2011

Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements

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I. INTRODUCTION

Increasing environmental problems, including those associated with climate change, highlight the need for land conservation. Dissatisfaction with public methods of land conservation has spurred environmentalists to pursue private options. One of the most common private land conservation tools is the conservation easement.

This relatively new servitude appears to be a creative method for achieving widespread conservation. However, conservation easements create rigid property structures, locking in a single landowner's preference and/or present conditions. Moreover, conservation easements often fail to accommodate the reality of environmental problems. Conservation easements are perpetual (often private) arrangements, usually lacking flexibility, making them inappropriate tools for environmental protection in the context of climate change and evolving understandings of conservation biology.

This article addresses concerns with the widespread use of conservation easements, specifically examining why conservation easements are unlikely to satisfy conservation goals. In choosing to use conservation easements, policymakers are often selecting the wrong conservation tool. Conservation easements are static

perpetual structures, and ill-suited to the adaptive management needed to respond to environmental changes. Additionally, even where the use of conservation easements is appropriate, conservation easements need improvement. Improved conservation easement structures and better decision-making regarding when to use conservation easements are necessary for the long-term viability of the tool.

Determining when conservation easements are the best tool for the job requires a comprehensive adaptive management approach. The dire need for land conservation indicates the necessity of a multi-tiered holistic approach. Mere reliance on private land conservation and one particular conservation tool will be inadequate to address increasing environmental problems. A robust conservation strategy will involve multiple levels of government, various regulatory and property law tools, and coordination among the players. Conservation easements may have a role to play in such an approach, but continued use of conservation easements must be accompanied by improvement in the tool. Indeed, the current style and use of conservation easements may actually hamper efforts to protect land. The use of conservation easements could promote complacency. When it mistakenly appears that conservation easements are meeting land conservation goals, legislatures will have reduced motivation to undertake comprehensive land protection measures. In the end, policymakers could be lulled into a false sense of security regarding the need for land protection, leading them to under-regulate and under-preserve.

A first step in rethinking our approach to the use of conservation easements is to shift from perpetual conservation easements to renewable term conservation easements. Although perpetuity is one of the defining aspects of most conservation easements, it is neither realistic nor desired. Where conservation easements are of a limited duration, their economic, societal, and conservation value can be more readily assessed and considered when making land-use decisions. Moreover, renewable term conservation easements will more closely align with adaptive management goals. Requiring revisitation of agreements enables periodic reexamination of their conservation value and creates a structure that can incorporate adaptive management techniques. The current default assumption is that conservation easements are perpetual. Shifting the initial assumption that these agreements

will *not* be perpetual can foster responsive agreements and better decision-making regarding appropriate use of conservation easements. Moreover, because conservation easements may not last in their original form forever (as state law contemplates), the use of term conservation easements will enable conservationists to make better upfront decisions about when to use the tool as they will have a more realistic understanding of the tool.

II. THE CHANGING WORLD: ENVIRONMENTAL DEGRADATION AND CLIMATE CHANGE

Increasing population and development pressures have led to environmental degradation and loss of open space. Land conservation is necessary to combat these ills. This section briefly outlines the current environmental crisis and the role that land conservation can play in ameliorating the situation.

A. *Likely Impacts of Global Climate Change Are Severe*

The warming of the climate system is unequivocal.[1] In 2008, the Intergovernmental Panel on Climate Change released a report regarding the existence and impacts of global climate change.[2] The report noted that the "resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g. flooding, drought, wildfire, insects, ocean acidification) and other global [climate] change drivers (e.g. land-use change, pollution, fragmentation of natural systems, overexploitation of resources)."[3] Changes in weather and climate can change vegetation structure, microclimates, ground cover, soil nutrients, and other ecosystem elements.[4]

As the report notes, human activity is undeniably linked to climate change.[5] Even with current mitigation and implementation of sustainable development practices, global emissions of

1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007 SYNTHESIS REPORT 7 (2008), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [hereinafter IPCC].

2. *Id.*

3. *Id.* at 48 (emphasis omitted).

4. C. R. Margules & R. L. Pressey, *Systematic Conservation Planning*, 405 NATURE 243, 248 (2000), *available at* http://www.nature.com/nature/journal/v405/n6783/full/405243a0.html.

5. IPCC, *supra* note 1, at 37.

greenhouse gases will grow.[6]

Climate change does not bring good tidings for many of the world's species. Many species face increased risk of extinction as the climate changes.[7] Scientists also expect climate change to cause major alterations in ecosystem structure and function, yielding shifts in species interactions and ranges.[8] This will have negative consequences for biodiversity.[9] As the climate changes, the landscape will transform as ranges for ecosystems and viable species' habitats shift.

B. *Land Preservation Is a Necessary Element of Environmental Safety*

Land conservation is an important component in both reducing the impacts of climate change (mitigation) and in responding to future changes in the environment due to climate change (adaptation). Land conservation can slow the pace of climate change by protecting carbon sinks and working in a land-use planning context to reduce vehicle emissions and energy use. Additionally, land conservation can play an important role in responding to climate change by fostering resilient systems, which enables adaptation to the coming changes.

Current land-use patterns and trends exacerbate the problems of climate change.[10] The population of the United States is increasing and, as jobs shift away from factory work, people have more flexibility and move out of urban centers to areas where land is cheaper. People are also increasingly mobile. Cars go further faster; commuting is a more accepted part of life; and governments invest in roads. These forces combine to create a more suburban and exurban lifestyle. Suburban and exurban dwellers have larger carbon footprints not only because they drive more than urban dwellers but also because they are (1) more likely to have newer homes, with added energy use from construction; (2) more likely

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6. *Id.* at 44.

7. Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145 (2003), *available at* http://www.nature.com/nature/journal/v427/n6970/pdf/nature02121.pdf (reporting that according to the mid-range scenario, 15-37% of species would be extinct by 2050).

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

9. *Id.*; *see also* Craig Groves et al., *Planning for Biodiversity Conservation: Putting Conservation Science into Practice*, 52 BIOSCIENCE 499, 510 (2002) (stating that "...habitat loss and degradation are the leading causes for imperilment for most species...").

10. PATRICK M. CONDON, DUNCAN CAVENS & NICOLE MILLER, LINCOLN INST. OF LAND POL'Y, URBAN PLANNING TOOLS FOR CLIMATE CHANGE MITIGATION 6 (2009).

to have larger homes, needing more energy for heating and cooling; and (3) more likely to have higher water use from gardening and lawn maintenance.[11]

Development of open space not only diminishes possible spiritual and recreational benefits associated with open space, but also converts lands that had been providing ecosystem services and biodiversity. Such lands increase resiliency within ecosystems. The Environmental Protection Agency (EPA) summarized some of the environmental impacts of sprawl in a 2001 report on the effects of changing land uses on environmental quality:

> Direct environmental impacts of current development patterns include habitat loss and fragmentation, and degradation of water resources and water quality. Building on undeveloped land destroys and fragments habitat and thus displaces or eliminates wildlife communities. The construction of impervious surfaces such as roads and rooftops leads to the degradation of water quality by increasing runoff volume, altering regular stream flow and watershed hydrology, reducing groundwater recharge, and increasing stream sedimentation and water acidity.[12]

Not only do current land-use patterns exacerbate and accelerate global climate change, they also hamper our ability to respond to environmental problems. Land preservation is a necessary element of environmental safety as it protects biodiversity and enables flexible futures.[13] With climate change comes a need for flexible and resilient systems. Lack of open space and protected areas will make it more difficult to respond to changing ecosystems. There

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11. REBECCA CARTER & SUSAN CULP, LINCOLN INST. OF LAND POL'Y, PLANNING FOR CLIMATE CHANGE IN THE WEST 24 (2010); JOHN O. NORQUIST, THE WEALTH OF CITIES 139-40 (1998) (pointing out many problems created by urban sprawl, including increased water use); Matthew E. Kahn, *The Environmental Impact of Suburbanization*, 19 J. POL'Y ANALYSIS & MGMT. 569, 584 (2000) (explaining that suburbanites drive more and are more likely to have larger homes); *Life in the 'Burbs: Heavy Costs for Families, Climate* (National Public Radio broadcast March 31, 2008), *available at* http://www.npr.org/templates/story/ story.php?storyId=89231809 (giving the example of suburban dwellers in the Atlanta, Georgia area using far more energy than urbanites). *See generally* David J. Ciselewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES 29-36 (Gregory D. Squires ed., 2002).

12. U.S. ENVTL. PROT. AGENCY, EPA REP. NO. EPA 231-R-01-002, OUR BUILT AND NATURAL ENVIRONMENTS: A TECHNICAL REVIEW OF INTERACTIONS BETWEEN LAND USE, TRANSPORTATION, AND ENVIRONMENTAL QUALITY at i-ii (2001), *available at* http://www.smartgrowth.org/pdf/built.pdf.

13. This problem has been oft studied and remarked upon. For a specific discussion in the context of the land conservation movement, see RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 62-71 (2003).

will be little opportunity to shift land uses like agriculture and accommodate migrating habitats. Thus, current land-use patterns present a challenge for both mitigating environmental problems and adapting to global climate change. The breadth of this challenge emphasizes the need for environmental protection strategies to address land conservation.

III. PREVIOUS APPROACHES TO LAND CONSERVATION

Land conservation is an important part of a campaign to fight environmental degradation and the ill effects of climate change. Previous attempts at land conservation focused on public action with two main strategies: public land ownership and regulation. When conservationists felt that these two methods proved inadequate, they looked for private methods to conserve land. Conservation easements have emerged as the preferred land preservation tool of both public and private entities. Although there are multiple benefits of conservation easements, they are beset by fundamental problems that hinder, instead of promote, sensible conservation planning.

A. *Public Land Ownership*

Recognizing the need for land conservation, federal and state governments have both retained and acquired fragile ecosystems and other important lands. However, protection solely through public ownership is inadequate as a conservation strategy.

Federal land ownership accounts for nearly one-third of the nation's land, with most of it concentrated in the western United States.[14] The amount of land under public ownership climbs to nearly forty percent when adding state and local government land.[15] Conservation and management of such lands is an important component of a land conservation strategy.[16] To the extent the State's function is to protect and promote the health, safety, and welfare of its citizens, it makes sense for government to

14. AMOS ENO, WILLARD DYCHE & LAURA MASS, RESOURCES FIRST FOUNDATION, STATE OF THE LAND 1 (2005), *available at* http://www.privatelandownernetwork.org/plnlo/ stateoftheland.pdf.

15. *Id.*

16. However, it would be a mistake to presume that all public lands serve conservation purposes. Public lands serve many uses, of which conservation is only one possible goal. *See* Sally K. Fairfax et al., *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 ECOLOGY L.Q. 630, 633 (1999).

be the preserver of land.

Although public lands are an important part of any program to prevent or respond to environmental degradation, they cannot present the entire picture. Public lands tend to be more marginal lands.[17] Although not true with lands in the National Parks system, much of the land under the auspices of the Bureau of Land Management, for example, is likely to be arid and at high elevations.[18] Indeed these were often lands undispersed because settlers and railroads found it hard to put them to productive use.[19]

Private lands are important elements of any environmental protection regime.[20] For example, one quarter of all ecosystem types are inadequately represented on public lands, and seven percent of ecosystem types are not found on public land at any level.[21] Government acquisition of all ecologically important lands would be expensive, politically unfeasible, and not necessarily a wise strategy without an accompanying expansion in bureaucracy to supply land managers.

Finally, public ownership of land is inadequate to ensure conservation of land.[22] Public title to land does not necessarily equate to public management or control,[23] and public ownership does not guarantee active conservation management. While public landownership is an important part of a holistic land conservation strategy, sole reliance on such lands is inadequate.

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17. J.M. Scott, F.W. Davis, R.G. McGhie, R.G. Wright, C. Groves & J. Estes, *Nature Reserves: Do They Capture the Full Range of America's Biological Diversity?*, 11 ECOLOGICAL APPLICATIONS 999, 1000 (2001).

18. *About the BLM*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Jan. 14, 2011).

19. GEORGE CAMERON COGGINS ET. AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 12 (6th ed. 2007).

20. U. S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-16, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS (1994); Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 435 (2002) (noting that public land boundaries were not drawn for conservation purposes and focus wildlife conservation efforts on public lands divides species habitat).

21. David W. Crumpacker et al., *A Preliminary Assessment of the Status of Major Terrestrial and Wetland Ecosystems on Federal and Indian Lands in the United States*, 2 CONSERVATION BIOLOGY 103, 111-12 (1988).

22. Peter S. Menell, *Institutional Fantasylands: From Scientific Management to Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 489, 491 (1992).

23. Sally K. Fairfax et al., *supra* note 16, at 635-36.

B. *Environmental and Land-Use Regulation*

Local, state, and federal regulation of land use and environmental amenities have further advanced conservation efforts, providing protection for ecosystems beyond that available through public land ownership. Indeed, some scholars consider environmental regulation one of the great successes of American public policy.[24] However, regulation has proven to be a limited route for achieving conservation goals. Public resistance and cumbersome political processes limit regulatory possibilities.[25]

Private conservation organizations have been dissatisfied with the extent of environmental protection provided by current regulations, leading them to endorse private conservation methods.[26] The incremental bureaucratic nature of environmental regulation also fosters a piecemeal approach to environmental protection—people specialize in individual fields (e.g., hydrology or biodiversity) without examining the larger interconnected features of environmental concerns.[27]

The government itself has noted the inadequacies of regulation for achieving environmental protection goals. Rising costs of federal environmental protection has led the EPA to call for private measures to supplement federal programs. The EPA believes that harnessing market mechanisms for environmental purposes is the most efficient way to achieve environmental protection.[28]

Some criticize regulation as too capricious, too sensitive to changes in the political climate.[29] Such uncertainty about the

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24. GREGG EASTERBROOK, A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM at xiii-xxi (1995).

25. A.M. Merenlender, L. Huntsinger, G. Guthey & S.K. Fairfax, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 66 (2004); Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 287-88 (2007).

26. Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1047-57 (2006).

27. Daniel J. Fiorino, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 ENVTL. L. 457, 461 (1996) (commenting that the bureaucratic response to environmental problems has generally been piecemeal programs and noting the lack of an organic statute to comprehensively address environmental concerns).

28. William K. Reilly, *Introduction* to U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT, at iii (1991).

29. Merenlender et al., *supra* note 25, at 66; Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U. CHI. L. REV. 341, 345 (2010).

future of environmental protection was another driver behind the private land conservation movement seeking to take control of matters to ensure some level of long-term protection.[30]

IV. PRIVATE LAND CONSERVATION

Finding governmental programs inadequate, conservationists began to explore other methods for protecting valued resources. They turned to market-based approaches. If environmental benefits are valued more than the development benefits of that land, the market should enable a transaction that would yield environmental protection. One can see this principle in action with large land conservation organizations like The Nature Conservancy that purchase land in fee simple to protect it from development.

Land purchase as a conservation strategy is limited. Conservation groups may not be able to afford to purchase the land. Additional costs accrue from having to manage the land and potentially pay taxes on it. Land purchase is also limited by a finite number of willing sellers. Moreover, it is not practical or desirable to remove people from the landscape to set aside the area for ecological protection. While some protection of wild lands, uninhabited by humans, is important for preserving biodiversity and sensitive ecosystems, conservation solely by ecological reserves omits the possibilities of protecting working landscapes and suburban areas.[31] Furthermore, removing people and buildings from settled areas presents ethical and equitable issues. Forcing people off land designated as ecologically important may yield an unjust result for an individual or community but also raises the question of where those people would relocate. Nature does not exist as something distinct from humans, and conservation efforts should recognize the need to proceed in the context of human use of the land. Finally, purchase of thousands of acres of land by conservation organizations would likely face political opposition.[32]

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30. The responsiveness of regulation is also one of its strengths. Such flexibility enables a response to changing societal needs in a way that private measures omit.

31. *See* James R. Mille & Richard J. Hobbs, *Conservation Where People Live and Work*, 16 CONSERVATION BIOLOGY 330, 332-34 (2002) (noting that many biologically important spots are in the midst of human settlements and explaining that conservation organizations are finding community-based efforts preferable to establishment of ecological reserves).

32. *See, e.g.*, PATRICE FRANKO, THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT 565 (3d ed. 2007) (recounting the struggles in Chile when The

The limitations of fee simple ownership of land accompanied by affection for market-based approaches led conservationists to explore private, contract-like agreements regarding land use. If an organization cannot afford to purchase land it wants to conserve (or for other reasons does not want the burden of land ownership), perhaps the organization could get the landowner to refrain from environmentally destructive practices. Property law already provides avenues for private land-use restrictions that do not transfer fee title. They are called servitudes.

A. *Traditional Servitudes*

Servitudes enable private agreements restricting land use, often creating arrangements that last far into the future. The common law of servitudes offers three basic tools for restricting land for conservation purposes: easements, real covenants, and equitable servitudes.

1. *Easements.*

One of the oldest methods of restricting land is an easement. Essentially, an easement is an agreement between two landowners (traditionally adjoining landowners) where a landowner either (1) agrees to allow the easement holder to engage in an action from which the landowner would otherwise be able to bar him or (2) the landowner agrees to refrain from engaging in an activity related to the land he would otherwise be able to legally engage in. Easements that enable the holder to exercise a right are *affirmative* easements. Easements in the second category are *negative* easements.

Negative easements present an opportunity for conservation. One can enter into an agreement with a landowner prohibiting her from engaging in environmentally destructive activities on her land. However, traditionally, courts only recognized four things negative easements could protect: (1) access to light, (2) access to air, (3) subjacent or lateral support, and (4) flow of an artificial stream.[33] Thus, negative easements for conservation purposes are

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Conservation Land Trust established the Pumalín Park nature preserve); Jeff Langholz, *Economics, Objectives, and Success of Private Nature Reserves in Sub-Saharan Africa and Latin America*, 10 CONSERVATION BIOLOGY 271, 275 (1996) (identifying community opposition as one of the challenges for private nature reserves).

33. Courts have expanded these categories in only very limited ways—adding, for example, easements to prevent neighbors from blocking a view or obstructing sunlight to

only possible in jurisdictions recognizing a broader category of permissible negative easements than traditionally allowed.

Using negative easements to meet conservation goals runs into a second obstacle with limitations on who may enter into an easement. Easements usually burden one parcel of land to the benefit of another parcel of land. These are *appurtenant* easements. Where the benefit of an easement is not tied to a person's ownership of land, the easement is *in gross*. Courts favor appurtenant easements over easements in gross, and where intent is ambiguous, courts interpret it as desiring an appurtenant easement.[34] For conservation purposes, an easement in gross is preferable because that enables conservation organizations or government agencies to hold easements even if there is no specific parcel of land benefitting from the encumbrance.

Unfortunately, it is not clear whether easements in gross are assignable—that is, whether the restriction for conservation can be transferred to future buyers, thus enabling it to continue. Most states allow assignment of easements in gross for commercial property.[35] State law varies (and is sometimes silent on) whether an easement in gross on noncommercial property is assignable.[36] Conservation organizations desire assignable easements. As the goal is long-term protection of land, it is advisable to have an encumbrance that a conservation organization could pass or sell to another organization if it were to dissolve or change its goals. It is not clear whether one could do this with negative easements in

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solar panels. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 13 (1989) (also explaining some modern day expansions of air and light easements to protecting views and access to sunlight for solar panels); *see also* Peterson v. Friedman, 328 P.2d 264 (Cal. 1958).

34. *E.g.*, Martin v. Music, 254 S.W.2d 701, 703 (Ky. 1953); Burcky v. Knowles, 413 A.2d 585, 587 (N.H. 1980); Marantaha Settlement Ass'n v. Evans, 122 A.2d 679, 680 (Pa. 1956); Mitchell v. Castellaw, 246 S.W.2d 163, 166 (Tex. 1952); Green v. Lupo, 647 P.2d 51, 53 (Wash. Ct. App. 1982).

35. Netherton studied whether easements in gross are assignable in the United States and found no consensus. Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 558-59 (1979). Although the Restatement of Property rejects the notion that easements in gross are unassignable, it is still part of the common law in many states. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 328 (1997).

36. George Kloek, *Assignability and Divisibility of Easements in Gross*, 22 CHI.-KENT L. REV. 239, 240 (1944); Gerald E. Welsh, *The Assignability of Easements in Gross*, 12 U. CHI. L. REV. 276 (1945); Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 110-111 (1986) (noting that courts are increasingly allowing transfer of easements in gross).

gross.

2. *Real covenants.*

Another type of servitude that provides an avenue for private land protection is a real covenant. Real covenants are promises regarding the land, which run with the land, and are enforceable at law. A burden or benefit runs with the land when it remains in place even when landownership changes. While easements are nonpossessory property rights, real covenants are akin to contracts regarding land. As with easements, these agreements burden a particular parcel of land and traditionally benefit another parcel of land. However, real covenants have to meet several requirements for the agreement to bind future landowners.

For conservation purposes, an environmental organization might desire a real covenant where a landowner agrees to refrain from environmentally destructive practices. This conflicts with the traditional version of the tool because there is no benefited parcel of land. As stated in property law terms: although the burden touches and concerns the land, the benefit does not. As this was not the real covenant structure recognized at common law, it is not clear whether a court would uphold such agreements. Specifically, under those conditions, courts may not allow the burden to run with the land.[37]

Determining whether burdens and benefits of restrictive covenants run with the land requires separate examination of the benefit and burden. For either one to run with the land, the original parties to the covenant must have intended it to do so.[38] Often, both the benefits and burdens of real covenants must touch and concern the land.[39] Furthermore, the party seeking enforcement must demonstrate adherence to both horizontal and vertical privity requirements.[40] Thus, in examining whether a real

37. This is a key distinction between a covenant under contract law and a real covenant under property law. Under traditional common law, the rights and duties associated with contracts were not assignable. Contracts terminated at the death of one of the original parties to the agreement. With real covenants, these rights and duties (now termed burdens and benefits) attach to the underlying property and transfer with the property interests.

38. CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND": INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS 96 (2d ed. 1947); *see also id.* at 91-143.

39. *Id.* at 101-11.

40. *Id.* at 131-32.

covenant will remain in place after a change in ownership, there are two lines of inquiry. First, look at the burden side and ask (1) did the original parties intend the burden to run with the land and (2) does the burden touch and concern the land. Then ask these same questions for the benefit side of the equation. If the answer to all four questions is yes, examine whether the privity requirements have been met. If the answer to any question is no, the agreement is not enforceable as a real covenant.[41]

There are many requirements that must be met for real covenants to provide long-term land protection. [42] If the burden does not run with the land, the restriction remains in effect only during the tenancy of the party who made the agreement. Once the land changes hands, the restriction ends. Such an arrangement would defeat long-term conservation efforts. Moreover, because real covenants are enforceable in law and not in equity, [43] the remedies for breach may be insufficient for conservation purposes. Damages would be the only available remedy, giving rise only to personal liability; yet, for conservation purposes, injunctive relief would be preferable.

3. *Equitable servitudes.*

The third type of servitude is the equitable servitude. Equitable servitudes are covenants running with the land enforced in equity. To run with the land, the original parties to the agreement must have intended both the burden and benefit to run with the land.[44]

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41. Horizontal privity requires an examination of the relationship between the original parties to the agreement. *E.g.*, William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 880-81 (1977); *see* Pakenham's Case, Y.B. 42 Edw. 3, fol. 3, pl. 14 (1368) (Eng.). Vertical privity refers to the relationship between the original parties to the agreement and the current landowners. The privity requirement was linked by a desire to keep lands free of undiscoverable burdens. The courts were concerned about purchasers unwittingly buying land burdened by promises that were not obvious from a physical inspection of the property. Stewart v. Elliot, 239 P.3d 1236, 1241 (Alaska 2010) (discussing justifications for privity requirements).

42. Beyond these already complicated requirements, many courts also require real covenants to be in writing and require that the owner of the burdened estate receive notice of the restriction before taking title. RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82 (Michael Allen Wolf ed. 2000); *e.g.*, Riley v. Bear Creek Planning Comm., 551 P.2d 1213 (Cal. 1976).

43. *But see* John H. Pearson, *Real Covenants: Promises Concerning the Land*, *in* 7-61 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 61.05 (Matthew Bender ed., 2010) (explaining that courts increasingly enable equitable relief in the context of real covenants).

44. POWELL, *supra* note 42, § 60.04[2].

A burden will run with the land only if both the burden and benefit touch and concern the land.[45] This follows the model of real covenants. However, unlike real covenants, the *benefit* of an equitable servitude may run with the land even if the burden does not touch and concern the land. Although there are no privity requirements for equitable servitudes (as with real covenants), notice requirements are a prominent concern.[46] A purchaser must have actual or constructive notice for the burden to run.[47] Equitable servitudes offer a broader scope of possible restrictions than available with easements, because there is no constrained category for negative restrictions.

Equitable servitudes provide an attractive method for making conservation arrangements on private land as they are enforced by equitable remedies and have fewer requirements for burdens to run with the land. Nonetheless, the requirement that the benefit touch and concern the land for the burden to run with the land hinders the use of the tool for long-term conservation. Unless the holder of the benefit is also an adjacent landowner, it may be difficult to meet the requirements of the *benefit* touching and concerning the land.[48]

B. *Conservation Easements*

1. *The mechanics of the tool.*

Although the common law offers many possible ways for individuals to restrict land, the use of servitudes presents problems when pursuing long-term land conservation. To protect land, it is helpful to be able to make enforceable, perpetual negative servitudes in gross. Land preservationists want an agreement that will run with the land so conservation can continue beyond the

45. *Id.* § 60.04[3](a); Runyon v. Paley, 416 S.E.2d 177, 189 (N.C. 1992).

46. POWELL, *supra* note 42, § 60.04; *see, e.g.*, Mackinder v. OSCA Dev. Co., 151 Cal. App. 3d 728, 735-37 (1984).

47. The burden of a real covenant might not run to a purchaser without notice because of state recording acts. In most jurisdictions, the burden of an equitable servitude will not run without notice to the purchaser where that person is a bona fide purchaser of the burdened land. POWELL, *supra* note 42, § 60.04; RESTATEMENT OF PROP. § 539 cmt. a (2010).

48. Perhaps the solution here is to expand the notion of when a benefit touches and concerns the land. Theoretically, the benefit of a conservation easement touches and concern all land in a community (arguably even land globally). Thus, conservation easements touch and concern land, but the benefit does not simply adhere to a particular parcel owned by the benefit holder.

current landowners. This means using assignable tools. No traditional servitude clearly meets all these needs.[49]

The inadequacy of these servitudes led states to enact conservation easement statutes.[50] Like traditional servitudes, conservation easements are property rights in land held by someone other than the landowner. State and federal laws regarding conservation easements generally require the holder of the conservation easement benefit to be either a nonprofit organization or a government entity.[51] Additionally, conservation easements must have a conservation purpose or yield a conservation benefit.[52]

When an owner places a conservation easement on her land, whether by donating the conservation easement, selling it, or creating it to meet legal requirements, she is agreeing to refrain from exercising certain rights.[53] Example rights include the right to develop, the right to farm in a certain manner, or the right to fill in wetlands.

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49. There may be some jurisdictions where certain servitudes would have worked. For example, jurisdictions that have done away with restrictions on in-gross easements or have broad acceptable categories of negative easements. Even where theoretically possible, the uncertainty of long-term enforcement and assignability led conservationists to hesitate about entering into the agreements. There are examples of conservation-easement-like agreements predating conservation easement statutes, but use of the tool did not proliferate until states passed legislation clarifying their enforceability. William Whyte, *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 11 (1959) (giving examples of pre-statutory efforts); Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 305 (2004). Conservation easements have seen the greatest rise in use since the emergence of land trusts. Land trusts have been growing over the past forty years at an incredible rate. ROB ALDRICH & JAMES WYERMAN, LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT, 4 (Chris Soto et al eds., 2005), *available at* http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf.

50. *E.g.*, Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65 (2006).

51. *See, e.g.*, Unif. Conservation Easement Act § 1(2) (1981).

52. *See, e.g., id.* § 1(1); I.R.C. § 170(h)(1)(c) (2010).

53. Although we generally think of conservation easements as preventing landowners from doing certain actions, conservation easements may also have affirmative obligations, such as requiring restoration projects. Alexander R. Arpad, Comment, *Private Transactions, Public Benefits, and Perpetual Control over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 112-21 (2002) (explaining that the affirmative aspect of conservation easements is often ignored). States often explicitly recognize both negative restrictions and affirmative duties in their state conservation easement statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-271(1) (2010); KY. REV. STAT. ANN. § 382.800 (2010); OR. REV. STAT. ANN. § 271.715(1) (2010); S.C. CODE ANN. § 27-8-20(1) (2009); WIS. STAT. ANN. § 700.40(1)(a) (2010).

State conservation easement statutes do not require conservation easements to be tied to neighboring land as was often the case with traditional servitudes. Holders of conservation easements may be located anywhere and may move around without disrupting their conservation easement property right. In traditional servitude parlance, conservation easements may be held in gross. Thus, the passage of conservation easement legislation enabled conservationists to use something that looks like a traditional servitude without the obstacles and uncertainties associated with those servitudes.

Another way to think of conservation easements is as private regulation. The holder of the conservation easement regulates the activities of the underlying landowner, enforcing agreed-upon rules about the land. This private regulation looks like a contract. The landowner and the conservation easement holder enter into an agreement about what can and cannot occur on the burdened land. The agreement differs from a contract, however, because it is tied to the land and the burden stays with the land even when the landownership changes. To change or modify the agreement, traditional property rules govern instead of contract law concepts. Thus, a conservation easement is a hybrid entity of property law, contract law, and private zoning.

2. *The attraction of conservation easements.*

a. *Land trust motivation.*

State conservation easement statutes gave conservationists the confidence to use the tool. With the statutory framework in place, concerns about court recognition of the tool and long-term viability faded away. Conservation easements emerged as a popular private conservation tool and their use continues to grow.

Many conservation organizations argue that using conservation easements is preferable to using other conservation methods. First, holding conservation easements may be preferable to fee simple ownership of land. Because purchasing conservation easements is often cheaper than purchasing fee title, conservation organizations can protect a larger number of acres than would have been feasible through landownership.[54] Additionally, conservation

54. *See* Isla S. Fishburn, Peter Kareiva, Kevin J. Gaston, & Paul R. Armsworth, *The Growth of Easements as a Conservation Tool*, 4(3) PLOS ONE 1 (2009), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004996.

easements may be preferable to fee ownership because they are not accompanied by the burdens associated with landownership. The underlying landowner retains the daily management duties for the land and polices against trespassers and adverse possessors. Further, unlike land in a nature reserve, conservation easements recognize that man and nature coexist.[55]

Second, conservation organizations see the use of conservation easements as superior to pure public conservation methods. These organizations (termed "land trusts") can often protect land more quickly by purchasing a conservation easement than could be done through public purchase or regulation.[56] Conservation easements can be flexible and tailor-made to suit the specific property and its environmental amenities.[57] Such a tool can achieve greater and perhaps more realistic protection than a one-size-fits-all regulation such as zoning.[58] Land trusts also contend that conservation easements are more likely to yield perpetual conservation than can be achieved through public means because government agencies are subject to the vagaries of politicians and manipulating developers.[59]

Finally, using conservation easements to protect land has the potential to foster a sense of community in a way top-down environmental regulation could never achieve.[60] Community members join together to make decisions regarding protection of their land, investing their money and energy in a shaping the

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55. *E.g.*, Cheever, *supra* note 20, at 448.

56. Vinson, *supra* note 25, at 287; Elizabeth Evensen, Note, *Open Space Preservation in Utah: Techniques, Tools, And First "Quality Growth" Steps*, 19 J. LAND RESOURCES & ENVTL. L. 267, 281 (1999).

57. *See* Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10,223,

58. Vinson, *supra* note 25, at 293-97.

59. *See, e.g.*, *Frequent Questions*, NORTH CENTRAL CONSERVANCY TRUST, http://www.ncctwi.org/faqs.html (last visited Jan. 14, 2011) (asserting that conservation easements are "better than zoning" because zoning can be changed due to changes in officeholders and development pressures); WILLIAM H. WHYTE, THE LAST LANDSCAPE 36 (1968).

60. *See, e.g.*, Sam Merrill, *Environmental Finance for Affordable Housing*, NEW ENGLAND ENVIRONMENTAL FINANCE CENTER, http://syracusecoe.org/EFC/images/allmedia/LIBRARYEnv Finance_Affordable_Housing.pdf (last visited Jan. 14, 2011) (arguing that conservation development programs using conservation easement like structures foster a sense of community); *Larry Gerlick profile*, MONTANA LAND RELIANCE, http://www.mtlandreliance.org/profile-5.htm (last visited Jan. 14, 2011) (explaining view that conservation efforts foster a sense of community).

landscape and seeking to retain present-day values.[61] When conservation easements preserve environmental resources on private lands where purchase or regulation would be burdensome, undesirable, or politically difficult, conservation easements can yield the public benefits of increased environmental amenities and healthy functioning ecosystem services.

b. *Landowner motivation.*

The reasons above explain why land trusts see conservation easements as a valuable tool. Landowner motivation to enter into conservation easements, however, differs. Many landowners restrict their land with conservation easements because of their interests in long-term land conservation, but other factors also play a role.

Conservation easements can be created by donation, sale, exaction, or condemnation.[62] These methods of creation indicate possible landowner motivation. Where a government entity uses the power of eminent domain to create a conservation easement, landowner motivation is absent. Government entities often create conservation easements by exaction, agreeing to issue sought-after permits in exchange for a landowner agreeing to create a conservation easement.[63] In such cases, the chief landowner motivation is obtaining the permit, not creating the conservation easement. Where a landowner sells a conservation easement to a government entity or land trust, the purchase price may be a prime motivator. Where a landowner donates a conservation easement, the possible tax breaks associated with that donation likely play an important role. Alongside these motivations, landowners still identify their desire to protect the land in perpetuity as an impetus for burdening their land with conservation easements.[64]

The federal Internal Revenue Service (IRS) began authorizing charitable income tax deductions for donations of qualifying conservation easements in 1964.[65] In 1976, Congress added what is

61. Owley Lippmann, *supra* note 26, at 1072-73.

62. *Id.* at 1088-89.

63. *See id.* at 1089.

64. *See, e.g., What is a Conservation Easement?*, TALL TIMBERS, http://www.talltimbers.org/ lc-conseasement.html (last visited Jan. 14, 2011); *Frequently Asked Questions About Land Conservation*, BLUE RIDGE FOOTHILLS CONSERVANCY, http://www.cnpr.org/BRFC/FAQ.htm (last visited Jan. 14, 2011).

65. Cheever & McLaughlin, *supra* note 57, at 10,225.

now section 170(h) to the Internal Revenue Code, officially enabling donors of conservation easements to obtain charitable income, gift, and estate tax deductions.[66] To qualify for these deductions, the taxpayer must donate a conservation easement to a qualifying organization—either a nonprofit organization or a governmental entity.[67] The conservation easement must be perpetual[68] and must have a qualifying conservation purpose.[69]

These tax breaks can be significant. Generally, the value of a conservation easement is the difference between the fair market value of the land before the conservation easement is in place and the land encumbered with the conservation easement.[70] Initially, landowners were able to deduct 30% of their income spread out over the course of six years.[71] In 2006, partially resulting from lobbying by the Land Trust Alliance, Congress amended the federal tax code to enable conservation easement donors to deduct up to 50% of their income with certain donors being able to deduct 100%.[72] Congress also extended the time over which a party could take the deduction to up to sixteen years.[73] Beyond these significant charitable tax deductions, there are additional deductions related to estate and gift taxes.[74] States are also

66. I.R.C. § 170(h) (2010). See also Cheever & McLaughlin, *supra* note 57, at 10,225-26, for a concise description of the tax benefits and their origins.

67. I.R.C. § 170(h)(3).

68. *Id.* § 170(h)(5)(A).

69. *Id.* § 170(h)(4). Qualifying purposes include recreation, habitat protection, open space protection, and preservation of historically important lands or structures. *Id.* To be valid under state law, a conservation easement must also adhere to state conservation easement statutes. State lists of acceptable purposes often differ from the IRS' list but usually are broader in scope. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 2010).

70. Many conservation easements are created by bargain sale, which reduces the value of the charitable donation by the purchase price. The valuation of conservation easements can be quite tricky because it is hard to establish estimates of their worth in the absence of a robust market for them. *See* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations–A Responsible Approach*, 31 ECOLOGY L.Q. 1, 69 (2004); *see also* Treas. and I.R.S. News Release IR-2004-86 (June 30, 2004); I.R.S. News Release IR-2005-19 (Feb. 28, 2005).

71. *See generally* McLaughlin, *supra* note 70, at 31 (explaining various easement-related tax incentives in detail).

72. Congress initially passed these rules in the Pension Protection Act of 2006. Public L. 109-280, § 1213 (Aug. 17, 2006). The 2008 Farm Bill extended this benefit through the end of 2009. The Food, Conservation, and Energy Act of 2008, Title XV, § 15302 (Pub. L. 110-234, 122 Stat. 923, enacted May 22, 2008, H.R. 2419).

73. Russell Shay & Sean Robertson, *Policy Roundup*, 28 (3) SAVING LAND 10 (2009).

74. American Farm & Ranch Protection Act, I.R.C. § 2031(c) (2010). For a discussion of this provision and which conservation easements qualify for the deduction,

increasingly enabling state income tax deductions,[75] and many jurisdictions reduce property taxes for lands encumbered by conservation easements.[76] Thus, while there may be many reasons that landowners choose to donate conservation easements, the tax incentives are likely a strong motivator.[77]

c. *Government motivation.*

Although we often hear conservation easements praised as a private land conservation tool, they are far from private mechanisms. First, government agencies are often the holders of conservation easements.[78] Under both the state statutes[79] and federal tax laws,[80] government agencies are permissible holders of conservation easements. In that way, government motivation mirrors the motivation of land trusts as described above by enabling protection of potentially more acres (than could be protected by fee simple ownership) without requiring the burden of landownership and management.

Second, government agencies often enable and coordinate the creation of conservation easements.[81] Governments condemn and exact conservation easements, and they are involved in conservation easement creation in other ways. Many conservation easements are purchased with government funds.[82] For example, conservation easements preventing conversion of agricultural lands are often purchased with a combination of state and federal funds.[83] Thus, government agencies both support and enable the

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see Stephen J. Small, *An Obscure Tax Code Provisions Takes Private Land Protection into the Twenty-First Century* 55, 60-65 *in* PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

75. Philip Tabas, *Making the Case for State Tax Incentives for Private Land Conservation*, 18 EXCHANGE 5 (1999).

76. *See, e.g.*, MONT. CODE. ANN. § 76-6-208(1) (2009); N.J. STAT. ANN. § 13:8B-7 (2010); S.C. CODE ANN. § 27-8-70 (2010).

77. *See generally* Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. (forthcoming 2011).

78. In fact, government agencies were some of the first holders of conservation easements. The National Park Service used conservation easements to protect scenic highways beginning in the 1930s. Whyte, *supra* note 49, at 12.

79. *See, e.g.*, Unif. Conservation Easement Act § 1(2)(i) (1981); ALASKA STAT. ANN. § 34.17.060(2)(A) (2010); MICH. COMP. LAWS ANN. § 324.2144(2) (2010).

80. I.R.C. § 170(h)(3) (2010).

81. *E.g.*, King & Fairfax, *supra* note 50, at 78.

82. *E.g.*, *id.* at 81-83.

83. *See, e.g.*, Aimee Weldon, *The Farm Bill: Steady Funding in Unstable Times*, SAVING LAND, Fall 2009, at 32-33 (describing $23 billion of federal funding for easement

proliferation of conservation easements.

Government agencies may encourage the use of conservation easements by private organizations and individuals as a way of reducing the burden of agencies' conservation duties.[84] The government saves money if private organizations conserve land and manage conservation easements instead of placing the land conservation burden on public agencies. Thus, when private land conservation organizations conserve land, the government benefits because the private organization takes on tasks that government entities might otherwise carry out. This means meeting societal goals through private mechanisms.

This cursory outline of the main land conservation tools provides insight into what has led conservationists and governments to rely on conservation easements. Unfortunately, the rapid embrace and proliferation of conservation easements may be misguided. After detailing the legal, ecological, and social concerns associated with conservation easements in the following section, I suggest a simple change in the tool, ending the perpetuity aspect, that will strengthen conservation easements and place them in a more considered and holistic land conservation strategy.

V. CONCERNS WITH THE USE OF CONSERVATION EASEMENTS

Although conservation easements may be a helpful tool in the conservation toolbox, the current use of conservation easements as a primary land preservation strategy may ultimately do more harm than good. This section outlines some of the major concerns with the use of conservation easements as a long-term land protection strategy. It examines four broad categories of concerns about the long-term viability of conservation easements as a land protection strategy.

First, conservation easements are a creature of statute precisely because common law servitudes created impediments to enforcing them. Those impediments existed to promote societal values of enabling efficient use of land and providing notice of land restrictions to subsequent landowners. Enabling conservation easements through statutes did not cure these common law

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acquisition and restoration programs in the 2008 Farm Bill—the single greatest source for federal funding for private land conservation).

84. King & Fairfax, *supra* note 50, at 78.

concerns, which persist despite improved land recording systems.

Second, the widespread use of conservation easements as a land conservation strategy raises questions about accountability, enforcement, and democracy. The use of conservation easements often involves private organizations taking on the regulatory function of environmental protection. The holder of a conservation easement acts as a regulatory entity and yet does not have the same checks and oversight regulatory entities do. This becomes a concern when those private organizations fail in their job as enforcers of conservation easements.

Third, conservation easements are not an ecologically sound method of conservation. Conservation easements have been piecemeal land protection arrangements with little coordination or connection among them. The process can be haphazard—based on where there are interested sellers and holders. The crafting of conservation easements has usually been done without the involvement of specialists trained in ecological protection, like conservation biologists, and they rarely incorporate adaptive management principles. As a land conservation strategy, conservation easements have the potential to provide for long-term protection, but would work best as part of a holistic program.

Finally, conservation easements may be illusory. That is, they do not even perform those functions that we think they do. Where conservation easements go unenforced or are unenforceable, they do not offer the expected long-term land protection. This leads to under-protection of the environment, as policymakers and conservationists believe that conservation easements are already doing the job.

This section discusses these concerns in detail. The following section then argues for an end to the perpetuity element of conservation easements, explaining why this change would be a step in the right direction for addressing the various concerns related to conservation easements.

A. *Common Law Concerns Remain*

As explained above, a conservation easement was generally not permissible under the common law. Each servitude has impediments to using it for conservation purposes. These various impediments are rooted in two key concerns: a dislike for restraints on alienation and a desire to ensure that landowners receive notice of land-use restrictions. Although states have

enacted legislation to remove the legal restrictions preventing unenforceability of conservation easements, these statutes did not cure the common law concerns that led to disfavoring conservation easements.

1. *Restraints on alienation.*

Both courts and policymakers have voiced concerns about the ability of current generations to burden future generations through the creation of perpetual land restrictions.[85] Such concerns were manifested in common law by limiting the transferability of covenants and easements in gross.[86] At common law, courts seemed wary about upholding land restrictions when land changed hands and the restrictions now applied to people who were not the original parties to the agreements. Enabling current landowners to perpetually define the use of land not only raises equity concerns with respect to current landowners but may also force retention of undesirable (for economic or social reasons) land uses. This wariness led courts to develop rules disfavoring restrictions on land.

There are two primary points under this dead hand argument. First, it is more socially desirable to have land controlled by the living because they are more apt to make economically efficient land-use decisions.[87] Second, perpetual land-use restrictions hinder implementation of socially optimal land uses. Subsequent landowners do not have the freedom to decide what to do with their land.[88] Perpetual private agreements can circumvent individual and community decisions regarding land use. This raises concerns about both paternalism and intergenerational equity. Widespread use of conservation easements indicates that today's landowners and policymakers do not trust future

85. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1098-1100 (1996); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 767-72 (2002); Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 36-40 (2007).

86. Courts have generally been concerned with the power of the present to control actions in the future. Such concerns of "dead hands" controlling present day actions gave rise to traditional property doctrines like the rule against perpetuities and the rule against restraints on alienation. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 cmt. b (2000).

87. LEWIS SIMES, PUBLIC POLICY AND THE DEAD HAND 59 (1955).

88. *See* John Walliser, *Conservation Servitudes*, 13 J. NAT. RESOURCES & ENVTL. L. 47, 55 (1997).

generations to make decisions about how best to use their land.[89] Having seen past generations make poor land-use decisions, conservationists argue it is appropriate to prevent future generations from having a full menu of choices by placing perpetual restrictions on land.[90] Under this framework, conservation easements could lock land into inefficient uses, preventing socially responsive development patterns, but also potentially prevent inefficient uses.

2. *Notice.*

Because of poor land recording systems, courts limited servitudes that would continue to operate as land changed hands.[91] Courts used strategies like horizontal privity to ensure that agreements would not be hidden from subsequent purchasers.[92] Law courts were concerned about the burden of a covenant running to a landowner who lacked notice of the covenant. By requiring appurtenancy, courts made it more likely that a benefit holder would be someone nearby who could easily inform the purchaser of the restriction.

Courts wanted landowners to be able to easily track down all parties with an interest in a particular piece of land. To have certainty in title for making changes on the land, a landowner or potential purchaser will want to be able to identify all parties with interest in the land. These are the parties with whom the landowner will be able to negotiate for change in those servitudes. When the party is an easily identifiable neighbor, such negotiations are easier.

Today, well-established land recording systems alleviate many notice concerns. However, there may still be situations where landowners do not know about conservation easements burdening

89. *See* Jessica Owley, *Use of Conservation Easements by Local Governments, in* GREENING LOCAL GOVERNMENT (Patricia Salkin & Keith Hirokawa eds.) (forthcoming 2011).

90. *See, e.g.*, Barton H. Thompson. Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 602-03, 606 (2004) (noting that such restrictions actually give future generations decision-making power regarding land use and conservation).

91. Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 941 (1988); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 651 (1985).

92. James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 90-93 (1989).

their land. Although some states require recordation,[93] conservation easements may still be difficult to track down or to understand.[94] For example, sometimes landowners do not learn of existing conservation easements until they try to create new conservation easements restricting already-encumbered land.[95] Land trusts often identified obtaining clear title as one of the more difficult aspects of land deals.[96]

B. *Privatization Concerns: Democracy and Accountability*

Where private organizations hold, monitor, and enforce conservation easements, concerns about democracy and political accountability arise. Environmental regulation and zoning draw upon the local police power to protect and promote the health, safety, and welfare of a community. Decision makers are accountable to this democratic process through election or appointment. Additionally, officials enact zoning laws and make land-use decisions through notice and comment procedures in a public forum. When private organizations gain the ability to circumvent this public process and engage in private land-use planning, the democratic process suffers.[97]

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93. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-274(A) (2010); FLA. STAT. ANN. § 704.06(5) (2010).

94. CONNECTICUT RIVER ESTUARY REGIONAL PLANNING AGENCY, HOW TO SEARCH FOR CONSERVATION EASEMENTS *available at* http://www.crerpa.org/Easements/SEARCHING CONSERVATION%20EASEMENTS.pdf (explaining their struggle tracking municipal conservation easements because the municipalities did not file them with land recording offices).

95. *See* Ginny Barnes, *What if a Property Has a Conservation Easement?*, POTOMAC ALMANAC, Nov. 4, 2010, *available at* http://www.connectionnewspapers.com/article.asp?article= 345740&paper=70&cat=110 (asserting that many landowners seem unaware of conservation restrictions burdening their land). Additionally, there may be conservation easement holders who do not know what they hold. *See* Gerald Korngold, *Private Conservation Easements: A Record of Achievements and the Challenges Ahead*, LINCOLN INSTITUTE OF LAND POLICY, Oct. 2009, at 8, 12 *available at* http://conservationtools.org/uploaded_files/0000/0844/Private_Conservation_Easements.pdf.

96. Susan Carpenter, Westchester Land Trust, Presentation at Pace Law School (Apr. 7, 2010) (explaining the struggle Westchester Land Trust has getting clear records of encumbrances on land and the difficulty of determining who holds various mortgages on parcels they contemplate acquiring).

97. This was one of the chief concerns of the NCCUSL (National Conference of Commissioners on Uniform State Laws) commissioners when they were drafting the UCEA. They feared the power of private individuals and groups making long-term decision about the land. NCCUSL, *Proceedings in Committee of the Whole: Uniform Conservation and Historic Preservation Agreements Act* 22 (1979) [hereinafter NCCUSL, 1979 *Proceedings*]

Where conservation easements arise from private agreements, the public does not have the opportunity to participate in the agreement's formation.[98] There is no public oversight of the terms of the conservation easement beyond a requirement that it meet the conditions outlined in state conservation easements statutes. Conservation easements give land trusts the ability to shape the land in a way that they feel is appropriate. Land trusts gain greater power to make decisions about the design of a community than other community members have, and they do so with perpetual static arrangements. Such structures could block beneficial uses or effectively overturn zoning in ways traditional property tools could not. This occurs even though landowners can obtain significant tax breaks (and, in the case of exacted conservation easements, obtain development rights and other public benefits). Thus, the public has the potential to lose tax revenue, ecosystem services, open space, and other amenities without the opportunity to participate in the process.

For the above reasons, some scholars advocate for the addition of a democratic element to the conservation easement creation process.[99] The National Conference of Commissioners on Uniform State Laws debated this issue when writing the Uniform Conservation Easement Act (UCEA).[100] Many commissioners believed that public agencies should be involved in all aspects of the conservation easement process as a balancing or controlling force.[101]

Concerns about public involvement and oversight of conservation easements come to the fore when considering enforcement of conservation easements. Although it varies by state law, generally only a few entities are able to enforce conservation easements: holders of conservation easements, third-party enforcers designated in the conservation easements, or parties with

(on file with author).

98. There are a few exceptions to this rule. A few state statutes require public agencies to approve conservation easements before they may be recorded. *See, e.g.*, California Open Space Easement Act, CAL. GOV'T. CODE § 51083 (2010) (requiring county approval of all open space easements).

99. *See, e.g.*, King & Fairfax, *supra* note 50, at 124-25; Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 462 (1984).

100. NCCUSL, 1979 *Proceedings*, *supra* note 97, at 38-39.

101. *Id.*

a property interest in the burdened property.[102] Few state statutes *require* those entities to enforce. In fact, if holders do not enforce conservation easements, it is not clear whom one could hold accountable for this failure.[103] Even where the underlying landowner has obtained significant tax benefits or where the conservation easement was part of a permitting requirement, (and thus, significant public interest is involved) the possibilities for public enforcement are uncertain. The public benefit of the agreements would be at risk without a clear public recourse.[104]

There are undoubtedly accountability concerns where small private land trusts hold conservation easements. Although growing, many land trusts have limited resources and rely chiefly on volunteers.[105] Such organizations might lack the capacity to monitor and enforce conservation easements. Although some organizations are developing funds for potential enforcement actions,[106] many land trusts simply do not have the money for a legal battle. Additionally, organizations may prefer modifying existing conservation easements to fighting over them.[107] Land

102. *But cf.* N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (2010) (also allowing the original grantor of the conservation easement to enforce).

103. Owley Lippmann, *supra* note 49, at 341-44.

104. Elsewhere, I have suggested possible routes of enforcement in the context of exacted conservation easements. State attorneys general should have the right to oversee conservation easements based on their ability to regulate nonprofit organizations. A land trust failing to enforce a conservation easement could arguably not be fulfilling its charter. Also, there appears sound justification for creating a citizen suit provision within conservation easement statutes. Owley Lippmann, *supra* note 49, at 344-53. *See also* Douglas M. Humphrey, Note, *The "Interior" Revenue Service: The Tax Code as a Vehicle for Third-Party Enforcement of Conservation Easements*, 37 B.C. ENVTL. AFF. L. REV. 425, 425 (2010) (proposing "a citizen suit against the Commissioner of Internal Revenue for approving income tax deductions for conservation easements as a way to ensure an easement is beneficial to the public.").

105. *E.g.*, Ashlea Ebeling, *The Conservationist Next Door*, FORBES MAGAZINE, June 28, 2010, *available at* http://www.forbes.com/forbes/2010/0628/investment-guide-land-trust-tax-breaks-conservationist-next-door.html; Dina Fine Maron, *New England Groups Plot to Save Their Dwindling Woodlands*, N.Y. TIMES, June 7, 2010, *available at* http://www.nytimes.com/cwire /2010/06/07/07climatewire-new-england-groups-plot-to-save-their-dwindli-2701.html.

106. *See* Lesley Ratley-Beach, *Background on the Conservation Defense Insurance Program*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/conservation/conservation-defense/documents/background (last visited Jan. 14, 2011).

107. Many conservation easement holders worry about maintaining good landowner relationships. *See, e.g.*, Mike Kaszuba, *DNR Faces Concern Over New Set-Asides*, STAR TRIBUNE, Mar. 5, 2010 (quoting a report by the Minnesota Department of Natural Resources mentioning the conflict between the adversarial conservation easement enforcement process and the agency's desire to build relationships with landowners).

trusts are often composed of community members seeking to maintain good relationships with neighbors, and such organizations are just as likely to feel political pressures to change restrictions as public agencies do, but lack the mechanisms to resist those pressures.

Some land trusts may decide that they no longer value the conservation easements they hold or that it is not worth their time and energy to monitor and enforce them. For example, some conservation easement holders are now considering ways to unencumber themselves from conservation easements to use their resources in areas identified as more likely to yield conservation benefits.[108]

Conservation easements are created under state and federal laws, or enabled through public funding. Thus the public has an interest in the enforceability of these agreements. If a nonprofit organization mismanages these public assets, how can the public hold the organization accountable? There is no ballot box solution here and usually no requirement for public participation.

There are additional concerns surrounding the tax breaks associated with conservation easements at the local, state, and federal levels. Overvaluation of conservation easements may lead to tax deductions beyond those warranted by the actual restrictions. Without proper policing of the conservation easements, the government may be giving out tax deductions for land that does not provide a sufficient public benefit.

As with most potential tax deductions, there have been allegations of nefarious conservation easement deductions. The IRS has expressed concern over the use of conservation easement deductions—calling into question the validity and accurate valuation of many donations.[109] The IRS asserts that some

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108. SOLID GROUND CONSULTING GROUP, PERPETUITY AND PROBLEM EASEMENTS (2010). *See also* Peter Kareiva, *Conservation Science: Trade In to Trade Up*, 466 NATURE 322 (2010) (an article by The Nature Conservancy's chief scientist arguing that it may be beneficial to sell off some protected areas to devote resources to more ecologically important lands).

109. In 2009, the IRS disallowed Rep. Walt Minnick (D-Idaho) from claiming a charitable deduction of $551,483 stemming from the conservation easement he granted to the Land Trust of the Treasure Valley. Dan Popkey, *Rep. Walk Minnick Sues IRS over Tax Liability on Idaho Land Transfer*, IDAHO STATESMAN, Sept. 17, 2010. There have been many recent IRS audits of conservation easements in Colorado. *IRS Audits of Conservation Easements*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/policy/taxincentives/ce-audits/irs-audits (last visited Jan. 14, 2011); Jessica Fender, *Preliminary Audit Will Scrutinize Easement Tax Collections*, THE

taxpayers claim deductions far exceeding the value of their land restrictions.[110] For this reason, the IRS is more closely examining deductions for conservation easements and reevaluating past deductions.[111] IRS Commissioner Mark Everson told The Washington Post that some of the claimed tax benefits relating to conservation easements "have been twisted for inappropriate individual benefit."[112]

Another way the public loses the benefit of tax revenues occurs when conservation easements do not meet conservation purposes. The tax deductions for conservation easements are justified by the public benefit resulting from the restrictions. The IRS believes that some of the restrictions that have qualified for tax deductions are of only limited public benefit.[113] Part of the problem may be associated with disreputable conservation organizations making "sweetheart deals" with donors of conservation easements.[114] As of yet, however, there is not a mechanism to comprehensively assess the validity and conservation value of conservation easements that have benefited from tax deductions. A congressional committee evaluating conservation easements felt that the benefit of conservation easements is "tenuous and speculative."[115]

Beyond the questions of proper valuation and justifiable conservation values attained, allowing a tax deduction for conservation easements may not be the best use of public funds. Even with adequately conserved land, providing a public benefit, and properly assessed according to the IRS's calculation instructions, conservation easements may not be the best choice for land preservation. Depending on the loss of tax revenues,[116] it

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DENVER POST, Nov. 9, 2010, *available at* http://www.denverpost.com/politics/ ci_16560363#ixzz14nu99kqL.

110. Joe Stephens & David B. Ottaway, *IRS Toughens Scrutiny of Land Gifts*, WASH. POST, July 1, 2004, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A19102-2004Jun30.html.

111. *Id.* at 1-2. However, the IRS does not visit the burdened sites to ensure that the agreements are being enforced.

112. *Id.* at 1.

113. *Id.*

114. *Id.* at 2.

115. Joe Stephens, *Panel Advises Ending Tax Breaks for Easements*, WASH. POST, Jan. 28, 2005, at A12, *available at* http://www.washingtonpost.com/wp-dyn/articles/A42697-2005Jan27.html (quoting the Joint Committee on Taxation).

116. The nonpartisan Joint Committee on Taxation has estimated that eliminating the charitable tax deduction would save the U.S. Treasury $1 billion over the next ten years. *Id.*

may be more economically efficient to collect the taxes and use the money to purchase land in fee. If the same conservation goals can be met via regulations instead of conservation easements, it may be more fiscally sensible to prohibit the tax deduction and encourage land preservation via regulatory channels.

C. *Ecological Concerns*

Ameliorating environmental degradation and working to combat the ill effects of climate change furthers societal goals. Conservation biologists and environmental scientists advise addressing such problems through holistic programs that incorporate principles of adaptive management.[117] Current conservation easement use rarely involves holistic planning or adaptive management.

Despite the fact that conservation easements are, at their core, a conservation tool and not merely a vehicle for tax breaks, few are reviewed by conservation biologists.[118] No state's conservation easement statute requires any review or monitoring of the agreements by persons with training in environmental science and biology.

Determining the best conservation policies in the context of ecological change is challenging. Because of the constantly changing nature of the problem and its effects on ecosystems, conservation planning must be flexible and responsive.[119] Principles of conservation biology must form a basis for such policies. Conservation biology, like many disciplines, is an evolving science. Researchers continually learn more about ecosystem health, biodiversity, and habitat needs. Many scientists agree that because of the evolving nature of ecosystems, the state of conservation biology knowledge, and political structures, adaptive management principles are the most appropriate for

117. Nicole E. Heller & Erika S. Zavaleta, *Biodiversity Management in the Face of Climate Change: A Review of 22 Years of Recommendations*, 142 BIOLOGICAL CONSERVATION 14, 27-29 (2009).

118. Some of the larger land trusts (like The Nature Conservancy) and some government conservation easement holders have staff scientists who give input on the conservation easements, but there is no uniform practice. *See, e.g.*, *Conservation Science*, THE NATURE CONSERVANCY, http://www.nature.org/tncscience/scientists/misc/kareiva.html (last visited Jan. 14, 2011) (profiling staff conservation biologist Peter Kareiva).

119. For a rich discussion of adaptive management and conservation easements, see Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND ECOLOGY MGMT. 167 (2010).

conservation.[120] To respond to changes in the landscape, and new knowledge about species and their habitats, preservation strategies should involve flexible programs that are continually reexamined and reevaluated.

1. *A non-holistic approach.*

Conservation easements are not by themselves a coherent conservation strategy. They could be a component of such a strategy, but currently they generally present a piecemeal approach where individual organizations enter into agreements with private landowners outside of a larger conservation context. This leads to a fragmented protection scheme. Such strategies can miss vital areas or neglect important ecological features like preserving corridors. Conservation biologists recommend that such planning focus on relatively large spatial areas or regions inhabited by thousands of species and hundreds of identifiable natural communities.[121] When protected areas are isolated and exposed, the challenges of preserving ecosystem health increase.[122]

Systematic approaches to conserving biodiversity are better than ad hoc ones. "Ad hoc approaches have resulted in biased distribution of lands and waters set aside for conservation purposes with a majority of these areas occurring at relatively higher elevations, with steeper slopes and poorer soils."[123] Conservation easements entered into outside of a comprehensive strategy are likely to focus on areas where the economic benefits of other activities do not outweigh preservation goals. The fact that conservation easements often require a willing donor or seller can lead to an arbitrary patchwork of preserved lands reflecting more where a landowner is willing to engage in a conservation easement arrangement instead of identifying areas most needed for conservation.[124] Would-be conservation areas compete with other uses and end up on lands too remote and disconnected from other habitat areas to be productive.[125]

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120. *See, e.g.*, C.S. Holling & Gary K. Meffe, *Command and Control and the Pathology of Natural Resource Management*, 10 CONSERVATION BIOLOGY 328, 332 (1996).

121. Norman Myers et al., *Biodiversity Hotspots for Conservation Priorities*, 403 NATURE 853, 856 (2000).

122. Margules & Pressey, *supra* note 4, at 247-48.

123. Groves et al., *supra* note 9, at 500.

124. Cheever, *supra* note 20, at 449.

125. Margules & Pressey, *supra* note 4, at 243.

2. *Complicating efforts at adaptive management.*

Conservation easements place unchanging restrictions on land, seeking to preserve the landscape in its current state. The strategy of preserving land with such a fixed tool does not make sense in a changing world. As the climate changes and ecological features shift, it will be important to have resilient conservation strategies.[126] A static structure making it more difficult to change land uses and shift priorities will work against that goal. Increasing problems from climate change, habitat and biodiversity loss demonstrate the need for conservation strategies that understand the changing environment and can change with it, that is, *adaptive management.*

Adaptive management is a structured, iterative process of optimal decision making in the face of uncertainty, with the aim of reducing uncertainty over time via system monitoring.[127] Adaptive management embraces uncertainty and risk.[128] Its key features are iterative decision-making, feedback between monitoring and decisions, and explicit characterization of system uncertainty through modeling. Decision-making in an adaptive management framework maximizes resource objectives and, either passively or actively,[129] accrues information needed to improve future

126. *See* Fikret Berkes & Dyanna Jolly, *Adapting to Climate Change: Social-Ecological Resilience in a Canadian Western Arctic Community*, 5 CONSERVATION ECOLOGY 18 (2001) (examining climate change adaptation by studying resiliency).

127. ADAPTIVE ENVIRONMENTAL ASSESSMENT AND MANAGEMENT (C.S. Holling ed., 1978); DAVID R. MARMOREK ET AL., FINAL REPORT TO THE NATIONAL COMMISSION ON SCIENCE FOR SUSTAINABLE FOREST: ENABLING ADAPTIVE FOREST MANAGEMENT 1 (2006), *available at* http://ncseonline.org/CMS400Example/uploadedFiles/NCSSF/NCSSF%20Project%20D1_Adaptive%20Forest%20Mgmt%20Final%2018%20May%2006.pdf.

128. James D. Nichols et al., *Adaptive Harvest Management of North American Waterfowl Populations: A Brief History and Future Prospects*, 148 J. ORNITHOLOGY S343, S344 (2007) (acknowledging that all conservation programs are marked by inherent uncertainty and calling for integrated adaptive management approach where scientists and land managers work together).

129. Passive adaptive management uses predictive modeling based on present knowledge to inform management decisions. As knowledge is gained, the models and management decisions are adapted accordingly. Carl J. Walters & Ray Hilborn, *Ecological Optimization and Adaptive Management*, 9 ANN. REV. ECOLOGY SYS. 157, 172-73 (1978). Active adaptive management involves changing management strategies altogether to test completely new hypotheses. *Id.* at 177-78. While the goal of passive adaptive management is to improve existing management approaches, the goal of active adaptive management is to learn by experimentation to determine the best management strategy. Carl J. Walters & C.S. Holling, *Large-Scale Management Experiments and Learning by Doing*, 71 ECOLOGY 2060, 2060-2061 (1990).

management:[130] It is often characterized as "learning by doing."[131]

The current environmental challenge is one of uncertainty and change with potentially devastating effects on ecosystems and economies. Addressing such a challenge requires a flexible approach that enables responsiveness to the acquisition of more data and input about the problem and its impacts. Unfortunately, land conservation techniques have largely failed to incorporate principles of adaptive management.[132] Not only are current land protection strategies static, but they are piecemeal. We lack comprehensive conservation planning that acknowledges both the changing nature of the environment and the role that humans can play in promoting ecosystem health.

D. *Conservation Easements Are Illusory*

Under the Uniform Conservation Easement Act, federal tax law, and most state statutes, conservation easements are perpetual.[133] However, it is unrealistic to assume that these conservation easements will actually be perpetual or even long lived because they may be too easily terminated and go underenforced.

There are two key conflicting concerns with conservation easements. First, some groups, for example conservation biologists, may be uneasy with conservation easements because they are perpetual. Alternatively, others, for example conservationists, may worry about conservation easements precisely because they do not last. One group worries that long-term agreements may prevent

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130. Carol Murray & David Marmorek, *Adaptive Management and Ecological Restoration*, *in* ECOLOGICAL RESTORATION OF SOUTHWESTERN PONDEROSA PINE FORESTS 417-428 (Peter Friederici ed., 2003). *But see* Melinda Harm Benson, *Adaptive Management Approaches by Resource Management Agencies in the United States: Implications for Energy Development in the Interior West*, 28 J. ENERGY & NAT. RESOURCES L. 87, 88 (2010) (discussing the United States' switch to more adaptive management).

131. Walters & Holling, *supra* note 129, at 2064.

132. *See, e.g.*, Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1, 25-26 (2009); Adena Rissman et al., *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 717 (2007) (noting that most of the conservation easements the authors studied did not specifically allow adaptive management).

133. For a landowner to receive federal tax benefits, conservation easements must be perpetual. 26 I.R.C. § 170(h) (2010). The UCEA (and most state statutes) declare perpetuity to be the default duration for conservation easements, but acknowledge that parties to the agreement could establish shorter terms. Unif. Conservation Easement Act § 2(c) (1981). *See also, e.g.*, ARIZ. REV. STAT. ANN. § 33-272(C) (2010); GA. CODE ANN. § 44-10-3(c) (2010).

future conservation efforts while the other group worries that agreements that do not endure will not be able to ensure land protection. Even more complicating is the fact that some groups or scholars, this author included, worry about both simultaneously. If the agreements do not last, they will not result in the bargained-for environmental protection. Alternatively, perpetual agreements that lock in land-use decisions could prevent embracing new conservation strategies or evolving scientific knowledge. Such conflicting views of conservation easements add to the reasons why they may be inappropriate tools for the job they seek to do.

1. *Conservation easements are too easily changed.*

Linked to concerns of enforcement is the fear that conservation easements may be too easily terminated or modified.[134] The public may be concerned about how easy it is for landowners or conservation easement holders to get out from under conservation easement obligations. In fact, there may be nothing to enforce if parties to the agreement are able to circumvent, modify, or terminate the conservation easement.

There are many methods for modifying and terminating conservation easements. In a few cases, state statutes outline the rules for modifying or terminating conservation easements.[135] However, most state statutes instruct courts to apply the law of easements to conservation easements.[136] Other statutes are silent on this issue.

Section 2(a) of the UCEA explains that conservation easements may be "released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[137] The comments following Section 2 make it clear that the drafters

134. Others may find solace in the myriad of ways conservation easements can be terminated. *See, e.g.*, Barton H. Thompson Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 609-10, 618 (2004). Enabling the termination of conservation easements may address concerns related to the perpetual nature of conservation easements. However, there is a tricky line to walk between (1) terminable conservation easements that can respond to legitimate changes in societal and ecological needs, and (2) easily terminated conservation easements that end outside of the public eye and confer solely private benefits.

135. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-272(A) (2010); ME. REV. STAT. tit. 33 § 477-A(2) (2009).

136. Unif. Conservation Easement Act § 2(a). *See also, e.g.*, MINN. STAT. ANN. § 84c.02(a) (2010).

137. Unif. Conservation Easement Act § 2(a).

intended conservation easements to follow state law regarding traditional easements except for the common law impediments to negative easements in gross.[138] Several states have adopted this language outright.[139] The statement alone, however, does not reveal much about conservation easement modification and termination.

Thus, to determine the rules for conservation easement modification and termination in states adopting the UCEA's approach, one must look to state laws regarding traditional easements. Generally, easements can terminate by agreement of the parties, release, abandonment, merger, estoppel, prescription, fulfillment of purpose, or impossibility.[140] This means theoretically that in many states, a conservation easement holder and the burdened landowner may make private agreements about the land outside of courts and beyond public review, including releasing the landowner from any obligations or burdens.[141]

Examples of land trusts modifying conservation easements are plentiful.[142] Many land trusts are now going through organized processes to update their conservation easements—a process that includes some amendments to conform with local laws and the Land Trust Alliance's Standards and Practices.[143] Land trusts seeking accreditation may find amendment necessary to meet

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138. *Id.* § 2 (comment).

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

140. 4-34 POWELL ON REAL PROPERTY § 34.18 (Mathew Bender, ed. 2010).

141. It is not even clear that a third-party enforcer named in the agreement would have the ability to prevent dissolution or modification in such cases.

142. *See, e.g.*, Orange Cnty., Resolution Approving an Amendment to Conservation Easement Deeded by John and Carolyn Lloyd to Orange Water and Sewer Authority and Orange County (Dec. 11, 2008), including Memorandum from the Board of Directors of the Orange Water and Sewer Authority from Ed Holland, Planning Director (explaining that the amendment was necessary to confirm to a landowner violation and mistakes in recorded property map), Orange Cnty. Bd. of Cnty. Comm'r 4-f, Nov. 6 2008 Bd. Meeting (Orange Cnty. Cal. 2008), *available at* http://www.co.orange.nc.us/occlerks/0811064f.pdf.

143. For more on the accreditation process, see the Land Trust Accreditation Commission's website. LAND TRUST ACCREDITATION COMMISSION, http://www.landtrustaccreditation.org/ index.php (last visited Jan. 14, 2011). There are currently 105 accredited land trusts with 27 applications pending. *Id.*

accreditation requirements. Although such amendments are likely to be either benign or beneficial to land conservation, the fact that amendments can be done easily and without a public process may indicate that the amendment process is inadequate.

Land trusts may also modify conservation easements to comply with landowner practices or landowner violations. Land trusts periodically discover landowner (or neighbor) violations of conservation easement terms. Often these violations occur because a landowner did not fully understand or know about the conservation easement terms. Where the landowner has violated the building envelope requirements or improperly removed trees, for example, land trusts face a quandary of how to proceed.[144] Land trusts may not deem such violations worthy of legal action or may consider restoration of the property too onerous.[145] Or they may obtain some other conservation benefit (or funds for conservation) from the landowner as compensation for the violation. Therefore, the conservation easements holder may agree to modify the conservation easement to align with the current state of the property or negotiate a settlement regarding payment of damages.[146]

In *Bjork v. Draper*, an Illinois appellate court held that a land trust could amend a conservation easement without court approval.[147] The court dismissed the idea that allowing amendment could affect the perpetuity aspect of a conservation easement, explaining that it is the general purposes of the

144. Many land trusts have written policies regarding discovery of conservation easement violations. *See, e.g.*, *Conservation Easement Violation Policy*, THE TRUST FOR LAND RESTORATION, http://www.restorationtrust.org/TLR_exhO-0103.pdf (last visited Jan. 14, 2011) (explaining in subsection 8 that deciding how to proceed against a violation includes consideration of public perceptions as well as legal responsibilities and likelihood of prevailing in court).

145. If the landowner is a board member or potential future donor, maintaining a good relationship with the landowner may be more important than recovering the ecological value of what was lost.

146. For example, the Sonoma Land Trust recently negotiated a settlement with a landowner who had violated the terms of an agricultural easement. Although the land trust views the outcome favorably, part of the settlement involved allowing the farmer to place dredge and fill on the land in a way that violated the terms of the conservation easement. *Sonoma Land Trust Successfully Defends Easement*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/ conservation/conservation-defense/conservation-defense-news/sonoma-land-trust-successfully-defends-easement/ (last visited Jan. 14, 2011).

147. Bjork v. Draper, 886 N.E.2d 563, 573 (Ill. App. Ct. 2008). Despite that holding, however, the Illinois court did not permit the proposed development because it conflicted with other provisions in the conservation easement.

agreement that must be upheld in perpetuity not specific individual requirements.[148] As this is the only case to address the issue, it is not clear whether this approach will be adopted in other states or withstand high court review.

There is a lot of support for the proposition that charitable trust principles apply to conservation easements. Scholars argue that donated conservation easements are like any charitable asset acquired for a particular charitable purpose.[149] In such cases, termination or significant modification of conservation easements must adhere to charitable trust principles and involve an equitable proceeding. Such proceedings would only be triggered where seeking termination or significant modification of a conservation easement.[150] Where proposed amendments are consistent with the purposes of the agreement, no proceeding is necessary and the parties are free to modify the terms of the agreement consistent with state property and contract law.[151] Land trusts are also releasing and modifying conservation easements where there are opportunities for beneficial land swaps. A recent land swap in Avon, Connecticut illustrates some of the issues that arise with such swaps. In the town of Avon, a Hartford suburb, some community members were concerned about a land swap proposed by the Avon Land Trust and Sunlight Construction, Inc.[152] The Avon Land Trust swapped a 3.8-acre parcel for a 16-acre parcel.[153] The smaller parcel previously held by Avon Land Trust was

148. *Id.*

149. Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 678-81 (2007).

150. *Id.* at 681 n.27 (explaining that amendments consistent with conservation easement purposes do not require cy pres proceedings).

151. It is not clear whether courts would extend these principles to cover conservation easements protecting federal land or created by sale, condemnation, or exaction. Nancy McLaughlin has argued that the doctrine should extend to all nonfederal conservation easements to avoid compromising public support of or faith in the tool. *Id.* at 702.

152. Barbara Thomas, *Application Involving Land Swap Raises Concern*, THE AVON NEWS, Jan. 22, 2010, *available at* http://www.foothillsmediagroup.com/articles/2010/01/22/avon/news/doc4b4d0539c8fa4027350904.txt.

153. Nora Oakes Howard, Letter to the Editor, *Yes, the Land Trust Can Be Trusted*, THE AVON NEWS, Jan. 11, 2010, *available at* http://www.foothillsmediagroup.com/articles/2010/01/11/opinion/doc4b47c13e87653268473058.txt; Barbara Thomas, *Avon TPZ Has No Jurisdiction over Land Swap*, THE AVON NEWS, June 26, 2010, *available at* http://www.foothillsmediagroup.com/articles/2010/06/26/avon/news/doc4c228235d54de329431957.txt.

encumbered by a deed restriction requiring the land to remain public.[154] Instead, Sunlight Construction is now planning residential subdivisions for the area.[155] The 16-acre parcel is arguably more valuable to the public. It is not only larger, but it will have developed trails and public spaces. One biologist has also asserted that the 16-acre parcel has unique ecological values.[156] Community members were surprised that the deed restrictions could be ignored[157] and sought recourse from the Planning and Zoning Commission, which stated that it had no power to interfere with these types of agreements between private parties.[158] Ultimately, the Commission approved the swap and the developer proceeded with building an eight-lot subdivision on the previously encumbered land.[159]

In some ways, this type of swap represents actions that conservationists want to encourage. The Land Trust believes it obtained greater public benefit by this arrangement. However, it may worry some that the land trust is able to dissolve perpetual deed restrictions. The community sentiment appeared to turn on how people felt about Avon Land Trust.[160] In letters to the editor, the Avon community debated whether Avon Land Trust is a trustworthy organization.[161] The debate about the land trust's actions largely ignores the fact that the Connecticut Attorney General approved the exchange.[162] Despite the Attorney General's

154. Thomas, *supra* note 152. This parcel was encumbered by a deed restriction instead of a conservation easement, but the dispute highlights some of the debates that arise for community members when what they believed would be perpetual land restrictions terminate.

155. *Id.*

156. Thomas, *supra* note 152.

157. Greg Frey, Letter to the Editor, *Can You Trust the Avon Land Trust*, THE AVON NEWS, Dec. 31, 2009, *available at* http://www.foothillsmediagroup.com/articles/2009/12/31/opinion/doc4b3d33cb01a3b132083526.txt.

158. Thomas, *supra* note 152.

159. Barbara Thomas, *Avon Land Swap Applications Approved*, THE AVON NEWS, July 27, 2010, *available at* http://foothillsmediagroup.com/articles/2010/07/27/avon/news/doc4c4750ae32ad7016052284.txt.

160. Greg Frey, Letter to the Editor, *Can You Trust the Avon Land Trust*, THE AVON NEWS, December 31, 2009, available at http://www.foothillsmediagroup.com/articles/2009/12/31/opinion/doc4b3d33cb01a3b132083526.txt.

161. Howard, *supra* note 153. Howard's mother donated the smaller parcel that the Avon Land Trust swapped. Howard, who endorses the swap, indicated in her letter to the editor that her mother trusted the land trust community.

162. *Compare* Barbara Thomas, *Land Swap Between Avon Land Trust and Private Citizens*

approval of the swap, residents abutting the currently restricted parcel were not informed of the change and were confused as to what "perpetual" restrictions mean when they can be altered in this way.[163]

The ability of land trusts to alter or release conservation easements is unsettled because few courts have considered the issue. Although courts appear inclined to enforce conservation easements and uphold their terms where conservation easement holders and public agencies pursue violators, there is little to indicate that courts would be critical of modifications or releases where conservation easement holders and landowners are in agreement or where the attorney general chose not to chime in on the issue.

2. *Conservation easements are underenforced.*

Enforcement problems may arise when parties who have the ability to enforce conservation easements are either unable to bring enforcement actions or choose not to bring enforcement actions. Conservation easement holders, specifically named third parties, and sometimes other legal entities, have the right to enforce conservation easements.[164] However, it is not clear what would happen if these parties fail to enforce a conservation easement. With few exceptions, there is no duty to enforce.[165]

Many conservation easements are held by local land trusts. Land trusts come in a variety of shapes and sizes, but are generally nonprofit organizations with conservation as a central goal that work to achieve their mission by acquiring fee title or conservation

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Draws a Crowd, THE AVON NEWS, June 11, 2010, *available at* http://www.foothillsmediagroup.com/articles/2010/06/11/avon/news/doc4c12a07b228dc863185908.txt, *with* Howard, *supra* note 153, *and* Frey, *supra* note 160.

163. *Cf.* Frey, *supra* note 160.

164. *See* Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Land*, 41 NAT. RESOURCES J. 373, 389 (2001).

165. State conservation easement statutes do not require enforcement of conservation easements; they just enable it. *See, e.g.*, Unif. Conservation Easement Act § 3(a) (1981). However, many land trust advocates (including the Land Trust Alliance) believe land trusts have a duty to enforce any violations. A land trust's consistent failure to enforce conservation easements could jeopardize its tax-exempt status. Whether government holders of conservation easements have a duty to enforce is a different inquiry. There is no tax-exempt status at risk and enforcement duties are generally discretionary.

easements.[166] It is not clear whether these groups have capacity to both monitor and enforce complex conservation easements well into the future. These groups are often small all volunteer organizations.[167] Some scholars worry that land trusts will spend their energies securing conservation easements without thinking thoroughly about enforcement.[168]

To enforce conservation easements, the first step is to monitor the land to ensure that there are no violations.[169] Depending on the funding and staff of an organization, this may be done in a structured manner, visiting the land each month, or could be a less-organized program of driving by occasionally without a set schedule.[170] Many conservation easements have provisions regarding monitoring, generally giving the conservation easement holder the right to enter the property to monitor compliance with the agreement.[171] Often the right only enables the holder to enter the land once a year.

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166. *E.g.*, *FAQ: Land Trusts*, LAND TRUST ALLIANCE, http://www.landtrustalliance.org/ conservation/landowners/faqs-1/faq-land-trusts/ (last visited Jan. 14, 2011).

167. This is of course not always true. The Nature Conservancy is one of the largest conservation easement holders. It is a well-established group with significant funding, history, and staff. But the number of land trusts is growing at a rapid pace. The Land Trust Alliance recognizes almost 1,700 land trusts nationwide, up from 1,200 five years ago. ALDRICH & WYERMAN, *supra* note 49.

168. *See, e.g.*, David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 348 (1995). In a recent conversation with a former land trust employee, I learned that this was in fact her land trust's practice: to get as many acres under conservation easement as possible. Land trust promotional literature also reflects such attitudes, often emphasizing acreage protected with little focus on the monitoring and enforcement duties. Opportunistic acquisition dominated the beginning of most land trusts and they are only now turning to management and enforcement concerns, embodied in the Land Trust Alliance's new accreditation process. LAND TRUST ACCREDITATION COMMISSION, http://www.landtrustaccreditation.org/index.php (last visited Jan. 14, 2011); SOLID GROUND CONSULTING GROUP, *supra* note 108.

169. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 143 (2d ed. 2005).

170. Many violations are reported by neighbors. Adena Rissman & Van Bustic, *Land Trust Defense and Enforcement of Conserved Areas*, CONSERVATION LETTERS 1, 3 (2010).

171. Rissman, *supra* note 132, at 716 (discussing lack of quantitative monitoring programs for conservation easements and the limits of ecological monitoring). James L. Olmsted, a conservation easement attorney in Oregon, is seeking to compile a database of conservation easements from around the United States. Although far from comprehensive, the documents available there offer a good sampling of conservation easements held by land trusts. James L. Olmsted, *Conservation Easement Examples*, CONSERVATION & PRESERVATION COUNSEL, LLC., http://www.landprotect.com/Conservation_Easements.html (last visited Jan. 14, 2011).

A 1999 survey in the San Francisco Bay area examined 315 conservation easements and found forty-three violations.[172] The survey found more reported violations on conservation easements held by land trusts than on conservation easements owned by public entities, but it may be that private groups were more diligent in their enforcement and thus more likely to find violations.[173] Furthermore, it is not only small, inexperienced or capacity-lacking land trusts that are of concern. Many large land trusts become so entrenched in their business and working with landowners that they may overlook transgressions.[174] Some groups may emphasize maintaining good relationships with landholders over enforcing conservation easements.

As discussed above,[175] land trusts may simply not be able to afford the expenses involved with enforcing conservation easements. Being a holder of a conservation easement gives these groups a legal tool they can use in litigation, but the tool has little meaning if the groups cannot afford litigation. Additionally, although the right to enforce against an underlying landowner may seem secure, it is not clear how to enforce against a third-party violator.

One of the concerns conservationists had with using traditional servitudes to meet conservation goals was uncertainty as to whether a court would enforce the agreement. These same concerns about enforceability remain with some conservation easements and may cause conservation easement holders to seek mutual modification of agreements instead of litigating the original terms.

In some cases, the conservation easement holder may no longer be interested in maintaining a conservation easement. With changes in the environment (and with new information about the environment), a conservation easement holder may realize that the conservation easement is yielding only minimal conservation benefit. In such cases, the organizations may seek to spend their resources on areas the organizations identify has having greater benefit or potential conservation value.[176]

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172. BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS 1, 23 (1999).

173. *Id* at 14. Around seventy-five percent of land trusts monitored their easements regularly while only thirty percent of public entities did.

174. *See* Farrier, *supra* note 168, at 349-50.

175. *See supra* Part V.B.

176. However, a landowner may be reluctant to dissolve a conservation easement for multiple reasons. In particular, a landowner may be concerned about the tax

Concerns about the desire and ability of organizations to enforce conservation easements foster the worry that conservation easements are likely to go underenforced. These institutional concerns combine with the fact that there may be few penalties for conservation easement holders who decide not to monitor or enforce the agreements.

VI. PROPOSAL

The widespread use of conservation easements has lulled us into a false sense of security. We believe that we have been protecting land and working against the ills of climate change, but it is not clear that we have been successful in that endeavor. We must question the use of perpetual private agreements as a proper land conservation method in the context of environmental change. The previous section outlined several areas of concern related to the use of conservation easements. Two changes (one straightforward and one daunting) could ameliorate these concerns. First, conservation easements should not be perpetual. Use of renewable term agreements can address many of the problems discussed above.

The second step in improving the use of conservation easements is a more challenging one to implement. Renewable term conservation easements will work best to achieve environmental goals where they are part of a holistic conservation-planning framework. To avoid piecemeal preservation and an overemphasis on ecologically marginal lands, renewable term conservation easements should be part of regional conservation planning efforts.

Limiting conservation easements to a term of years and using them as part of a comprehensive land conservation planning program will address the concerns raised above and make the conservation easement an important and useful part of our land conservation portfolio.

A. *Renewable Term Conservation Easements*

Conservation easements vary in duration. Most conservation easements are perpetual. Indeed, the desire to make perpetual land restrictions was one of the chief reasons states passed

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consequences of donated conservation easement dissolution.

conservation easement statutes. Because one of the UCEA's goals is to enable perpetual conservation easements, it makes perpetuity the default duration.[177] Notably, however, the language of the UCEA is permissive, not mandatory; the UCEA does not *require* conservation easements to be perpetual. Most state statutes use this same language, making perpetuity the default, but not the mandatory, duration.[178] Additionally, to qualify for federal charitable tax benefits, donated conservation easements must be perpetual.[179]

Not all states follow the UCEA model of default perpetuity. Some states have specific time limits on conservation easements. A few states require minimum durations. For example, Kansas limits conservation easements to the lifetime of the grantor.[180] In Alabama, conservation easements may be in perpetuity, but the default duration is "the lesser of 30 years or the life of the grantor, or upon the sale of the property by the grantor."[181] In Montana, conservation easements may be perpetual, but may not be for less than fifteen years.[182] West Virginia is a bit more stringent, requiring that conservation easements last a minimum of twenty-five years.[183] California,[184] Florida,[185] and Hawaii[186] require conservation easements to be perpetual while North Dakota prohibits it.[187]

State legislatures should amend their conservation easement statutes to change the duration requirement—to prohibit perpetual conservation easements and usher in renewable term

177. Unif. Conservation Easement Act § 2(c) (1981) (specifying that "...a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.").

178. Twenty-four states have adopted some version of the UCEA. Uniform Law Commissioners, *UCEA Fact Sheet*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp (last visited Jan. 14, 2011). Even non-UCEA states have perpetuity as the default duration. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 49-0305(1) (2010).

179. I.R.C. § 170(h) (2010).

180. KAN. STAT. ANN. § 58-3811(d) (2010). In Kansas, the grantor can also revoke the conservation easement at anytime.

181. ALA. CODE § 35-18-2(c) (2010).

182. MONT. CODE ANN. § 76-6-202 (2009).

183. W. VA. CODE § 20-12-4(c) (2010).

184. CAL. CIV. CODE § 815.2(b) (2010).

185. FLA. STAT. § 704.06(2) (2010).

186. HAW. REV. STAT. § 198-2(b) (2010).

187. N.D. CENT. CODE § 47-05-02.1(2) (2009) (restricting conservation easements to ninety-nine years).

conservation easements.[188] Renewal term conservation easements insert a reassessment date into the agreements. It would require (in fifteen years, for example) reevaluation and renegotiation of conservation easements. Determining the appropriate course of action at the end of the term is the challenge. Creating renewable conservation easements enables preservation of the land while enabling slight (or, if appropriate, major) modifications to account for changes in the natural or social environment.

The conservation easement holders are the appropriate entity to hold the decision making power here, assessing whether the conservation easement should be maintained. There are already models in conjunction with agricultural land preservation that can serve as guidance for assessing the right course of action at the end of the term in relation to issues like tax assessment and payments to landowners for increased restrictions.[189] The key is to change default presumptions about conservation easements. Instead of planning for perpetuity and then scrambling to change course when that becomes impractical or undesirable, start with an assumption that conservation easements will only be around for a limited duration. That assumption will change not only the availability of tax breaks for conservation easements but also decision-making processes for assessing when to use conservation easements.

1. *Common law concerns.*

Renewal term conservation easements insert a reassessment date into the agreement, enabling periodic reevaluation. This would assist in combating the concerns that served as the common law foundations for impediments to such agreements. For example, the act of revisiting and rerecording conservation

188. Assessing the appropriate length of the term requires empirical analysis involving assessment of valuation methods and societal goals that is beyond the scope of this article. The term must be meaningful enough that the restriction is worth the effort of negotiating and drafting it but not so long that it prohibits incorporation of adaptive management programs and societal reassessment. A term somewhere on the order of fifteen or twenty years is likely appropriate.

189. One useful example is California's Williamson Act. California Land Conservation Act of 1965, CAL. GOV'T CODE §§ 51200-51297.4 (2010). The Williamson Act creates temporary (but renewable by landowner) restrictions on land in exchange for favorable tax assessments. At the end of the Williamson Act term, the landowner can decide to renew and continue to receive the benefit. If the landowner opts out, her property taxes increase. There are onerous penalties for withdrawing land before expiration of the term.

easements will provide notice to subsequent purchasers. Even if a subsequent landowner finds herself holding land burdened by a conservation easement, the burden on compliance will not be a perpetual one.

The common law disfavored restraints on alienation. Although term conservation easements burden land, the restriction will not last generations into the future. Instead, each generation will have the opportunity to decide whether the conservation easement should stay in place. This is a benefit not only to the landowner but also to the holder who can determine whether the benefit of the restriction merits the resources invested. This ameliorates concerns associated with intergenerational equity and paternalism.

2. *Privatization concerns: democracy and accountability.*

Shifting to renewable term conservation easements would reduce accountability concerns. Renewal can provide an opportunity to assess landowner compliance and conservation easement holder enforcement. In states with conservation easement statutes requiring approval of agreements by government agencies, the requirement to renew the agreements would enable government entities to evaluate whether the agreement continues to yield a benefit.

Switching from perpetual conservation easements to term conservation easements also changes the tax discussion. Professor Nancy McLaughlin, Attorney Stephen Small, and others have written extensively about the tax implications of conservation easement donation.[190] One noted problem area is appraisal.[191] Currently, landowners who donate perpetual conservation easements (and meet other requirements) can receive a federal tax break. To merit such a benefit, the conservation easements must be (1) donated and (2) perpetual.[192]

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190. *See, e.g.*, McLaughlin, *supra* note 70; STEPHEN J. SMALL, THE NEW CONSERVATION TAX INCENTIVES — SOME THINGS WE KNOW AND SOME THINGS WE DON'T KNOW (2007) *available at* http://www.landtrust.org/TaxInfo/steven_small_perspective_new.pdf.

191. Erin B. Gisler, Comment, *Land Trusts in the Twenty-First Century: How Tax Abuse and Corporate Governance Threaten the Integrity of Charitable Land Preservation*, 49 SANTA CLARA L. REV. 1123, 1137 (2009).

192. Of course, many conservation easements are purchased and exacted. *See generally* Owley Lippmann, *supra* note 26. There is no comprehensive assessment of conservation easement creation, and the numbers vary by jurisdiction. Where conservation easement are exacted or sold, there is no concern about the charitable tax deduction, but property tax concerns might arise. The fact that there are many non-donated conservation

Putting an end to perpetual conservation easements would mean putting an end to the federal tax break as currently structured. Without a federal tax benefit, the number of donated conservation easements would undoubtedly decrease. Based on recorded abuses of this tax break, such a move may not be a bad thing. More significantly, however, switching to renewable term conservation easements, which give a more appropriate assessment of the likely conservation value of the agreement, will enable better valuation of the restriction. Quite simply, perpetuity is difficult to predict and hard to value. While valuation problems remain with term conservation easement, it may be easier to assess the actual value the public will receive and the potential revenue lost by the landowner. If Congress still values the benefit received, it can amend the Internal Revenue Code to accommodate renewable term conservation easements.

3. *Ecological concerns.*

The use of perpetual conservation easements does not promote an ecologically sound land-conservation strategy. Land protection by conservation easement is a haphazard endeavor without a coherent strategy regarding acquisition, management, or restriction. Ending the perpetual nature of conservation easements may not alleviate this concern. We are still likely to see a piecemeal acquisition process and widely varying levels of protection within agreements. This is why conservation easements must be part of a comprehensive land protection strategy. Within such a strategy, renewable term conservation easements remain superior to perpetual conservation easements because they accommodate the incorporation of adaptive management principles. It is a significant step on the path to making conservation easements more ecologically sound.

Conservation easements place static restrictions on a changing landscape. Long-term unchanging agreements fail to recognize and work with the realities of a changing world. Requiring renewal

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easements operating in the United States indicates that the use of conservation easements would continue (although undoubtedly would diminish) even where federal tax breaks are unavailable. This is further bolstered by the use of conservation easements in states where the state enabling act directly conflicts with requirements of federal tax law like North Dakota (prohibiting perpetuity while the IRS requires it), N.D. CENT. CODE § 47-05-02.1(2) (2009) and West Virginia (prohibiting limitations on mining in conflict with IRS code), W. VA. CODE § 20-12-4(c) (2010).

of conservation easements creates an automatic framework for incorporating principles of adaptive management. During the renewal process, the parties to the agreement (and, where applicable, third-party enforcers and government agencies) can reexamine the conservation value of the conservation easement and the information that served as the basis for the agreement. Conservation biologists can review the landscape and evaluate whether the restrictive terms should be modified.

4. *Illusory issue.*

As detailed above, some perpetual conservation easement agreements may be illusory. There appear many ways for conservation easements to terminate or change without any public review or notice. Renewable term conservation easements may be subject to some of the same mechanisms of termination and modification as perpetual conservation easements, but it is less likely that such mechanisms would play as pivotal a role or be met as warmly by courts. Where a conservation easement is only going to last twenty years, for example, it might be harder to persuade a court to dissolve or modify a conservation easement based on traditional property law principles if the court feels that the parties to the agreement could simply wait things out. Any concerns associated with marketable title acts will also dissipate as the agreements must be reevaluated and rerecorded periodically.

Shortening the life of conservation easements may not increase the likelihood of their enforcement. Conservation easement holders may still lack the capacity or desire to enforce the agreements. However, by periodically reevaluating the agreements and the conservation benefit being derived therefrom, conservation easement holders will be more aware of compliance concerns and may face more pressure to ensure the agreements are yielding a conservation benefit. Calling attention to the conservation easements and requiring reexamination should yield stronger pushes from constituencies of the conservation organizations or government entities to uphold their ends of the bargain. Increasing transparency may increase enforcement; at the very least, it should expose conservation easements with minimal value due to lack of enforcement.

There are also concerns that conservation easements may not be enforceable. Because few conservation easements have been litigated, many provisions have not been examined by courts.

Switching to term conservation easements instead of perpetual conservation easements may not change this dilemma. However, where conservation easements are revisited and reevaluated, they can be updated to reflect changing understandings of the law. Furthermore, such a process can enable parties to the agreement to easily correct any flaws or omissions present in earlier versions.

5. *Challenges.*

Shifting from perpetual to renewable term conservation easements unsurprisingly introduces some new challenges. Land trusts and government agencies have turned to conservation easements in their efforts at long-term land protection. Renewable term conservation easements do not offer the same sense of certainty regarding such protection. Although the sense of certainty may be a false one, it is undeniable that renewable term conservation easements will not be as attractive to conservationists seeking perpetual land protection.

Additionally, there will be multiple challenges associated with taxes. Removing the perpetuity aspect of conservation easements will prevent landowners from receiving charitable tax deductions when they donate conservation easements under the current federal statutes. Beyond the unavailability of this deduction though, federal tax law may discourage donation of renewable term conservation easements because of gift tax liabilities.[193] If true, this may lead to a decline in the number of donated conservation easements but should not affect conservation easements created through other methods.

Finally, creating a structure in which conservation easements are periodically reviewed and potentially renegotiated increases the transaction costs of land protection. Higher transaction costs may discourage the use of conservation easements. Because renewable term conservation easements are desirable for other reasons, the increased transaction costs are worth the improved decision-making process and having responsive tool. The next task then becomes exploring ways to reduce the transaction costs. Creating structured agreements where the renewal and amendment processes are relatively straightforward will help, as will clear rules regarding roles of holders, landowners, and third-party beneficiaries.

193. Cheever & McLaughlin, *supra* note 57, at 10,226 n.37.

B. *Holistic Conservation Planning Efforts*

Using renewable term conservation easements instead of perpetual conservation easements can provide a more realistic sense of what is being preserved and what work is left to do. However, the use of conservation easements alone is inadequate to form a robust land conservation strategy. It is important to preserve not only plots of land, but also conserve the underlying biological processes.

One particular concern associated with conservation easements is their haphazard, piecemeal nature. Preserving land through scattered private agreements leaves key ecological areas underprotected. Such a strategy fails to ensure the availability of important ecological features, such as corridors, while increasing edge habitat. Instead, conservation easements should be part of a comprehensive strategy. A conservation planning program should serve to identify important areas and ecosystems for protection. Conservation easements can then serve as a tool to protect identified areas.

The first step in such a process is to assemble stakeholders, planners, and scientists to map community needs from both ecological and social standpoints. Such endeavors can draw upon already existing planning processes such as county general plans or species habitat planning. The effectiveness of a systematic conservation planning process comes from efficiency in using limited resources to achieve conservation goals. Efficient land protection techniques may very well include the use of renewable term conservation easements. Thus, conservation easements may yet provide a helpful way to protect land, but to do so, they must be part of a broader conservation planning program. Additionally, the planners must understand the realities of the tool.

Evaluating the needs of the community should include evaluating ecological protection needs and crafting a plan for land protection that involves various land-use tools, including, where appropriate, conservation easements.

VII. CONCLUSION

Conservation easements developed as a creative method of using private property rights, contracts, and the free market to increase land protection beyond what was already occurring through public means, such as public landownership and

regulation. In essence, conservation easements enable private regulation on a parcel-by-parcel scale. Even where government entities hold the conservation easements, the regulatory aspect remains a private one because the nature of the restriction differs from one derived from open regulatory processes like notice and comment rulemaking.

There are several concerns with the use of conservation easements. The same concerns that prevented the use of private perpetual easements in gross and similar servitude mechanisms have not disappeared simply with the creation of statutes enabling conservation easements. Such statutes alleviate some worries associated with transferability of both the underlying land and the conservation easement. However, there may still be problems with notice or courts may be concerned by burdensome restraints on alienation.

Also worrisome is the rather private nature of what should be a public venture. When private organizations (or even government entities) enter into private agreements with landowners, the restriction and its enforcement occur outside of the public sphere. This absence of governmental involvement is one of the chief benefits of donated and sold conservation easements noted by scholars.[194] Landowners can donate or sell a conservation easement to a local land trust, keeping the transaction both local and out of government hands.[195] Distrust of government may make conservation easements preferable to government regulation of land-use planning. However, the lack of recognized government involvement is also cause for concern. There is little public oversight regarding the terms of the agreement and nearly no mechanisms to ensure enforcement of these bargained-for rights associated with public benefits like tax breaks.

Furthermore, the use of conservation easements may do more harm than good in terms of promoting an ecologically sound land-conservation strategy. First, land protection by conservation easement is often a haphazard endeavor without a coherent strategy regarding acquisition, management, or restriction.

194. *See, e.g.*, Christine Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. 218 n.21 (2008); *see also* Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1265 (2009) (explaining interviewees' views that conservation easements are private agreements and not the business of government).

195. Conservation easements often have ties to government, because of funding or creation, but these ties are not necessarily felt by the landowner.

Conservation easements place static restrictions on a changing landscape, only more worrisome for their perpetual nature. Long-term unchanging agreements fail to recognize and work with the realities of a changing world. Landscape change and our understanding of the changing landscape are accelerating, and our land preservation tools should account for that.

Finally, there are strong arguments for the proposition that conservation easements will not live up to their intended purpose. There appear many ways for conservation easements to terminate or change without public review or notice. All these factors together yield a situation of questionable land protection. Yet, public entities and conservationists are only increasing their use of this tool.

The use of conservation easements promotes complacency. Touting the successful proliferation of conservation easements, it may appear that the country is doing a bang-up job of attacking the land protection problem. This reduces motivation to craft comprehensive land protection statutes and regulations. In the end, policymakers are lulled into a false sense of security regarding the need for land protection and they under-regulate and under-preserve.

Some of these concerns would be lessened by the simple shift from perpetual conservation easements to renewable term conservation easements. Term conservation easements enable incorporation of adaptive management, responding to the changing world in ecological terms. Renewable term conservation easements also facilitate response to changing societal interests regarding land. Additionally, term conservation easements improve valuation of the restrictions. Although the current federal tax law only enables charitable deductions for perpetual conservation easements, that law can change to value term conservation easements if society so desires. Term conservation easements can also address some of accountability concerns by creating opportunities for revisitation and reevaluation.

Conservation easements are a tool for achieving land conservation goals. However, there is a tendency to misuse and misvalue this tool. Various factors have led government agencies and others to over-enthusiastically embrace conservation easements. Ending the use of perpetual conservation easements and replacing them with term conservation easements can lead to better decisions about when and how to use conservation

easements. The continued use of conservation easements, term or perpetual, will likely only be successful for land conservation efforts where incorporated into a holistic land protection strategy. Situating conservation easements in a larger program of ecosystem planning and ending the perpetuity requirement will improve the use of the tool. Making conservation easements better will lead to better decisions about when and where to use them.

Note