems intolerably broad to legislators, OPCEs could be limited to fifty years or even thirty years. Again, creating a broad “safe harbor” from potential challenges based on unreasonable restraint on alienation arguments would not require any landowner to agree to a fifty-year option term. It would do no more than give negotiating parties confidence that the terms they agreed to would be enforceable.

Finally, as discussed in Part III.A.1, the dual nature of OPCEs—in contract and property—can create confusion regarding remedies. The remedies associated with breach of contract and violation of a property right can be different. Although the Uniform Conservation Easement Act contains no provision regarding remedies, the Colorado Conservation Easement Act does. The latter Act provides:

(2) Actual or threatened injury to or impairment of a conservation easement in gross or the interest intended for protection by such easement may be prohibited or restrained by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by an owner of the easement.

(3) In addition to the remedy of injunctive relief, the holder of a conservation easement in gross shall be entitled to recover money damages for injury thereto or to the interest to be protected thereby. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.²²⁰

Including a similar provision in OPCE amendments to conservation easement statutes would avoid confusion when breaches take place. Because OPCEs are rights to purchase conservation easements rather than actual conservation easements, the language could be simplified:

Actual or threatened breach of an option to purchase a conservation easement may be prohibited or restrained by injunctive relief granted

220. COLO. REV. STAT. §§ 38-30.5-108(2), (3) (2014).

by any court of competent jurisdiction in a proceeding initiated by the holder of the option. In addition to the remedy of injunctive relief, the holder of an option to purchase a conservation easement shall be entitled to recover money damages for injury to the option interest. In assessing such damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, and environmental values.

It is not our purpose to resolve all OPCE issues with one stroke. Many will take issue with such a broad statutory mandate for remedies for breach of an option. However, broad effective remedies will help make sure that options are effective tools for conservation.

CONCLUSION

The land trust community currently lacks the tools it requires to deal with long-term climate change. Purchasers of both conservation easements and real estate in fee simple obtain rights to individual, described parcels of land without any guarantee that conservation values will persist on protected land.

Reviving and reinforcing OPCEs may offer land trusts a cost-effective tool for mitigating this problem. Steven Johnson wrote about the concept of the “adjacent possible,”²²¹ that realm in which innovation is most likely to connect with existing structures of technology and understanding, and is therefore most likely to have a significant impact.²²² In the face of climate change, scholars have considered a range of extraordinary legal options to redesign land conservation.²²³ Among these possibilities, nothing is as clearly within the realm of the “adjacent possible” as options to purchase conservation easements. OPCEs are consistent with long-standing practice. Authority to purchase them exists within the bylaws of hundreds of land trusts. Form option contracts are available. Clarifying statutory amendments, like those proposed in this Article, might

221. Johnson has credited the concept to Stuart Kauffman. See Steven Johnson, *The Genius of the Tinkerer*, WALL ST. J., Sept. 25, 2010, <http://perma.cc/BP3B-7Z6Z>.

222. STEVEN JOHNSON, *WHERE GOOD IDEAS COME FROM: THE NATURAL HISTORY OF INNOVATION* (2010).

223. See, e.g., Alejandro E. Camacho, *Assisted Migration: Redefining Nature and Natural Resource Law Under Climate Change*, 27 YALE J. REG. 171 (2010) (discussing the possibility of “assisted migration”—moving species into areas they have not naturally inhabited previously); Rene Castro et al., *The Costa Rican Experience with Market Instruments to Mitigate Climate Change and Conserve Biodiversity*, 61 ENVTL. MONITORING & MGMT. 75 (2000) (describing experiences using market mechanisms in conjunction with climate change policy); Robin Kundis Craig, “Stationarity is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9 (2010) (arguing for a principled flexibility model of climate change law that incorporates resilience theories); Craig R. Groves et al., *Incorporating Climate Change into Systematic Conservation Planning*, 21 BIODIVERSITY & CONSERVATION 1651 (2012) (proposing adaptations to biodiversity conservation plans, including enhancing regional connectivity and protecting “refugia” displaced by climate change); J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENVTL. L. 363 (2010) (discussing trends in environmental policy towards, among others, relying on adaptive and flexible management and using a greater variety of regulatory instruments).

even be uncontroversial. In the final analysis, only the decisions that specific landowners and conservation easement holders make in the decades to come will prove or disprove the actual utility of OPCEs. However, in light of the potentially dire effects of climate change on our current system of land conservation, it would be wise to include such an “option” in our conservation toolbox.

