Tribes as Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*

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* This Article and a companion article resulted from a year-long project sponsored by the Wayne Morse Center for Law and Politics, University of Oregon, as part of a two-year "Theme of Inquiry" on indigenous rights. Two symposium workshops brought together tribal, land trust, and government professionals to provide vision and case studies for the research. The authors would like to thank workshop participants Laura Baxter, former Tribal Lands Program Coordinator, The Trust for Public Land; Bowen Blair, Senior Vice President, The Trust for Public Land; James Honey, Program Officer, Sustainable Northwest; Bruce Jones, Natural Resources Program Director, Quinault Indian Nation; Joseph McCormack, Nez Perce Tribal Fisheries and Member, Board of Directors, Wallowa Land Trust; Jaime Pinkham, Watershed Program Manager, Columbia River Inter-Tribal Fish Commission; Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council; and Chuck Sams, National Director, Tribal & Native Lands Program, The Trust for Public Land. In particular the authors are indebted to Hawk Rosales for his review of early drafts. Any errors that remain are our own responsibility. Considerable thanks also go to Margaret Hallock and Elizabeth Weber of the Wayne Morse Center, and to Jill Forcier for providing invaluable administrative support for this project. This work is dedicated to Rennard Strickland.

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> The lands of the planet call to humankind for redemption. But it is a redemption of sanity, not a supernatural reclamation project at the end of history. The planet itself calls to the other living species for relief. . . . The lands wait for those who can discern their rhythms. The particular genius of each continent—each river valley, the rugged mountains, the placid lakes—all call for relief from the constant burden of exploitation.
>
> – Vine Deloria Jr., *God is Red*[1]

I. INTRODUCTION

This Article is the second part of a Work exploring tribal use of conservation trust mechanisms to assert traditional Native prerogatives on privately held lands in the United States. Part I of the Work presented this role as an interface between two separate movements: the Native environmental sovereignty movement aimed at protecting environmental resources located off the reservations, and the conservation trust movement created in response to the deficiencies of environmental law. Part I highlighted potential benefits to both Native and non-Native interests associated with this emerging tribal role and outlined four models of Native engagement.[2] Part II, this Article, seeks to develop the tribal role by evaluating the models according to criteria important to both Native and non-Native interests. The

1. VINE DELORIA, GOD IS RED 296 (2003).

2. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement,* 32 HARV. ENVTL. L. REV. (forthcoming Summer 2008).

four models describe different holders of conservation title (which can be easements or fee ownership): (1) the tribal holder; (2) the Native land trust holder; (3) the public agency holder; and (4) the non-Native land trust holder.[3]

In the first model, a tribal government itself holds conservation title. For example, the Klamath Tribes hold a 788-acre conservation easement on the Yainix Ranch in southern Oregon.[4] In the second model, a Native land trust operates in a manner similar to other land trusts, except it is controlled and managed by Native Americans for the benefit of one or more tribal communities. A Native land trust is independent from any one tribal government. The InterTribal Sinkyone Wilderness Council in Northern California and the Native Land Conservancy in Alaska are examples of Native land trusts. In the third model, a federal agency, such as the U.S. Fish and Wildlife Service, holds conservation title designed to benefit tribal interests, either directly or indirectly.[5] Finally, in the fourth model, existing non-Native land trusts develop and implement programs aimed at acquiring conservation title in order to protect tribal interests. The Trust for Public Lands (TPL), for example, has developed a wide-reaching Tribal & Native Lands Program.[6]

Exploring the potential strengths and weaknesses of each model should help tribes develop conservation strategies for imperiled lands and resources. Section I below begins with an explanation of private conservation tools and dynamics. It highlights particular issues that may arise as tribes implement the models offered in this Article. Section II compares the four models

3. Examples of these models are described in depth in Part I of this Work. *Id.*

4. *See* Duncan M. Greene, Comment, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 920 (2005).

5. *See* ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 8 (2d. ed. 2005). For the purposes of this Article, the possibility of the federal Bureau of Indian Affairs (BIA) holding conservation title in trust for a tribe is considered under the tribal holder model rather than the agency holder model. *See infra* Sections II.A.3 and II.C.1. Because the BIA's trust ownership of Indian property derives from federal Indian law, BIA ownership on behalf of tribes is distinct from other federal agency ownership of interests to protect tribal values.

6. *See* Trust for Public Land, *Tribal Partnerships*, http://www.tpl.org/tier3_print.cfm?folder_id=217&content_item_id=13226&mod_type=1 (last visited Mar. 6, 2008). TPL is a national, nonprofit, land conservation organization that helps conserve a variety of public and natural resources such as parks, community gardens, historic sites, rural lands, and other natural places. *See generally* http://www.tpl.org (last visited Mar. 6, 2008).

according to six criteria: (1) opportunities for conservation; (2) funding potential; (3) longevity of the holder; (4) opportunities for tribal management; (5) opportunities for tribal access and beneficial use; and (6) enforcement of the easement. Section III suggests measures to seed a tribal trust movement.

II. THE MECHANICS OF PRIVATE CONSERVATION

Tribes, land trusts, government agencies, and other actors must undertake numerous steps in meeting conservation goals. This section addresses some of the options and concerns presented by each of these steps: deciding whether to obtain fee ownership or a conservation easement over the land; choosing among various funding and financial arrangements available to secure property interests; determining who should hold an easement, considering the constraints presented by state property law and federal tax law; entering into partnerships; selecting transaction experts, such as The Trust for Public Land (TPL), as necessary, to formulate, negotiate, and close a transaction; setting the parameters of easements and deciding what types of activities to allow on the land; monitoring and enforcing agreements; and addressing the legal vulnerabilities of maturing easements.

A. *Fee Ownership Versus Conservation Easement*

When a land trust (or government agency) wishes to conserve land, it may either acquire the full property interest in land or acquire a conservation easement over land owned by another.[7] A conservation easement is a legally binding agreement between the owner of the land and a third party that is designed to permanently protect the land's conservation values by limiting development and other environmental impacts on the land. The owner of the property subject to the easement retains title to the land and may use and manage it for any purpose not inconsistent

7. A land trust—or grantor—may pursue individual transactions actively, or react to opportunities that present themselves. *See* Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 462-63 (2002) [hereinafter *Land Trusts*] (noting that "although land trusts sometimes acquire easements in a reactive manner, letting landowner requests, imminent sales or threats of development determine which easements they accept, an increasing number of land trusts engage in strategic planning in an effort to target their limited resources to the protection of key parcels that fit within broader programs of landscape preservation").

with the easement. The easement may run with the land in perpetuity, meaning that all subsequent owners are bound by the restrictions of the easement.[8] The primary right acquired by the holder is the right to prevent or severely limit certain undesired uses on the property, such as mining, water extraction, subdivision, building construction, road building, and industrial logging. The holder typically also acquires limited rights of access to the property for purposes of inspection and enforcement.

Where a land trust acquires conservation fee title to property, the ownership amounts to a public/private ownership. It is private in the sense that the property is not managed by any governmental agency. However, it is public in the sense that the property must be managed according to the conservation purposes set out in the state and federal laws that make the land trust a qualified holder of the property interest in the first place. An explicit and fundamental intent of these laws is the public benefit that conservation easements must provide. The land trust manages the property or easement in accordance with the trust's conservation mission. That ownership is much different than corporate ownership, which manages land for profit, or individual ownership, which manages land according to individual preferences.

B. *Funding Concerns and Financial Incentives*

1. *Financial arrangements of transfer.*

Conservation transactions invoke one of three types of financial arrangements: donations, purchases, or bargain sales.[9] First, an easement or fee title may be donated to the conservation holder (a land trust or sovereign). When an easement is donated, the value of the donation is the difference between the land's value with the easement and its value without the easement. Federal tax incentives may make donations an attractive option for a landowner.[10] Second, the conservation holder may purchase the

8. *See* JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 7 (1988).

9. Purchased easements are becoming more common than donated easements. Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 125 (2006).

10. *See* discussion *infra* Section I.B.3.

fee or easement, typically with funding gained from third parties. Grant programs that provide funding for such purchases often impose a layer of additional restrictions on the property beyond what the landowner and conservation holder are otherwise subject to as a result of the negotiation process, state law, or federal tax law. For example, funding programs might provide for mandatory public access,[11] a factor that may be detrimental to tribal objectives. Finally, the conservation holder may purchase the fee or easement, often at a bargain price (below market value), in which case the conveying private owner may benefit from some increment of tax deduction. In a bargain sale, the holder need not assemble funds for full market value.[12]

2. *Costs associated with a conservation transaction.*

In any of these financial arrangements, three types of additional costs should be considered before a land trust or sovereign purchases or receives an easement to protect tribal interests. First, property conveyances typically trigger transaction costs such as recording fees, attorneys' fees, appraisal fees, and excise taxes. In addition, a landowner and land trust can incur significant staff, legal, and overhead costs in developing and executing an easement. This can be a protracted process that sometimes takes several years to complete. Second, where a transactional expert, such as TPL, is brought in to formulate, negotiate, and close a transaction, there may be costs to cover staffing.[13] Occasionally, an organization with such expertise obtains

11. For example, in 1986, using funds raised through a bond issue for coastal public access, the California State Coastal Conservancy (SCC) loaned capital to TPL so that TPL could acquire fee title to 3845 acres in northwestern California from the Georgia-Pacific Corporation. At that time, SCC insisted on a public access easement over the property. Today, SCC holds an "irrevocable offer to dedicate," requiring the Native land trust that now holds fee title, the InterTribal Sinkyone Wilderness Council, to provide limited public access on its land. E-mail from Hawk Rosales, Executive Director of InterTribal Sinkyone Wilderness Council, to authors (Feb. 8, 2008, 03:34:55 PST) (on file with authors).

12. *See* BYERS & PONTE, *supra* note 5, at 249 (describing how agency acquisition programs may benefit from "bargain sales" where a landowner donates a percentage of the easement's value to expedite the transaction process, since the grantee does not have to spend time fundraising for the acquisition; "some programs have so many landowners competing to sell easements that the administering agencies generally give priority to landowners offering the greatest discount").

13. The role of a "broker" organization is discussed in more detail below in Section I.E.

outside funding to recoup these fees. In some cases, such fees may be reflected in a higher purchase price offered to the conservation buyer.

A third cost is a "stewardship fee," which is money typically placed in an interest-bearing "easement endowment fund" that provides for long-term monitoring, management, and enforcement of conservation goals for the property. Enforcing the easement may include costs related to the holder's legal defense of the easement, as well as those instances where easement violations result in damage to easement values that must be restored or otherwise cured. Maintaining an easement will always cost something, and the best way to ensure that there are funds available for enforcement is to establish an easement endowment fund solely for monitoring and defending the easement. Indeed, if the donor claims a tax deduction, the IRS regulations state that the donee must "have the resources to enforce the restrictions" of the easement.[14] Hence, grantees often create a stewardship fund at the time of the gift by soliciting a cash contribution from the donor or raising money from other sources.[15] Alternatively, some grantees may set aside a certain percentage of each year's revenue as a monitoring fund.[16]

3. *Tax incentives for private conservation.*

If certain conditions are met, a donor of a conservation easement may be eligible for federal income, gift, and estate tax deductions.[17] Internal Revenue Code (I.R.C.) section 170(h) sets forth three requirements for a conservation easement donation to be eligible for a charitable income tax deduction: the contribution must be (1) a "qualified property interest," (2) "exclusively for conservation purposes," and (3) to a "qualified organization."[18]

To meet the first requirement of a "qualified property

14. 26 C.F.R. § 1.170A-14(c)(1) (Westlaw 2008).

15. *See* BYERS & PONTE, *supra* note 5, at 124-25.

16. *See id.* at 126-27.

17. A landowner who donates a conservation easement may be eligible for state and local tax benefits as well.

18. I.R.C. § 170(h)(1) (Westlaw 2008). The requirements for tax deductions for charitable gifts are based on the income tax deduction rules. *See id.* § 2522(d) ("A deduction shall be allowed . . . in respect of any transfer of a qualified real property interest . . . which meets the requirements of section 170(h).").

interest," the easement must be granted in perpetuity.[19] For the second requirement, I.R.C. § 170(h) defines a "conservation purpose" as:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, (iii) the preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or (iv) the preservation of an historically important land area or a certified historic structure.[20]

Regarding the third requirement, a "qualified organization" under I.R.C. § 170(h)(3) includes certain religious, medical, and educational organizations, government units, and charitable entities.[21] A government unit includes a "State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."[22] Charitable entities include corporations, trusts, or community funds and foundations that meet the requirements of I.R.C. § 170(c)(2) so long as they receive a "substantial part of [their] support . . . from a government unit . . . or from direct or indirect contributions from the general public."[23] Non-profit groups that qualify under I.R.C. § 501(c)(3) are "qualified organizations" under I.R.C. § 170(h)(3) provided that they meet certain requirements regarding their sources of funding.[24] The question of which tribal entities fit the definitions under I.R.C. § 170(h)(3) is discussed in Section II.B.2 below.

In 2006, Congress expanded the federal tax incentive for

19. *Id.* § 170 (h)(2)(C).

20. *See id.* § 170(h)(4)(A); *see also* BYERS & PONTE, *supra* note 5, at 18.

21. *See* I.R.C. § 170(b)(1)(A) (Westlaw 2008).

22. *See id.* § 170(b)(1)(A)(v) (referring to a "government unit" as defined by §170(c)(1)).

23. *See id.* §§ 170(b)(1)(A)(vi), 170(c)(2).

24. *See id.* § 170(h)(3)(B) (allowing tax deductions for property owners who donate conservation easements to 501(c)(3) groups that meet the funding requirements of § 509(a)(2) or § 509(a)(3)).

conservation easement donations.[25] The new law raises the deduction landowners can take for donating a conservation easement from thirty percent to fifty percent of their income in any year;[26] allows farmers and ranchers to deduct up to one hundred percent of their income;[27] and extends the carry-forward period for a donor to take tax deductions for a voluntary conservation agreement from five to fifteen years.[28] Whether this expansion of benefits becomes permanent is still an open question.[29]

A property owner may also reduce his or her estate tax by donating an easement.[30] Estate tax calculations are based on the fair market value of the property, which is usually the price that a developer or speculator would pay. This tax may be so high that heirs have to sell the property to pay the taxes. However, if a conservation easement is granted on part or all of the property, only the lower value of the newly encumbered property is taxed. The property owner may also donate the easement after death through a provision in his or her will.[31]

C. *The Holder Issue*

A beginning point for assessing potential conservation transactions to protect tribal interests is determining who will hold an easement. Two legal constraints bear upon what entities can be "holders": state property law and federal tax law. The first

25. President Bush signed the Pension Protection Act of 2006 (the Pension Act), on August 17, 2006. Pub. L. No. 109-280, 120 Stat. 780 (2006).

26. Pension Protection Act § 1206, Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended at 26 U.S.C. § 170(b)(1)(E)(i) (Westlaw 2008)).

27. 26 I.R.C. § 170(b)(1)(E)(iv)(I) (Westlaw 2008).

28. *Id.* § 170(b)(1)(E)(ii).

29. The 2006 law is set to expire at the end of 2007, but Senate Bill 469, pending as of this writing, would make the changes permanent. S. 469, 110th Cong. (2007). *See also* Press Release, Sen. Max Baucus, Baucus Tapped to Lead Hunting, Fishing Caucus (Jan. 31, 2007), http://baucus.senate.gov/newsroom/details.cfm?id=268263.

30. I.R.C. § 2031(c) (Westlaw 2008) allows an exclusion of up to forty percent of the value of the land subject to the easement from the landowner's estate for estate tax purposes. *See also* DIEHL & BARRETT, *supra* note 8, at 9.

31. I.R.C. § 2031(c) (Westlaw 2008). Where a property owner does not grant a conservation easement before his death, I.R.C. § 2031(c)(9) allows the estate and the heirs to grant an easement eligible for estate tax deductions, so long as the transfer is made before the estate tax filing deadline, no person involved receives a charitable deduction, and the state law does not require express authorization in the decedent's will for the donation.

constraint derives from the statutory law defining conservation easements as a valid, recognizable property interest. Because such easements are not recognized in common law, they require statutory authorization. The Uniform Conservation Easement Act (UCEA),[32] adopted by twenty-one states,[33] defines who can hold an easement. The remaining states have developed their own criteria, which often closely follow the UCEA guidelines.[34] Regardless of whether a state's authorizing statute derives from the UCEA, this restriction is described as a "property law holder constraint" in this Article.

Definitions of a conservation easement "holder" vary among states.[35] The UCEA allows government bodies and charitable corporations, associations, and trusts to hold conservation easements. According to the UCEA:

> "Holder" means: (i) governmental body empowered to hold an interest in real property under the laws of this State or the United States; or (ii) charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.[36]

The second constraint arises from federal tax laws. While federal tax laws do not address the validity of the easement itself,

32. For an overview of the UCEA, see Julie A. Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, *in* PROTECTING THE LAND: CONSERVATION EASEMENTS, PAST, PRESENT, AND FUTURE 11 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND]. For a detailed discussion on the drafting of the UCEA, see King & Fairfax, *supra* note 9.

33. As of 2000, twenty-one states had adopted the UCEA with or without modifications. *See* Roderick H. Squires, *Introduction to Legal Analysis*, *in* PROTECTING THE LAND, *supra* note 32, at 71-73 (listing states' conservation easement statutes).

34. *See id.* (noting that twenty-five other states have enacted legislation "that reflects the intent, if not the wording, of the UCEA").

35. *See* Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, *in* PROTECTING THE LAND, *supra* note 32, at 35-40; BYERS & PONTE, *supra* note 5, at 18-19 (noting, for example, that governmental entities are not eligible holders in New Mexico, and that private corporations are eligible holders in North Carolina).

36. UNIF. CONSERVATION EASEMENT ACT § 1(2) (1981).

they pervade the "holder" issue, since they provide tax incentives for easement donations, especially among high income donors.[37] As discussed above, within certain limitations either a governmental entity[38] or a land trust[39] may be a "qualified" easement holder for charitable tax contribution purposes.[40] Hence, maintaining donors' eligibility for federal tax deductions by complying with the mandates of the tax code is a paramount concern for any entity acquiring conservation easements. Moreover, some states have imported federal tax holder requirements to their state laws defining "holder" for the purpose of defining a valid conservation easement.[41]

Given the relative youth of conservation easements as a legal instrument and the consequent lack of case law on the subject, the precise boundaries of the statutory requirements remain uncertain. As is evident from the language above, statutory holder restrictions deriving from property law and tax law do not take into account federal Indian law or the status of tribes. The ramifications of tribes' uncertain status regarding holder constraints under both state property law and federal tax law are explored below in Sections II.C.1 and II.B.2, respectively.

D. *The Role of Partnerships*

The flexible nature of private transactional conservation tools allows for multiple variations of partnerships models.[42] The models explored in this Article represent only the broad contours of possibilities; each model is amenable to partner configurations between tribes, Native land trusts, federal agencies, and non-Native land trusts. Partner arrangements may expand conservation

37. *See* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 28-29 (2004).

38. *See supra* notes 21-22 and accompanying text.

39. *See supra* notes 23-24 and accompanying text.

40. *See* I.R.C. § 170(h)(3) (Westlaw 2008).

41. *See* Mayo, *supra* note 35, at 38 (noting, for example, that Vermont requires holders to be exempt under 26 U.S.C. § 501(c)(3) or § 501(c)(2)).

42. *See generally* BYERS & PONTE, *supra* note 5, at 169-82; s*ee also* SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 13 (2001) (noting that "[i]nstitutional design will . . . emerge as an increasingly important conservation challenge" as "[n]on-federal and nongovernment agencies, and especially mixed organizations—public-private partnerships, cooperatives, and consensus groups . . . play an increasing role in managing multi-ownership landscapes and watersheds").

opportunities and funding possibilities, increase the willingness of private landowners to convey conservation easements, and obviate some of the hurdles currently posed by state and federal holder requirements. Drawbacks include the complexity of partnerships, the diverging missions of agencies and land trusts, the unique and often misunderstood needs of tribal communities, and unequal commitments by partners.[43] Existing conservation easements under public-public and public-private partnerships provide an instructive realm of experience for future transactions involving tribes.[44]

There are numerous possibilities for structuring a partnership, but generally they fall into the categories of involvement described below. Any of the four models examined in this Article may incorporate each of these partnership arrangements, depending on the environmental and institutional context of a particular conservation easement.

1. *Purchase/funding partnerships.*

A partnership may be structured around the purchase of conservation title. Several agencies and private land trusts may provide joint funding for the deal. Such arrangements may have contractual restrictions or obligations that translate into covenants binding on the property. For example, some state fish and wildlife grants carry the obligation of public access.[45] The purchase

43. *See* BYERS & PONTE, *supra* note 5, at 278-79.

44. *See* FAIRFAX & GUENZLER, *supra* note 42, at 57 (noting that, in the context of government trusts, "[c]ertainly no one in partnership with the federal government can count on being an equal partner. But it is possible to design around the federal government's least attractive tendencies if one is aware of them."); Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 439-50 (2002) [hereinafter *Property Rights*] (discussing the purchase of a Colorado ranch by a private non-profit corporation which subsequently sold the property to a county agency with support from a state wildlife agency; the county then granted the state wildlife agency a conservation easement to preserve the habitat of grouse, listed under the state's Endangered Species Act). Professor Cheever observes that "[c]reating a conservation easement . . . allowed two owners to pursue their separate, but not inconsistent, purposes on the same piece of land in an organized way. . . . [The] County obtained title . . . for the normal mix of local government purposes. The [State] Division of Wildlife, on the other hand, was interested in the property exclusively for wildlife and wildlife habitat, its statutory mission." *Id.* at 441.

45. *See* BYERS & PONTE, *supra* note 5, at 268 (stating that, in Massachusetts, "there is the presumption that public access will be permitted on all lands protected by conservation easements purchased with public funds"). *See also supra* note 11 (discussing a

partnership may also involve an acquisition role. For example, a land trust may preacquire a conservation easement on property before such property is transferred to an agency for conservation management, or an agency may preacquire an easement before subsequent transfer to a land trust. These configurations may divide the overall price of the conservation transaction into two components: a price for the conservation easement, and a price for the encumbered fee title. Such an arrangement may substantially lower the purchase price for a tribe or Native land trust seeking to obtain fee title to property.[46]

2. *Management, regulatory, and enforcement partnerships.*

Parties also may form a partnership to manage a conservation easement or fee property. This can happen where there is only one conservation holder, or where multiple coholders have partnered in the purchase of the conservation title. Different types of management partnerships include: management agreements, when a land trust agrees to manage an agency's easement;[47] technical assistance partnerships, in which a land trust provides technical support to an agency's easements or vice versa;[48] regulatory partnerships, in jurisdictions that require an agency's approval for a land trust's conservation easement;[49] and enforcement partnerships, in which oftentimes small land trusts lacking adequate staff agree to pool human, legal, or financial resources to enforce easement violations.

3. *Holder partnerships.*

Partnership arrangements may be useful in structuring the ownership of fee title or conservation easements. There are many

public access requirement imposed by the California State Coastal Conservancy).

46. For example, TPL purchased fee title to 3845 acres in northwestern California from the Georgia-Pacific Corporation in 1986. TPL then granted a conservation easement in 1996 to the Pacific Forest Trust (PFT), a non-Native land trust, and, a year later, TPL sold the encumbered fee lands to the InterTribal Sinkyone Wilderness Council, a Native land trust. *See* Neal Fishman, *Sinkyone Lost and Found*, CAL. COAST & OCEAN, Autumn 1996, http://www.coastalconservancy
.ca.gov/coast&ocean/archive/SINKYONE.HTM. For additional discussion of the transaction, see *supra* note 11.

47. *See* BYERS & PONTE, *supra* note 5, at 273-74.

48. *See id.* at 269-71.

49. *See id.* at 271-72.

variations, but two are common: (1) overlapping easements, in which one or more land trusts and/or agencies hold distinct easements on the same parcel;[50] and (2) coholding agreements, where an agency and land trust cohold the same easement.[51] A partner consortium may form its own entity to receive and manage the conservation title.[52] The presence of established non-Native land trusts or agencies as partners may be particularly important as tribes and Native land trusts seek acquisitions of conservation easements on private property. Because there are so few examples of tribal and Native land trust holders to draw from, the presence of a more established holder partner may persuade an otherwise unwilling landowner to convey a conservation easement.

4. *Backup holder partnerships.*

All land trusts must plan for possible dissolution by designating "backup holders" or "preferred assignees" that would assume ownership of fee properties and easements in the event the land trust is no longer able to hold them.[53] The designation of backup holders creates a partnering opportunity and may bring several benefits to an easement transaction. First, naming a specific backup holder ensures an efficient transfer to a qualified holder.[54] Second, if the land trust is challenged successfully in court for not conforming to federal or state statutory requirements for easement holders, the backup grantee, rather than the challenger of the easement, may acquire ownership.[55] Third, having an established

50. *See id.* at 181, 272; discussion *infra* Section II.E.1 (describing four overlapping conservation easements held by a state agency and private land trusts in California on property purchased in 1997 by the InterTribal Sinkyone Wilderness Council).

51. *See* BYERS & PONTE, *supra* note 5, at 273. For a general discussion of coholding, see *id.* at 175-88.

52. For example, the Bergdorf Meadows easement described in Part I of this Work was accepted by a partnership consisting of the Nez Perce Tribe, the Idaho State Department of Fish and Game, the Bonneville Power Administration, the Rocky Mountain Elk Foundation, and the U.S. Forest Service. *See* Wood & Welcker, *supra* note 2.

53. Should the land trust cease to exist, or become unable to fulfill its stewardship obligations, the backup holder will acquire the conservation easement and assume the original management and enforcement obligations. *See* BYERS & PONTE, *supra* note 5, at 169-72.

54. *See id.* at 170.

55. *See id.* at 169. *Cf.* Federico Cheever, *Environmental Law: 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, 1102 n.96 (1996) [hereinafter *Public Good*] (noting that if "the terms of the easement give the back-up grantee a perpetual option to take the

backup holder can reassure property owners wary of making a long-term commitment with a nascent land trust.[56]

As the tribal trust movement grows, there will be a time when tribal and Native land trusts garner the same community goodwill and confidence that most established non-Native land trusts enjoy today after years of conservation work. At that time, tribal and Native land trusts will be positioned to take property if another land trust dissolves. Tribal conservation professionals may wish to seed future opportunities for tribal and Native land trusts by designating, in the acquisition document, a tribal or Native land trust as a backup holder even though such a land trust does not exist at the time of the acquisition. The acquisition document could include a provision that the property will pass to a tribal or Native land trust in the future if one is established, is in existence for a certain number of years, and meets any other criteria deemed important to the parties. In the case of easements, such automatic transfers could be subject to the consent of the underlying landowner. By drafting a role for tribal and Native land trusts in the backup holder provisions of current acquisition documents—even when such land trusts do not yet exist in the community—the acquisition reserves a growth opportunity for land trusts promoting Native interests. This procedure is being used by the InterTribal Sinkyone Wilderness Council in its conveyance documents.[57]

E. *Brokering the Deal*

Conservation transactions, like most real estate transactions, involve a complex matrix of players, needs, and constraints.

easement from the Local Area Land Trust or an executory interest transferring the easement to the back-up grantee upon the failure of the Local Area Land Trust, the interest may violate the Rule Against Perpetuities, common law or statutory"). Thus, a third-party executory interest might need to be limited in duration. Careful drafting is required to specify the precise rights of the third party in each contingency. *See* BYERS & PONTE, *supra* note 5, at 171 (discussing implications of naming an "executory interest" holder or preferred assignee, and variations).

56. *See* BYERS & PONTE, *supra* note 5, at 171.

57. The easement held by a local land trust on fee lands owned by the InterTribal Sinkyone Wilderness Council reads in part: "Should a Native American Indian land trust be formed that is qualified to hold conservation easements under applicable law, upon Grantor's request Grantee agrees to transfer its interests under its Grant to the entity to hold such interests under the law." E-mails from Hawk Rosales, Executive Director of InterTribal Sinkyone Wilderness Council, *supra* note 11.

Putting together the pieces of a conservation puzzle may require a skilled transactional expert, particularly where a land trust lacks the requisite expertise, immediate access to funding, or local or regional contacts necessary to complete a transaction. For example, TPL has "brokered"[58] a large number of successful projects involving tribal conservation easements. In the Pacific Northwest, TPL has negotiated transactions for tribes involving over thirty-two thousand acres and $27,000,000.[59] Hence, examining TPL's role in tribal transactions is illustrative of the contributions an organization with transactional expertise can make in the tribal context.

A conservation "broker" may play several simultaneous roles in tribal projects. First, a transactional expert can help tribes and land trusts establish a conservation vision that identifies lands to be protected so as to maximize the conservation benefits associated with investments. Second, a broker can provide financing for projects through leveraging its own resources and also through external fundraising. Navigating the fiscal aspects of conservation entails a considerable amount of experience that many tribes and Native organizations lack. As part of this role, for example, TPL draws on a national set of partners and contacts to match funders with tribes or land trusts seeking support.

Third, a transactional expert can serve as a real estate agent of sorts for the conservation community. For example, TPL keeps a finger on the pulse of conservation nationwide and often is aware of match possibilities when a tribe seeks a conservation buyer for an easement, or when a seller seeks a tribal conservation buyer. A conservation broker's role is not unlike that of a real estate agent who consults the "listings" out in the field. In the case of conservation, however, an organization's knowledge of opportunities derives from its regional or national base and internal information-sharing structure. Because there is no "listing" service for conservation transactions, another organization's involvement may greatly enhance the potential opportunities available for tribes.

58. We use the term "broker" in the general sense of an organization with expertise in bringing together interested parties and designing and closing property transactions. Importantly, TPL differs from traditional real estate brokers in that TPL actually acquires properties and conservation easements before conveying them to third parties.

59. *See* Trust for Public Land, *supra* note 6.

Fourth, a broker organization can structure and negotiate land transactions. A tribe's general counsel may lack the expertise necessary for complex conservation transactions. An important dimension is structuring a purchase in a manner that maximizes funding opportunities. A transaction, for example, can be split between a purchase of a conservation easement and underlying fee title. To illustrate, a developer might hold a parcel with a value of $4,000,000. The conservation parties may seek to put the parcel in tribal ownership, but the tribe may lack the money to make the purchase. A conservation organization with transactional expertise could structure a conservation easement valued at $3,500,000—which is the lion's share of the market value because the easement deprives the owner of development rights. The U.S. Fish and Wildlife Service (USFWS) requests and is awarded the $3,500,000 from the Land and Water Conservation Fund to purchase the easement. That leaves only $500,000 worth of property value left to fund (representing the posteasement value of the fee). The tribe secures the $500,000 through a grant from the private foundation associated with a tribal casino. The transaction involves sequential steps: (1) the developer conveys the conservation easement to USFWS in exchange for $3,500,000; (2) the developer then conveys the encumbered parcel (freighted with the conservation easement) to the tribe for $500,000. The tribe is the holder of conservation property subject to an easement held by USFWS.

In practice, the planning and execution of this type of bifurcated transaction is stunningly complicated and can become mired in many more details. With their expertise, "broker" organizations can evaluate the capacity of various models to leverage funding and, using partnerships, structure a transaction that surmounts barriers inherent in any one holder model.

Finally, a conservation group with transactional expertise can act as a strategic buyer, making short-term acquisitions of threatened parcels in order to take them off the market and protect them from private development. This venture funding plays a crucial role in securing land and allowing conservation to proceed. TPL, for example, rarely holds land for permanent management, but rather sells parcels to long-term conservation buyers with appropriate restrictions. Absent this role, threatened parcels would succumb to development due to the quick timeframes necessary to put together conservation deals.

F. *Drafting Parameters*

Conservation easements are flexible tools that are drafted to reflect the individual conservation attributes of the parcel as well as the preferences of the owner and holder.[60] Conservation easements may allow limited ground-disturbing activity such as grazing, farming, and certain forms of logging if those uses are not inconsistent with the purposes of the easement. The easement may grant the holder a direct management role (or an informal consulting role) on the property, or simply provide the right to enforce against specified activities on the land. In addition, access is nearly always a central concern in negotiating an easement. The easement may or may not grant public access over the land, depending on the mutual agreement of the owner and the holder. Some easements require access, either to ensure tax deductibility or as part of a grant stipulation. For example, if an easement is granted for recreational, educational, or historic preservation purposes, either physical or visual access is required to qualify for a federal tax deduction.[61] If the easement is granted to protect wildlife or plant habitats, access generally is not required.[62]

Negotiating a conservation transaction, like any transaction, usually involves some inherent tension between the property owner and prospective easement holder. The parties do not necessarily have the same motivations. On the one hand, property owners donating or selling conservation easements may be concerned with the prevention of development, the financial benefits accompanying the transaction, the economic viability of the land, regulatory issues, and their ability to preserve their rights—and possibly the rights of others—to hunt, fish, or recreate.[63] On the other hand, land trusts or other potential holders may be concerned with land preservation, habitat protection and restoration, and surface water and soil conservation.[64] Which party has the upper hand in negotiations often depends on their respective financial circumstances and the

60. Indeed, experienced land trusts are adept at achieving conservation on private lands, even where acquiring a conservation easement is problematic. Some land trusts use covenants and deed restrictions as alternative tools.

61. *See* BYERS & PONTE, *supra* note 5, at 21-22.

62. *Id.*

63. *See* McLaughlin, *Land Trusts*, *supra* note 7, at 468-69; Greene, *supra* note 4, at 914.

64. *See* Greene, *supra* note 4, at 914.

conservation importance of the lands.

One of the hallmarks of conservation easements is their flexibility.[65] Certainly at the transactional stage, land trusts and property owners enjoy considerable latitude when negotiating and drafting a conservation easement. However, this flexibility diminishes rapidly once the transaction is completed.[66] Moreover, conservation easements typically are conveyed for perpetuity, meaning that they are supposed to last forever.[67] Accordingly, foresight is essential, because all parties want to avoid the expensive and uncertain proposition of terminating or modifying a conservation easement.[68] Hence, drafters of conservation easements must balance flexibility with specificity. Whereas incorporating specificity into the easement's terms helps ensure enforceability, incorporating flexibility into the easement helps both parties respond to unforeseeable circumstances.

In terms of drafting, one of the most crucial clauses in any easement is the "purpose clause," which should clearly define the purposes of an easement. This clause is pivotal because it sets forth the framework against which all of the parties' future obligations and performance will be measured.[69] One drafting issue that will arise repeatedly in tribal conservation transactions is the extent to which drafters explicitly incorporate indigenous goals into purpose statements of easements. On the one hand, drafters must ensure that an easement's wording fits into the boilerplate conservation language of the tax laws in order to qualify the grantor for tax

65. *See* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 752 (2002) (discussing the "great advantage" of conservation servitudes' flexibility).

66. *See* Greene, *supra* note 4, at 885 ("Traditional conservation easements are flexible during the drafting process but become inflexible once they are signed by both parties.").

67. In most states, conservation easements need not be perpetual. Where a state allows, easements may be confined to a specified period of years. *See* Mayo, *supra* note 35, at 40-42. This is known as a term easement. However, "most conservation easements are perpetual in duration because most recipient conservation organizations accept only perpetual easements and the federal tax incentives encourage the donation of perpetual easements." McLaughlin, *Land Trusts*, *supra* note 7, at 469 n.63.

68. *See* Mahoney, *supra* note 65, at 777 (emphasizing the high transaction costs associated with negotiating modifications and terminations of easements, in part due to the complex goals of easement holders).

69. *See* BYERS & PONTE, *supra* note 5, at 390 (describing the importance of the purpose clause); *see also* Mayo, *supra* note 35, at 27-31 (listing which conservation easement purposes each state allows).

benefits.[70] On the other hand, this new genre of easement should reference specific Native values in order to establish parameters of management that will inure to the benefit of tribes through time.

There is no apparent drawback to drafting multiple purposes reflecting both concerns.[71] Sometimes the Native interest will directly reinforce the holder requirements. For example, the UCEA and many states recognize as an appropriate holder purpose the goal of "preserving the . . . cultural aspects of real property."[72] Therefore, a reference to Native cultural significance in the purpose statement meets the UCEA requirement while also providing a handle for managing the land to benefit tribal values.[73] In the same vein, the purpose clauses "To perpetually protect and preserve agricultural lands" and "To preserve breeding grounds for threatened wildlife" are buttressed by a clause such as "To maintain land management in compatibility with tribal values."[74] For example, the purpose clause of an easement over the InterTribal Sinkyone Wilderness Council's property weaves together important traditional Native values with the "traditional" conservation values typically expressed by non-Native land trusts.[75] Thus, the easement's purpose clause expresses a synthesis of values to ensure the protection of an important wilderness area containing important cultural-ecological values.

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70. *See* discussion *supra* Section I.B.3.

71. *See* Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 610 (2004); Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. U. L. REV. 373, 410 (2001) (arguing that conservation easements drafted with narrow purposes may be more susceptible to attacks based on changed circumstances).

72. UNIF. CONSERVATION EASEMENT ACT § 1(2) (1981). *See* Mayo, *supra* note 35, at 35-40.

73. For a discussion of possible challenges to a holder's legal status, see discussion *infra* Section I.I.

74. For a thorough discussion of drafting and numerous examples of model easement provisions, see BYERS & PONTE, *supra* note 5, at 283-489.

75. The easement's purpose clause reads: "It is the purpose of this Easement to contribute to the protection of Mother Earth by preserving and protecting the Conservation Values, to allow and preserve specified public access through the Property to the Sinkyone Wilderness State Park, to restore and forever maintain the Property predominantly in its natural, ecological, scenic, forested and open condition, and to prohibit any use of the Property that will impair, degrade or interfere with the Conservation Values of the Property." E-mail from Hawk Rosales, Executive Director of InterTribal Sinkyone Wilderness Council, to authors (Feb. 8, 2008, 03:34:55 PST) (on file with authors).

As Native-driven conservation easements become more common, drafters undoubtedly will assemble their experience and produce model easements that can serve as valuable templates for future transactions. The conservation trust movement was supported greatly by an early model conservation easement drafted by TPL and published in the first Conservation Easement Handbook in 1988.[76] More recently, the Handbook has been amended to reflect the substantial experience gained by land trust attorneys since the early easements.[77] Model variations on the generic easement are available to suit particular circumstances—hence the evolution of ranchland and agricultural easements, wildlife habitat easements, working forest easements, and historic preservation easements. Template Native easements of various sorts may grow in a similar fashion. Sharing such drafting templates through publications such as the Handbook is vital to the movement.

G. *Monitoring and Stewardship of Conservation Easements*

Acquiring a conservation easement is only the first step in the long-term—perhaps perpetual—process of protecting a tribally significant property from development and other threats.[78] The drafting, organizational, and enforcement mechanisms for legal protection discussed in this Article may be secondary in importance to the on-the-ground management of conservation easements. Indeed, the complementary tasks of monitoring and stewardship are at the heart of successful private conservation, and one of the holder's "greatest challenges."[79] Without an effective monitoring and stewardship program, legal protections for

76. *See* DIEHL & BARRETT, *supra* note 8.

77. *See* BYERS & PONTE, *supra* note 5.

78. *See id.* at 43.

79. McLaughlin, *Land Trusts*, *supra* note 7, at 469; *see also* Greene, *supra* note 4, at 923 (concluding that "[u]ltimately, the durability of a land trust's conservation easements may depend as much on the strength of its stewardship program as on the contents of the instruments used to convey easements"). Interestingly, the UCEA does not mention monitoring. *See* King & Fairfax, *supra* note 9, at 96. King and Fairfax note that the Comment to the UCEA "does not . . . 'impose restrictions or affirmative duties' on either the fee holder or the easement holder. Rather, it 'merely' allows the parties to make whatever arrangements seem appropriate. Thus, the watchful neighbor's role in monitoring the easement evaporated in the transition from the common law to statute." *Id.* (quoting UNIF. CONSERVATION EASEMENT ACT prefatory n., at 2. (1981)).

easements are shallow.[80] Periodic inspections of land protected by a conservation easement are the only way to verify a landowner's compliance and identify third-party encroachments.[81] Most violations are discovered through monitoring; hence, it is imperative that, at the transactional stage, the holder negotiate for the right of immediate access when the holder has a good faith suspicion of an ongoing or looming violation.[82]

Over the long term, cultivating mutually supportive relationships with grantors through a stewardship program may be the most cost effective way for a holder to protect its conservation easements.[83] Benefits of a successful stewardship program include assisting landowners in easement compliance, identifying conflicts with landowners or third parties at an early stage, complying with statutory requirements, and fostering positive public relations.[84]

80. *See* BYERS & PONTE, *supra* note 5, at 143 (summarizing the importance of monitoring). Moreover, monitoring facilitates adaptive management, thereby allowing land trusts "to continually develop knowledge about managing resources and ecosystems and to systematically incorporate this knowledge into management plans." *See also* Greene, *supra* note 4, at 923 (footnotes omitted). Greene describes how adaptive management was incorporated into a 788-acre conservation easement granted by an Oregon ranching family to the Klamath Tribes. *Id.* at 920-23. A land trust may incorporate adaptive management into a conservation easement implicitly—through reference to a property management plan that is subject to periodic review—or explicitly—by including adaptive management as one of the easement's purposes. *Id.* at 919-20. *See also* BYERS & PONTE, *supra* note 5, at 77-78 (discussing advantages and disadvantages of management plans for conservations easements). It should also be noted that effective monitoring is important on a broader scale—to maintain the land trust movement's legitimacy. King and Fairfax note that, in order to combat "rogue land trusts" aimed primarily at conferring private benefits rather than conservation, the Land Trust Alliance is developing a system for self-regulation among land trusts. King & Fairfax, *supra* note 9, at 126-27.

81. Ideally, the grantee will visit each site yearly to monitor and determine whether the property is still in the condition prescribed by the easement. Additionally, the grantee must maintain written records of the monitoring visits. If, during a visit, the grantee determines that the easement has been violated, the grantee may require the owner to correct the violation.

82. *See* BYERS & PONTE, *supra* note 5, at 159-60. The holder's ability to access the property in emergency situations should be structured in a way that does not violate the landowner's reserved rights to privacy, usage, and other enjoyment of the land. Contact with the landowner by phone, email, or facsimile prior to entering the property in such circumstances can go a long way toward avoiding misunderstandings and other problems. Stating such requirements in the easement is preferable to simply trusting that they will be observed. An increasingly attractive monitoring tool for large and remote properties is satellite photoimagery, which the holder can use to observe and pinpoint changes to the property, thus avoiding the expenditure of valuable time and resources spent during on-the-ground searches.

83. *See generally id.* at 116-41.

84. *See id.* at 116-17.

Without stewardship, a holder's relationship with the underlying property owners may so erode that challenges to the holder's easements may overwhelm its capacity for defense. Allocating sufficient resources to stewardship is therefore essential.[85]

H. *Enforcement*

Even with perfect agreements and monitoring, conflicts do arise. The most common violations of conservation easements are prohibited surface alterations, such as building roads, cutting vegetation, or building unauthorized structures.[86] Other common violations include wetlands alteration, dumping, and deforestation.[87]

Enforcing against violations of a conservation easement protects the conservation value of the property, maintains and increases public confidence in a particular holder, and fosters public confidence in the private conservation movement as a whole.[88] More importantly, land trusts are legally obligated to enforce the terms of their conservation easements.[89] A dismal enforcement track record can cause a conservation easement holder to lose its coveted tax-exempt status.[90] Yet a lack of financial resources for enforcement is a problem common to many land trusts.[91]

85. *See id.* at 119; Jeff Pidot, Reinventing Conservation Easements: A Work in Progress, Address Before the Georgetown University Law Center Continuing Legal Education Environmental Law & Policy Institute Conference on Regulatory Takings 16 (Oct. 14-15, 2004) (discussing costly, yet vital, task of monitoring), *quoted in* Carol N. Brown, *A Time To Preserve: A Call for Formal Private-Party Rights in Perpetual Conservation Easements*, 40 GA. L. REV. 108 n.88 (2005).

86. *See* BYERS & PONTE, *supra* note 5, at 159 (discussing a national survey conducted by the Land Trust Alliance in 1999 of over 7400 conservation easements).

87. *See id.*

88. *See id.* at 156-57.

89. *See* Cheever, *Property Rights*, *supra* note 44, at 433 ("The holder of the conservation easement operates as a regulatory authority charged with enforcing the mandate set forth in the conservation easement document, just as a public agency operates as an authority charged with enforcing the mandate generated by the municipal zoning code or state wildlife law.").

90. *See* BYERS & PONTE, *supra* note 5, at 157.

91. *See id.* at 157-59 (describing the high cost of enforcement, including "extensive staff time, special documentation, court costs, and fees for consultants, attorneys, and expert witnesses;" and how the cost of single violation case in 2002 reached $284,000); Cheever, *Public Good*, *supra* note 55, at 1100 ("How can a land trust with an annual budget of $10,000 a year and no paid staff members hope to defend its rights created by a

Land trusts have a number of options to confront violations, ranging from seeking voluntary reparation by the landowner to mediation to litigation.[92] Litigation may produce an injunction ordering the landowner to cease violating the easement. However, litigation is costly and can cause hard feelings that may cripple the relationship between the easement holder and the landowner. Given the costs and uncertainties associated with litigation,[93] it is often preferable to arrive at voluntary, negotiated resolutions with the property owner.[94] Although not as costly as litigation, arbitration still entails considerable expenses. However, arbitration may result in a speedier outcome than litigation. Mediation is a good option when arbitration is not allowed, for example where a federal or state agency is involved.[95]

Four categories of entities may enforce a conservation easement: the holder, the owner of the underlying fee land, parties identified by the grantor and holder at the time of the conveyance, and any other "person authorized by other law," such as a state attorney general in some jurisdictions.[96] Parties may grant an enforcement right to a third party as a contingency in case the original grantee is unable to enforce the easement terms.[97] Third

conservation easement from an attack by a landowner who may have tens of millions of dollars to gain by developing the servient land? The scales tilt even more when the land trust may find itself challenged by more than one such landowner.").

92. *See* BYERS & PONTE, *supra* note 5, at 162-66.

93. For a list of reported case decisions involving the enforcement of conservation easements, *see id.* at 285 n.3; PROTECTING THE LAND, *supra* note 32, at 531-32.

94. *See* BYERS & PONTE, *supra* note 5, at 162 (noting that voluntary reparation is the most preferable and common enforcement response).

95. *Id.* at 164-65.

96. *See* King & Fairfax, *supra* note 9, at 97 (quoting UNIF. CONSERVATION EASEMENT ACT § 3, and discussing the commissioners' intent). Although in California local residents can sue if a city or county fails to enforce one of its own easements, in most states there is no citizen suit provision. *See* BYERS & PONTE, *supra* note 5, at 181. Indeed, the UCEA "specifically disallows citizen suits unless initiated by the attorney general." *Id.* For a breakdown of the availability of third-party enforcement rights by state, *see* Mayo, *supra* note 35, at 48-50. For a discussion of why private parties should have third-party standing to enforce conservation easements, *see* Brown, *supra* note 85.

97. *See* UNIF. CONSERVATION EASEMENT ACT § 1 cmt. (1981):

> Recognition of a "third-party right of enforcement" enables the parties to structure into the transaction a party that is not an easement "holder," but which, nonetheless, has the right to enforce the terms of the easement. . . . But the possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust. Thus, if Owner transfers a

parties may include other land trusts or governmental entities.[98] Although land trusts may lack the enforcement resources that some of their government counterparts enjoy, in some cases that advantage may be counterbalanced by bureaucratic sluggishness.[99]

I. *Predictable Legal Vulnerabilities in Maturing Easements*

Although hailed by advocates as win-win opportunities for conservation of private lands,[100] conservation easements are more vulnerable to legal attack than some proponents claim. The rapid growth in the land trust movement over the past three decades may have masked vulnerabilities surrounding this relatively new legal instrument.[101] Uncertainty abounds for at least three reasons. First, soon the "first generation" of property owners who initially granted conservation easements will transfer ownership of

conservation easement on Blackacre to Conservation, Inc., he could grant to Preservation, Inc., a charitable corporation, the right to enforce the terms of the easement, even though Preservation was not the holder, and Preservation would be free of the common law impediments eliminated by the Act (Section 4). Under this Act, however, Owner could not grant a similar right to Neighbor, a private person.

98. *See* Cheever, *Public Good*, *supra* note 55, at 1101-02.

99. *Compare* BYERS & PONTE, *supra* note 5, at 257-58 (discussing the governmental Maryland Environmental Trust's high capacity for enforcement) *with* King & Fairfax, *supra* note 9, at 120 (stressing the inadequacy of government trusts' monitoring and enforcement) *and* Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 391 (2001) (noting that one study of several hundred conservation easements near San Francisco showed that private land trusts were more likely to monitor their easements than were government agencies, and hence private land trusts were more likely to discover violations on their easements).

100. *See, e.g.*, Press Release, Md. Dep't of Natural Res., Maryland Landowners Donate Nearly 3,300 Acres of Conservation Easements in 2006 (Jan. 8, 2007), www.dnr.state.md.us/dnrnews/pressrelease2007/010807b.html (quoting the Maryland Environmental Trust as reporting, "More and more Maryland landowners seem to be learning from their friends, neighbors, advisors and local land trusts that land conservation is something they can do for themselves. . . . With supportive agencies and nonprofits to help them out, the circle of easement donors grows wider and wider. The property owner benefits from the tax incentives available, the natural resources and farmland are conserved, and the cost savings from gift easements mean that government programs need not use taxpayer dollars to buy them. It's a win-win-win.").

101. *See* FAIRFAX & GUENZLER, *supra* note 42, at 153 (noting that "the current emphasis on easements is a bit of an experiment. Conservation easements are defined in state and federal law, and it is not clear how the relevant state and federal laws will be interpreted several decades hence, when landowners not involved in the original transaction want to use their lands in ways circumscribed by an easement."). There is also a growing body of literature on legal defenses for traditional land trusts. *See, e.g.*, BYERS & PONTE, *supra* note 5; Brown, *supra* note 85; Cheever, *Public Good*, *supra* note 55.

encumbered lands to heirs or third parties, who may not be as cooperative or conservation-minded.[102] Second, as land trusts confront growing pains, competition, and calls for public accountability, some will likely fold or merge with other land trusts, or even go into bankruptcy.[103] Third, as development and sprawl continue and global warming increases, environmental conditions on protected lands will deteriorate. As a result of these changes, conflicts inevitably will surface between holders and property owners.

Practitioners and commentators have analyzed the weaknesses in the legal framework of conservation easements.[104] However, given the lack of legal precedent on a range of issues surrounding the legal defense of conservation easements, at this point such analyses are somewhat speculative. Nevertheless, it is safe to say that litigation is probable on both sides of easements. As second-generation owners of protected lands violate their easements, land trusts or sovereign holders may sue to enforce the easements. Conversely, the second-generation owners preemptively may bring suit to invalidate conservation easements burdening their lands.

In so doing, burdened property owners will likely pursue two avenues. First, they may attack the legal status of the holder of a conservation easement.[105] A "holder" attack might, for example, challenge a holder's federal tax-exempt status[106] or the holder's compliance with state property law holder constraints.[107] Second, the property owner may challenge the restrictive easements under the doctrine of changed circumstances. Some scholars have suggested that courts may refuse to enforce a conservation easement if changes in social or environmental circumstances ultimately make the purposes of the easement impossible to accomplish or render the original purpose of the easement

102. *See* Cheever, *Public Good, supra* note 55, at 1087-93 (discussing a hypothetical Colorado ranch with a conservation easement challenged, decades after the transaction, by the granddaughter of the deceased grantor).

103. *See* McLaughlin, *Land Trusts*, supra note 7, at 463 (describing how the "land trust movement is still in its early acquisition phase, and at some point there will likely be a shakeout, when some land trusts will fold, and others will merge").

104. *See, e.g.*, Cheever, *Public Good*, *supra* note 55, at 1087-93; Mahoney, *supra* note 65, at 769-81.

105. *See* Cheever, *Public Good*, *supra* note 55, at 1093-95.

106. *See* discussion *supra* Section I.C; *infra* Section II.B.2.

107. *See* discussion *supra* Section I.C; *infra* Section II.C.1.

futile.[108] The changed circumstances concern is likely to become paramount as a result of climate change. In response to global warming, species are shifting their habitats, including migrating towards the poles in search of cooler temperatures.[109] As a result, standard conservation easements with ephemeral purposes, such as protecting habitat for an endangered species, may be vulnerable to attack if the species an easement is designed to protect goes extinct or no longer uses the property.[110]

Drafting a flexible, "dynamic" conservation easement may be the best armor against an attack based on changed circumstances. In contrast to a traditional "static" easement whose terms mandate unchanging land use restrictions, the terms of a dynamic easement

108. *See* Thompson, *supra* note 71, at 610; Cheever, *Public Good*, *supra* note 55, at 1095-97.

109. In addition, many species will go extinct. Projections of extinction associated with temperature increases reach to fifty percent of all species now living on the planet—an extinction rate as high as the last mass extinction on Earth, fifty-five million years ago. *See* Jim Hansen, *The Threat to the Planet*, 53 N.Y. REV. BOOKS, Jul. 13, 2006, *available at* http://www.nybooks.com/articles/19131. Conservation organizations such as The Nature Conservancy are now examining ways in which to address the imminent changes brought about by climate change. This will require adopting innovative strategies, including "identifying for preservation potential refuges against changing climate, landscapes that have had relatively stable vegetation over thousands of years, and removing or reducing other stresses on the landscape, particularly activities by people. Other plans are to search for resilient species or subspecies that can cope with a warming trend." Cornelia Dean, *The Preservation Predicament*, N.Y. TIMES, Jan. 29, 2008, at F1.

110. *See* Thompson, *supra* note 71, at 610. Thompson and Jay write:

> If the purpose of a conservation easement is narrow, for example to preserve a crane rookery, a particular endangered species of plant, or a wetlands area, it is important for land trusts to try to think ahead 100 years or more to a changed landscape. Will the purpose of the conservation easement still exist, or will the restrictions be voided by elimination of the purpose of the original easement? Is the goal long term preservation of the land or just the specific ecological feature of the property? Although narrow purpose statements in conservation documents aid land trusts' stewardship efforts and assist in litigation when the particular purpose is at risk from landowner activity, a long view of the conservation effort is important and conservation easements should contain language barring extinguishment by changed conditions.

Thompson & Jay, *supra* note 71, at 410. *See also* James L. Olmsted, *Capturing the Value of Appreciated Development Rights On Conservation Easement Termination*, 30 ENVIRONS ENVTL. L. & POL'Y J. 39, 45 (2006). ("[E]asements should contain provisions that allow the holder of the easement to recover the full, appreciated value of the easement upon its termination . . . if . . . the species the terminated conservation easement was designed to protect was extirpated from the area with no hope of recovery, the funds could be better used in another location.").

provide that land use restrictions on a protected parcel may change over time.[111] Drafting flexibility into an easement allows the parties to work toward the ideal that "the law does not fly in the face of nature, but rather seeks to act in harmony with it."[112] Explicit recognition that habitats evacuated by some species likely will be filled by others may be written into conservation easements, providing some versatility in an increasingly uncertain biological world.[113]

The emerging tribal trust movement has an inherent advantage in avoiding challenges based on changed circumstances. The articulation of timeless tribal values in easements bolsters dynamic drafting. Because tribal values run back to "time immemorial," they add force to the argument that tribal easements should be perpetually binding into the future.[114] The spiritual covenants reflected in Native stewardship pose a counterweight to the "dead hand control" lamented by opponents of perpetual easements.[115]

III. EVALUATING THE MODELS ACCORDING TO SIX CRITERIA

The tribal conservation trust projects completed so far represent an intersection between two movements: the Native environmental sovereignty movement and the conservation trust movement. With an infusion of structure and funding, however, this intersection likely will grow into its own movement.[116] It is

111. *See* Greene, *supra* note 4, at 885.

112. Lamar v. Harris, 44 S.E. 866, 868 (Ga. 1903).

113. *See* Greene, *supra* note 4, at 908 (noting that "dynamic conservation easements may seem prohibitively difficult or expensive to draft, particularly to a small land trust with little or no staff support. When compared to the prospect of a conservation easement that fails to achieve its purpose, however, the effort and cost involved in drafting a dynamic conservation easement are insignificant."); Olmsted, *supra* note 110, at 41, 43.

114. For further discussion of the unique tribal defense to the changed circumstance attack, see *infra* Section II.C.3.

115. *See* Mahoney, *supra* note 65, at 769-81.

116. *See* Wood & Welcker, *supra* note 2. Indeed, the traditional conservation movement has been criticized by some as excluding indigenous peoples from the process of conserving lands. *See* Mac Chapin, *A Challenge to Conservationists*, WORLD WATCH (Nov./Dec. 2004), at 17-31 (criticizing conservation organizations that fail to engage local indigenous groups); Rebecca Adamson, *A Caution on 'Soft-eviction' Strategies Toward Indigenous Peoples in Protected Areas*, ENVTL. GRANTMAKERS ASS'N NEWSLETTER, Winter 2003, http://www.ega.org/
resources/newsletters/win2003/softevictions.html. For a counterexample, see Hawk Rosales, *EcoCultural Recovery and Indigenous Communities in Northwest California*, TREES FOUNDATION, BRANCHING OUT Q. NEWSLETTER, Fall 2006, http://treesfoundation.

important to assess actual and potential models for tribal trust conservation in terms of their abilities to meet certain objectives important for Indian and non-Indian interests alike. The discussion below compares the four models introduced in Part I according to six criteria that, while not exhaustive, reflect key concerns in conservation transactions. The four holder models, again, are: (1) the tribal holder; (2) the Native land trust holder; (3) the federal agency holder; and (4) the non-Native land trust holder.[117]

The movement will take shape, over time, around the models that prove most successful to the various participants. The discussion below highlights strengths and weaknesses of the various models. It should be noted that today's tribal projects may unduly rely on traditional land trust models simply because they are presently available. For example, in the absence of a tribal holder or Native land trust, the federal agency holder is often called upon to save threatened land. In the future, however, as tribal and Native land trusts become more prevalent and gain administrative capability, the acquisitions may shift toward them and away from federal holders. In that sense, the four models may be viewed more accurately as stages in an evolving movement. Conservation professionals designing projects should bear in mind the growth of the movement when making conservation acquisition decisions.

A. *Opportunities for Conservation*

Although conservation easements are flexible, cost-effective, and widely available as compared to other conservation tools, achieving lasting conservation through easements still requires considerable planning, expertise, and financial resources. Hence, a key criterion for comparing the four models is how each maximizes opportunities to conserve tribally significant landscapes. The ability of each model to achieve conservation may be analyzed

org/publications/article-249 ("Some of these [local land trusts and] conservation groups are now collaborating with North Coast tribes to preserve and restore important natural areas within the temperate rainforest and other critical ecosystems. International conservation organizations often ignore the rights and concerns of indigenous people, who suffer from displacement when large areas of land are acquired for conservation. On the North Coast smaller, community-based organizations appear to be willing to engage in a meaningful dialog with tribes who are stakeholders in planned conservation areas.").

117. These holders can own fee title or conservation easements.

through four lenses: (1) landowner receptivity to tribal objectives, (2) administrative capacity, (3) ability to react quickly to opportunities, and (4) capacity to spread the conservation beyond the boundaries of protected lands.

1. *Landowner receptivity.*

The linchpin to conservation easements is landowner receptivity. Without a willing grantor, there can be no conservation easement. Landowners approach conservation easements with justified trepidation. A landowner's grant of an easement transforms his or her exclusive fee title into an encumbered title and creates an interest in the property held by a sovereign agency or land trust. Landowners will only convey conservation easements if they are comfortable with this prospect.

Fortunately, all four models benefit from the enormous trust that the private conservation community has built around the use of easements. When the conservation trust movement was in its nascent stage, landowners viewed conservation easements with uncertainty, and rightly so, because these were new tools with little experiential evidence to back them up. The explosion of land trusts across the country, fueled by the proliferation of success stories and substantial literature geared to the average landowner, have made conservation easements a tool that is familiar and comfortable to landowners. This is true notwithstanding some high-profile criticisms of particular land trusts.[118] At this point, the key for landowner receptivity is more likely to be a degree of comfort with the holder institution or entity, rather than the land trust movement as a whole. The four models may differ substantially in this comfort quotient.

Land trusts are ideally situated to build high comfort quotients. Typically, their boards of directors are filled with respected community leaders. Non-governmental entities carry far more personal cache than governmental bureaucracies. Just as a doctor or lawyer builds a thriving practice out of the accumulation of happy clients throughout the community, so do land trusts build a base of satisfied partners who then serve as ambassadors of

118. *See* King & Fairfax, *supra* note 9, at 68-69 (discussing a series of Washington Post articles in 2003 that exposed questionable business practices by The Nature Conservancy, a prominent national land trust).

conservation in the community.

Established, non-Native land trusts likely have the highest comfort quotient among the four models and thereby are the most likely to attract landowners receptive to conservation easements. These land trusts regularly showcase their properties to demonstrate good relationships with landowners. However, Native land trusts likely will build goodwill in the same fashion and will find an increasing number of landowners receptive to conservation transactions. Native land trusts might expedite this process in their initial set of projects through partnering with more established land trusts. Media outreach and public relations are effective tools to increase public support for, and awareness of, a trust's activities, as well as to facilitate grantor recruitment.

It is potentially more difficult for public agencies and tribes to gain landowner receptivity. Public agencies suffer from the public perception that bureaucracies are difficult to deal with. Moreover, in some regions where government is disliked intensely, landowners may be reluctant to convey property interests to agencies.[119] Tribes also face an uphill climb, though perhaps for different reasons.

Some tribes are much easier to deal with than public agencies in bureaucratic terms, but they may encounter racial prejudice that still festers in communities within their aboriginal homelands. Some landowners have a nearly reflexive concern that a tribe will seek to establish a casino on lands acquired in fee simple. The concern, in nearly all cases, has no rational basis, and can be addressed through covenants. Nevertheless, the casino concern poses a modern-day cultural barrier that some tribes may have to overcome in order to gain broad landowner receptivity to conservation transactions.

In addition, tribes' sovereign immunity may discourage property owners from entering into legal agreements.[120] Tribes, like other sovereigns, enjoy immunity from lawsuits.[121] Potential

119. *But see* BYERS & PONTE, *supra* note 5, at 245-46 (emphasizing that the supply of easements for sale by property owners exceeds demand from the government and land trusts, which face funding constraints); *id.* at 249 (describing how some agency acquisition programs "have so many landowners competing to sell easements that the administering agencies generally give priority to landowners offering the greatest discount").

120. For a discussion of how sovereign immunity may impact tribes' legal defense and enforcement of conservation title, see *infra* Sections II.C.1 and II.F.2, respectively.

121. For discussion of tribal sovereign immunity, see FELIX S. COHEN, COHEN'S

grantors may be concerned that if a tribal holder does not fulfill its obligations under an easement, there will be no legal recourse against the tribe, since it may be protected from lawsuits. If a grantor refuses to deal with a tribe because of its sovereign immunity, the tribe can always consider waiving its immunity. Alternatively, a tribe could establish a 501(c)(3) organization to acquire the conservation title.[122] A sub-entity of a tribal government, if acting as an "agent" of the tribe, generally is entitled to sovereign immunity, but such immunity can be waived without affecting the immunity of the tribe.[123]

Despite the concerns mentioned, among certain types of landowners tribes may carry particular appeal, for at least two reasons. First, for landowners motivated primarily by a desire to protect their land in perpetuity, tribes may represent the ideal holder. Indeed, tribes' aboriginal history reflects "staying power" on the land.[124] While public agencies notoriously shift their priorities with the political winds, and land trusts may fold, tribes have proven their endurance on the landscape for centuries and in some cases millennia. Second, tribes or Native land trusts may offer indigenous land management expertise that attracts property owners,[125] particularly those dissatisfied with standard approaches to land stewardship. Increasingly tribes draw upon their traditional knowledge of landscapes to provide alternative management techniques for pest control, species re-introduction, and other difficult resource challenges.[126] This scenario has the potential to

HANDBOOK OF FEDERAL INDIAN LAW § 7.05 (Lexis-Nexis 2005).

122. *See* Internal Revenue Service FAQs for Indian Tribal Governments regarding Employee Plans and Exempt Organization Issues, http://www.irs.gov/govt/tribes/article/0,,id=102549,00.html#A3 (last visited Mar. 8, 2008).

123. *See* discussion *infra* Section II.F.2.

124. Jaime Pinkham, Watershed Program Manager, Columbia River Inter-Tribal Fish Comm'n, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (audio recording on file with author).

125. *See* BYERS & PONTE, *supra* note 5, at 141 (noting that "[i]ncreasingly, easement holders—particularly larger organizations with staff capacity—are helping landowners access land management expertise by moving beyond easement stewardship into stewardship of the land. Many holders of working-ranchland easements agree that the easements give them an opportunity to work proactively with a landowner on land management practices.").

126. *See* discussion *infra* notes 187-189, 193; University of Idaho Extension, *Lapwai Demonstration Garden: Native American Garden Yields Knowledge and Produce for Ten Consecutive Years*, http://extension.ag.uidaho.edu/nezperce/lapwai_garden.htm (last visited Feb. 2,

create a self-perpetuating, positive cycle of increasing Native management of private (and public) lands, grantor recruitment, and tribal land trust growth.

Moreover, tribes may hold special appeal to landowners in economically distressed regions such as those dominated by the ranching and timber industries. Such regions typically have little private ownership, and land trusts often encounter a negative perception that their work takes land out of economic productivity. Tribes that are already economic players in the region, through their own timber operations, casinos, farming, or other enterprises, may have won the confidence of the community by using a management approach that promotes economic viability. In some regions, such as the Umatilla Basin of Oregon, tribes have distinguished themselves from the mainstream conservation movement as players that structure conservation projects in a manner intended to provide a productive, sustainable economic future for both Indians and non-Indians alike. In such regions, tribes may already enjoy strong relationships with the landowner community and may be viewed by many as the preferred holder of conservation title.

2. *Administrative capacity.*

Tribes and public agencies generally enjoy an advantage over both Native and non-Native land trusts in terms of administrative capacity. Most public agencies that hold conservation title have significant administrative resources. The downside of this may be bureaucratic drag and indifference. Likewise, an existing tribal government structure presents benefits and drawbacks, depending on the size and resources of the tribe. For many larger tribes, a land trust program could draw on existing human, financial, and technical resources, particularly in the early stages. However, a tribe might be exposed to intertribal politics, conflicts of interest, and shortfalls in resources that could hamper the program's development.

Administrative capacity among non-Native land trusts varies considerably. Nevertheless, in general these established land trusts will have much greater resources than Native land trusts, which have not been in existence for as long. A Native land trust will

2008) (discussing Nez Perce integrated pest management program).

need to grow its administrative capacity. Over time, however, the training of tribal members in land trust management will have long-term benefits for tribal communities, as experienced Native professionals can help develop new Native land trusts and advocate for the tribal trust movement as a whole.

3. *Ability to react quickly to opportunities.*

In the world of conservation, timing is everything. A parcel of land threatened with development may be destroyed by bulldozers in a week. The ability to react quickly to conservation purchase opportunities is a key factor to consider when weighing the holder models.

A land trust, Native or non-Native, is likely to respond with greater expediency than a governmental agency. A land trust's acquisition decisions are typically made by a board of directors that can convene pursuant to its own internal processes. However, new land trusts are hindered in states that require a land trust to have been in existence for a specified period of time before accepting easements.[127]

Clearly, a federal agency is the least able to move quickly on conservation opportunities, due to both bureaucratic drag and the potential requirements stemming from environmental law.[128] A tribe, while also a bureaucracy, is likely to act more expediently than public agencies, but only if the Bureau of Indian Affairs (BIA) is not involved in the acquisition. If BIA is purchasing land or an easement to hold for a tribe, an enormous bureaucratic

127. *See* BYERS & PONTE, *supra* note 5, at 19 (noting that Colorado and Virginia impose two- and five-year "existence" requirements, respectively).

128. In particular, if the acquisition is part of a broader action impacting the environment, the National Environmental Policy Act (NEPA) could be triggered. NEPA requires environmental analysis for federal actions that could affect the environment. 42 U.S.C. §§ 4321-4395 (Westlaw 2008). The Fifth Circuit held in *Sabine River Authority v. United States Department of Interior* that an Environmental Impact Statement (EIS) was not needed when the U.S. Fish and Wildlife Service (USFWS) acquired a conservation easement on wetlands because precluding the development of wetlands did not "change[] the character or function of the land;" USFWS's "'action' in accepting the negative easement [was] tantamount to 'inaction.'" 951 F.2d 669, 680 (5th Cir. 1992). *But see* Ind. Forest Alliance, Inc. v. United States Forest Serv., 2001 U.S. Dist. LEXIS 11996, at *26 (D. Ind. 2001) (finding that a final decision by the U.S. Forest Service to maintain 947 "forest openings" via periodic mowing or burning in a National Forest differed from *Sabine River Authority* "[b]ecause the openings would grow back if left alone," so "the decision to maintain them is not analogous to decisions simply to preserve the environmental conditions present at the time of the agency decision.").

process comes into play.[129] BIA must evaluate whether to accept the title into trust, a process that is cumbersome, time-consuming, and unpredictable in outcome.[130] For that reason, tribes normally do not involve BIA in conservation transactions.[131] Accordingly, if a tribe wants to take advantage of a conservation opportunity within a short time frame, it should acquire the title itself, and then begin the long process of submitting an application to BIA if it deems the effort worthwhile.

Significantly, the slow response capabilities of the public agency and tribal models may be mitigated by an intermediate buyer, such as TPL or another land trust. Such an organization can purchase a conservation easement or fee title on a threatened property and hold it off the market during the time it takes to formalize a transaction.

4. *Spreading conservation beyond boundaries of protected land.*

In assessing the various models, it is important to focus on a

129. *See generally* 25 C.F.R. § 151 (Westlaw 2008) (detailing the steps that BIA must take before making a decision on the merits of an application for BIA acquisition of property).

130. The Secretary of Interior has discretionary authority, granted by statute, to take land into trust for Indian tribes and Indian individuals. 25 U.S.C. § 465 (Westlaw 2008).

> The Secretary of the Interior is authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, *any interest in lands, water rights, or surface rights to lands,* within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians. . . . Title to any lands *or rights* acquired pursuant to this Act…shall be taken in the name of the United States *in trust for the Indian tribe* or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id. (emphasis added). Only federally-recognized tribes may benefit directly from the Indian Reorganization Act of 1934. Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 160-61 (D.D.C. 1980). As the distance between a tribe's reservation and the property to be acquired increases, the Secretary of the Interior must "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" and the acquisition's potential local effects. 25 C.F.R. § 151.11 (Westlaw 2008). If BIA is skeptical of assuming this responsibility, particularly where BIA's resources are limited, a tribe could argue that holding conservation easements is actually in the best interests of both the BIA and the tribe, since conservation easement acquisitions are more cost-effective than fee purchases.

131. Bowen Blair, Senior Vice President, TPL, Remarks at the Wayne Morse Center Symposium on Tribes as Trustees Again (Apr. 6, 2007) (audio recording on file with author).

somewhat intangible conservation "zone of influence" that reaches beyond the borders of the anchored conservation parcel. Securing a buffer zone is vital to protecting the integrity of the conserved parcel, as artificial property boundaries in no way guard against external threats arising on neighboring lands.[132] Once a parcel is secured, the holder has an opportunity to develop relationships in the community and among neighbors in pursuit of other compatible conservation opportunities. Indeed, the tribal trust movement to date has manifested a "growth by handshake" process whereby formalized transactions are preceded by perhaps years of informal understandings between conservation managers and neighbors.[133]

The ability to grow the zone of conservation rests primarily on human engagement with neighbors and community members.[134] As holders of easements, public agencies are perhaps least likely to nurture, much less promote, such outreach. The bureaucratic orientation of public employees and managers seemingly would stifle such initiative. Moreover, agency officials are frequently transferred out of their jobs or move on to other positions. A handshake agreement tends to be most effective when it is personal and backed by trust, something difficult to achieve with a transitory work force.

Established, non-Native land trusts seem to have the greatest short-term potential for growing the conservation zone because, locally, they may have the most personal contacts. But the tribal or Native land trust holder may have more long-term potential to grow the conservation zone of influence, particularly if Native employees managing the land are connected in some way with the aboriginal history of the anchored property or the geographic area. While neighbors at first might be threatened by the prospect of a tribe reestablishing a presence, the tribe or Native land trust may, in due time, develop a base of goodwill that will nurture conservation reciprocity across fence lines.

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132. For a summary of the importance of conservation easements to private lands conservation, *see* Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 545 (2006) (emphasizing the utility of conservation easements to protect less than pristine private lands, as well as buffer zones).

133. *See* Wood & Welcker, *supra* note 2.

134. *See* Tom Quinn, *A Farm and River Greenway on the St. Croix River: Standing Cedars Community Land Conservancy and Wisconsin Farmland Conservancy*, *in* PROTECTING THE LAND, *supra* note 32, at 339 (discussing the unique role land trusts can play in communities).

B. *Funding Potential*

The growth of private conservation depends in large part on funding opportunities. Because land is an asset with enormous market value, the financial components of a transaction "make or break" many deals. Landowners typically (though not always) want some sort of financial benefit from conveying land or conservation easements. Generally, two sorts of funding can be used to put land into conservation. The first could be thought of as third-party funding. Grants from foundations, individual donors, and public agencies may be used to fund conservation. Additionally, as some tribes develop profitable casino operations, conservation funding may flow from that source.

The second type of funding is indirect public funding through tax incentives. When a landowner makes a donation or bargain sale of fee or an easement, she or he may receive valuable tax benefits, assuming that the transaction meets the terms of the Internal Revenue Code.[135] Such tax advantages can be calculated into the transaction as a financial component. However, tax advantages are not available for all donors. Some landowners, particularly ranchers already operating under tremendous debt, have so little profit and so many available tax write-offs that any further tax advantages are unlikely to make a financial difference to them. In those cases, third-party funding may prove critical. As described below, the four holder models differ in their ability to leverage various funding opportunities.

1. *Third-party funding.*

a. *Foundation and private donor funding.*

Overall, the private foundation sector gives relatively little to environmental causes, and even less to private conservation, when compared to grants for other social causes.[136] Funding opportunities depend a great deal on the geographic and institutional context in which a conservation deal takes place.

135. *See* discussion *supra* Section I.B.3.

136. *See, e.g.*, Foundation Center, *Highlights of Foundation Giving Trends*, Feb. 2007, at 1, http://foundationcenter.org/gainknowledge/research/pdf/fgt07highlights.pdf (last visited Feb. 2, 2008) (showing that in 2005 foundations gave only six percent of total grants, in terms of both dollars and numbers of grants, to the "Environment and Animals" category of grantees).

Many established land trusts have developed a loyal set of individual donors and some foundation donors. Native land trusts no doubt will embark on the same process when they become established. Tribes, and to a lesser extent, Native land trusts, may enjoy access to funding sources not available to the established land trust community. Individual donors may be moved through historical and social concerns to give to tribes for conservation. Suffice it to say, of the four models, public agencies are the least likely to receive any private grants, as the private world is keenly aware that government is already funded through tax dollars.

b. *Public funds.*

Some public funds are available for conservation. Two of the most prominent sources are the Land and Water Conservation Fund (LWCF),[137] administered by the National Park Service, and the Forest Legacy Program (FLP),[138] a program of the U.S. Forest Service. However, LWCF only provides money to states and select federal agencies, and FLP only provides funding to states. Tribes appear to be ineligible for direct receipt of funds from either program. However, tribes, as well as land trusts, are eligible to receive LWCF and FLP funds indirectly by applying to participating states for funding from these programs.[139] Given that federal funding sources often require partnerships with federal agencies, an established non-Native land trust may enjoy a fundraising advantage over a new Native land trust due to its existing relationships with the federal government stemming from other projects. Public funding available at the state and local levels likewise encourages—and rewards—partnerships with agencies.[140]

137. *See* 16 U.S.C. §§460l-4 to 11 (Westlaw 2008); Trust for Public Land, *Land and Water Conservation Fund,* http://www.tpl.org/tier3_cd.cfm?content_item_id=10566&folder_id=191 (last visited Feb. 2, 2008).

138. *See* 16 U.S.C. § 2103c (Westlaw 2008). *See also* BYERS & PONTE, *supra* note 5, at 247 (describing the nationwide growth of the Forest Legacy Program (FLP) and stating that the "FLP funding has been responsible for protection of 390,000 acres of forestlands valued at $216 million . . . through collaborative projects involving states, local communities, non-profits, and private landowners"); *id.* at 263-64 (describing a Washington case study involving FLP).

139. *See* FAIRFAX & GUENZLER, *supra* note 42, at 10 (discussing how The Nature Conservancy and TPL are among the most elaborate examples of "private groups designed specifically to procure LWCF funds to support their own acquisition priorities and to assist unimaginative federal real estate specialists in actually making the transactions").

140. *See, e.g.*, BYERS & PONTE, *supra* note 5, at 269 (noting how local land trusts can

While tribes may be ineligible to receive direct funding from LWCF and FLP, other programs do fund tribal conservation projects. For example, the Bonneville Power Administration's Mitigation Program for the Columbia River hydrosystem has funded several tribal projects geared towards protecting habitat of the imperiled Columbia River salmon which support treaty harvests.[141] Moreover, while public agencies may be excluded from supporting some funding sources, particularly private funds, they have capacity to offer direct funding for projects through their standard appropriations.[142]

c. *Tribal funds.*

Perhaps the most obvious source of support for some tribal conservation projects is the tribe itself. Tribal revenues from profit-making ventures such as casinos potentially could fund the acquisition program of land trusts promoting indigenous values.[143] Another source of tribal funds is settlement agreements from litigation between tribes and governments or private adversaries. Reinvestment of tribal settlement funds in a tribal acquisition program or Native land trust seems especially appropriate where the litigation concerns the natural resource sought to be protected through private conservation.

receive "a constant stream of revenue from public sources to fund their easement programs"); *see also id.* at 249 (describing how agency acquisition programs may benefit from "bargain sales" where a landowner donates a percentage of the easement's value to expedite the transaction process, since the grantee does not have to spend time fundraising for the acquisition; "some programs have so many landowners competing to sell easements that the administering agencies generally give priority to landowners offering the greatest discount").

141. One such example is the ninety-acre easement that the Nez Perce cohold on the South Fork of the Salmon River near McCall, Idaho. Part of the tribe's $400,000 easement purchase came from BPA mitigation funds to protect salmon spawning grounds. *See* Wood & Welcker, *supra* note 2.

142. *See* BYERS & PONTE, *supra* note 5, at 269.

143. Many tribes operate grant-making foundations to fund community projects with profits generated at casinos. Environmental projects may qualify. For example, the Confederated Tribes of the Grand Ronde's Spirit Mountain Community Fund dedicates six percent of the profits from Spirit Mountain Casino to non-profit organizations in Western Oregon. One programmatic area of the Fund is Environmental Protection. *See* Spirit Mountain Community Fund, About the Fund, http://www.thecommunityfund.com/about/ (last visited Feb. 2, 2008).

2. *Ensuring tax incentives for donors.*

A central concern for indirect funding is ensuring tax benefits for grantors of conservation title. The I.R.C. provides the framework for determining whether a donation is eligible for tax benefits. As described in Section I.B.3, the I.R.C. permits tax deductions for charitable gifts to governments or land trusts, but I.R.C. regulations address each type of recipient differently. While all four models carry the potential for providing such benefits, some models face greater uncertainty than others.

The public agency model and the non-Native land trust model present the most certainty to landowners seeking tax deductions. Public agencies clearly fit the description of a qualified governmental recipient: a "State, a possession of the United States, or any political subdivision of any of the foregoing."[144] Likewise, non-Native land trusts are unlikely to face new challenges meeting the requirements of I.R.C. § 170(h)(3).[145] In contrast, tribes and Native land trusts must consider additional issues, as discussed below.

a. *The tribal holder.*

At first glance, tribes appear to be at a disadvantage in accepting easements due to a lack of clarity regarding their ability to confer tax deductibility for grants. Like many statutes that have bearing on conservation, I.R.C. § 170 neglects to address unique tribal circumstances: tribes are mentioned neither in the definition of "qualified organization" nor "government unit."[146] However, the conundrum presented by the failure of I.R.C. § 170 to expressly identify tribes as permissible holders is solved by I.R.C. § 7871. That section clarifies that:

> An Indian tribal government shall be treated as a State—(1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under—(A) section

144. I.R.C. § 170(c)(1) (Westlaw 2008).

145. *See supra* notes 21-24 and accompanying text.

146. *See* I.R.C. § 170(h) (Westlaw 2008); *id.* § 170(b)(1)(A)(v) (referring to a "government unit" as defined by §170(c)(1)).

> 170 (relating to income tax deduction for charitable, etc., contributions and gifts), (B) sections 2055 and 2106(a)(2)(relating to estate tax deduction for transfers of public, charitable, and religious uses), or (C) section 2522 (relating to gift tax deduction for charitable and similar gifts) . . .[147]

Hence, because a tribal government is "treated as a State" under the I.R.C. provisions relating to federal income tax deductions, charitable gift deductions, and estate tax deductions, and states are "qualified organizations" under these same provisions,[148] a landowner granting a conservation easement to a tribe need not worry about extra barriers presented by transacting with a tribe.

However, uncertainty still may cloud transactions involving non-federally recognized tribes and transactions in which the grantor seeks additional tax deductions at the state or local levels. For tribes lacking federal recognition, one option would be to establish an entity that fits I.R.C. § 170(b)(1)(A)(vi), which covers a "corporation, trust, or community chest, fund, or foundation"[149] that "receives a substantial part of its support" from the tribe itself, another governmental body, "or from direct or indirect contributions from the general public."[150] However, this approach appears problematic because of another requirement: the entity must be organized "exclusively for religious, charitable, scientific, literary, or educational purposes"—conservation per se is not included.[151]

A better option for tribes concerned about the lack of coverage of I.R.C. § 7871, either because their donors seek state or local tax breaks or because the tribe lacks federal recognition, is to establish a 501(c)(3) organization. Such an entity is a "qualified organization" under I.R.C. § 170(h)(3)(B), so long as its funding sources conform with I.R.C. § 509(a)(2) or (3).[152] Tribes can elect to be 501(c)(3) organizations, and can form 501(c)(3) sub-

147. *Id.* § 7871 (internal cross-references omitted).

148. *See id.* §§ 170(h)(3), 170(c)(1).

149. As defined in I.R.C. § 170(c)(2).

150. *Id.* § 170(b)(1)(A)(vi).

151. *See id.* § 170(c)(2)(B).

152. *See id.* § 170(h)(3)(B). I.R.C. § 509 defines "private foundation"; subsections (a)(2) and (a)(3) place limits on the amounts and sources of such entities' funding.

entities.[153]

I.R.C. § 7871(d) provides tax deductibility for donors to tribes that form sub-entities to function as tribal land trusts, but with a major caveat. Such donations will only be tax deductible if "the Secretary determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial governmental functions of the Indian tribal government."[154] Because acquiring conservation easements is a "function . . . customarily performed by State and local governments with general taxing powers,"[155] a tribal land trust operating within a tribal government should fit this requirement.

Another potentially troublesome facet for tribes is that the I.R.C. allows deductions for gifts to governmental bodies only if such gifts are made for "exclusively public purposes."[156] This restriction does not apply to land trusts.[157] Hence, a tribal land trust wishing to maintain tax deductibility for its donors via I.R.C. § 7871 must be careful to manage its easements for "exclusively public purposes." This language would pose little impediment to states or federal agencies that take easements into conservation trust ownership, because those sovereigns represent the general "public." Tribes, however, represent their own discrete populations, and are likely to acquire easements to benefit tribal interests.

Nevertheless, for several reasons it is plausible to argue that any tribal conservation interest is also a "public purpose," in that the values protected by conservation also serve the public. First, fish and wildlife resources contribute to the biodiversity and species abundance—values emphasized in laws such as the Endangered Species Act. Second, sacred sites and archeological resources have

153. *See* Internal Revenue Service FAQs, *supra* note 122 ("A tribe may choose to create, through separate organizing documents, an entity separate from the tribe that does not have sovereign powers and that is organized exclusively for purposes as described under I.R.C. section 501(c)(3).").

154. I.R.C. § 7871(d) (Westlaw 2008).

155. *Id.* § 7871(e).

156. *See id.* §170(c)(1); *see also id.* §170(b)(1)(A)(v) (recognizing contributions to a "governmental unit referred to in subsection (c)(1)" as charitable contributions); BYERS & PONTE, *supra* note 5, at 18.

157. Of course, land trusts must comply with a host of other requirements to maintain their status as "qualified organizations" for which donations are tax deductible. *See supra* notes 21-24 and accompanying text.

crucial historical value, as evidenced by a variety of other statutes.[158] Third, arguably the "exclusively public purpose" requirement is difficult for any conservation easement transaction to meet, since acquisitions bundle a myriad of public and private benefits. Finally, on a more general level, any tribal acquisition to promote tribal culture, economy, or conservation is arguably a per se "exclusively public use," as there is a general public interest in supporting tribes and tribal values. In another context, the federal government has equated "public interest" with the trust obligation to support tribal fisheries.[159] However, to avoid potential complications of tax law and ensure that grantors receive federal tax benefits, a tribal government could establish a special entity, such as a not-for-profit corporation or charitable corporation under state law, to acquire and hold its conservation easements.[160]

Hence, although the federal tax holder requirements obviously were not written with tribes in mind, the tax laws do not foreclose tribal acquisitions of conservation easements. First, they have no bearing on transactions in which easements are purchased rather than donated, because there is no role for tax incentives in the deal.[161] Second, tribes can take advantage of I.R.C. sections 7871 and 501 to ensure tax deductible donations for grantors. Third, even where particular circumstances prevent a tribe from using I.R.C. sections 7871 or 501, structuring a partnership with a federal agency or established land trust, or accepting the easement through BIA, may avoid some of the pitfalls of the present statutory language.

158. *See, e.g.*, Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa to mm (Westlaw 2008); Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§ 3001 to 13(Westlaw 2008).

159. *See* Northwest Sea Farms v. U.S. Corps of Eng'rs, 931 F. Supp. 1515, 1518 (D. Wash. 1996) (upholding the Army Corps of Engineers' 1992 denial of a fish-farming corporation's application for a required permit under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (West 1986), "based upon a finding that the project would be against *the public interest* because it would conflict with the Lummi Nation's fishing rights at one of its usual and accustomed fishing places under the Treaty of Point Elliot.") (emphasis added).

160. *See* COHEN, *supra* note 121, § 21.02(1)(b). In this context, such an organization would be very similar to a Native land trust, with perhaps the only difference being the degree of independence from a tribal government.

161. This is not entirely the case, however, where the state property holder constraints incorporate federal tax holder constraints. *See supra* note 41 and accompanying text.

b. *The Native land trust.*

In contrast to established non-Native land trusts, for which federal tax holder constraints are unlikely to raise unexpected issues, newly established Native land trusts may encounter uncertainties. First, a land trust must meet various IRS requirements regarding its sources of funding.[162] The "public support" test set forth in I.R.C. § 170(b)(1)(A) requires that a land trust prove that a "substantial part of its support" comes from a "governmental unit"—which includes tribes[163]—or "from direct or indirect contributions from the general public."[164] A Native land trust bankrolled entirely or to a large degree by a tribe that is not federally recognized, and therefore perhaps not deemed a "government unit" for tax purposes, must diversify its donor base to preempt challenges to its "holder" status based on a lack of public support.[165]

If for some reason a Native trust cannot meet the requirements set out in I.R.C. § 170(b)(1)(A)(vi),[166] it still can ensure tax deductible donations for its grantors by organizing itself as a 501(c)(3) organization. Of course, as a 501(c)(3) organization, it will have to comply with numerous other funding requirements regarding public support.[167] For example, 501(c)(3) Native land trusts should be careful to observe formalities of independence from a tribe in terms of accounting, staffing, and other administrative linkages. Failure to do so may open the Native land trust to allegations that it is a mere offshoot of a tribe itself, in which case it may encounter the constraints described above with respect to tribal holders.

Like any other land trust, a Native land trust will have to limit its activities to its conservation mission.[168] In other contexts, courts

162. *See* I.RC. §§ 170(h)(3), 170(b)(vi) (Westlaw 2008).

163. *See supra* notes 147-48 and accompanying text.

164. I.RC. § 170(b)(1)(A)(vi) (Westlaw 2008).

165. *See id.*

166. *See supra* notes 149-150 and accompanying text.

167. *See* I.R.C. § 170(h)(3)(b) (Westlaw 2008) (requiring 501(c)(3) groups to comply with § 509(a)(2) or (3)). Section 509 defines private foundations and details permissible sources, and amounts, of funding.

168. *See* Cheever, *Public Good*, *supra* note 55, at 1094 ("A tax-exempt charitable organization must be organized exclusively for exempt purposes. 'The presence of a single nonexempt . . . purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly exempt . . . purposes.'") (quoting Better Bus. Bureau v.

have stripped tax-exempt status from some charitable organizations with activities that benefit profit-making businesses.[169] Native land trusts that receive funding primarily from a tribal enterprise such as a tribal casino should maintain independence from the donor casino to avoid challenges. But again, these federal tax limitations are only relevant where the conservation transaction incorporates an element of tax benefit.

To qualify for charitable contributions, the Native land trust should be careful to craft its objectives in conservation easement purpose clauses to reflect the general purpose of conservation of land or historic structures mandated by I.R.C. § 170(h)(4)(A).[170] The best approach may be to tie the purpose clause to the I.R.C. language, while at the same time specifying tribal values.[171]

C. *Durability of Protection*

As most conservation easements are intended to be perpetual, designing the easements and the holder organizations to withstand legal challenges over the long-term is essential. As described below, with proper planning and foresight a holder can minimize future challenges attacking its legal status.

United States, 326 U.S. 279, 283 (1945)); FAIRFAX & GUENZLER, *supra* note 42, at 15-16 (discussing risks of a non-profit corporation losing its non-profit status).

169. Cheever, *Public Good*, *supra* note 55, at 1094. As Professor Cheever highlights:

> A particularly troubling line of cases for land trusts hold [sic] that otherwise charitable organizations, whose activities benefit for-profit organizations with which they maintain a business relationship, are ineligible for tax-exempt status. Land trust operations often involve arrangements with local for-profit organizations and land trust preservation acquisitions can enrich private holders of nearby land by guaranteeing their scenic vistas or open space access.

Id.

170. *See supra* note 20 and accompanying text.

171. For example, instead of "To conserve medicinal plant life so as to ensure adequate supply for the tribe," a conservation easement might propose "To conserve native vegetation from adverse land use and invasive species." Likewise, "To ensure open-space features of Protected Property sufficiently to accommodate tribal ceremonies" might be riskier than "To ensure open-space features for low-impact cultural and recreational purposes." In other words, while the mention of tribal values is important, the drafter must anticipate any challenges. *See generally* BYERS & PONTE, *supra* note 5, at 318-19.

1. *Legal challenges to holders.*

Commentators have cautioned that future owners of encumbered conservation lands likely will search for legal avenues to defeat the easements.[172] One possible challenge is based on holders' federal tax-exempt status, as discussed above in Section II.B.2; another type of challenge is based on property law holder constraints, as discussed in Section I.C.

Opponents seeking to invalidate a tribe's conservation easements may challenge the legitimacy of the tribe as a "holder" under federal and state law. Indeed, the novelty of a tribe holding a conservation easement may invite such an attack. The outcome will depend in large part on the "holder" requirements of the particular state statute governing the conservation easement.[173] Property law holder constraints do not appear to foreclose tribal acquisition of conservation easements. The UCEA definition of "holder" is "a governmental body empowered to hold an interest in real property under the laws of this State or the United States."[174] This definition certainly encompasses tribes, which may hold property apart from BIA involvement. At present, however, only California expressly identifies tribes as eligible conservation easement holders.[175] Nevertheless, the lack of express tribal recognition in the other state statutes does not appear to present a legal impediment unless the statute specifically lists all qualified governmental holders without mentioning tribes. Where there is a potential legal infirmity surrounding "holder" status, it may be advantageous to enlist BIA to hold a conservation easement in trust. Partnering with an established non-Native land trust also may be a strategy to circumvent the novel issues facing a tribal trust in terms of withstanding challenges to its status as a valid holder.[176]

172. *See generally* Cheever, *Public Good*, *supra* note 55.

173. *See* Mayo, *supra* note 35, at 35-40 (describing variations among states); *see also* Greene, *supra* note 4, at 909-11 (discussing Washington's holder requirements and relevant case law on "essentially collateral" attacks on land trusts).

174. UNIF. CONSERVATION EASEMENT ACT § 1(2) (1981); *supra* note 36 and accompanying text.

175. King & Fairfax, *supra* note 9, at 129 n.123 (noting "California Senate Bill 18 includes two categories: (1) 'a federally recognized California Native American tribe' and (2) 'a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission.'" (quoting 2004 Cal. Adv. Legis. Serv. 905 (Deering)). *See also* Mayo, *supra* note 35, at 35-40.

176. For a discussion of established land trusts' compliance with holder

A new Native land trust must navigate the holder requirements in order to insulate the organization from legal challenges later on. As noted earlier, the state property holder constraints vary from state to state.[177] The requirement in some states that a land trust's "primary purpose" be the conservation of land should not be problematic.[178] However, new Native land trusts must be aware that some states require that a land trust be in existence for a number of years before it can accept easements.[179]

2. *Holder stability.*

Due to their purpose of lasting in perpetuity, conservation easements require a stable holder. All four models described herein are susceptible to organizational instability, but to different degrees. Overall, public agencies and tribes are more stable than land trusts. Of course, public agencies must withstand ever-shifting political whims and the accompanying budget swings. But as a part of an enduring sovereign, a public agency is unlikely to disappear or relinquish interests in land.

Tribal holders may provide even more conservation durability than public agencies. Any tribe with the resources to acquire conservation easements likely has sufficient citizenship and organizational strength to provide stability over the long term. Indeed, tribes today have withstood centuries of abuse since the arrival of Europeans, and today many tribes are growing in size and political clout. Of course, tribal governments face the same shifts in political priorities and economic pressures as any other government.

Established non-Native land trusts are likely to be perceived as more stable than Native land trusts. Because of the small number of Native land trusts, there is little track record to evaluate the trusts' institutional longevity. Although most non-Native land trusts only have been in existence for one or two decades, they nevertheless possess financial resources and community support

requirements, *see* Cheever, *Public Good*, *supra* note 55, at 1093-96; Greene, *supra* note 4, at 909-11; Mayo, *supra* note 35, at 35-40.

177. *See* Mayo, *supra* note 35, at 35-40.

178. *See id.* at 38-39 (noting that California, Illinois, and Washington, among others, have "primary" or "principal" purpose requirements).

179. *See id.* (noting that Colorado and Virginia impose two and five-year "existence" requirements, respectively).

that nascent Native land trusts lack.

As discussed in Section I.D, until Native land trusts become established, a range of holder partnerships are available to strengthen the protection of a conservation easement and provide assurance to both the grantor and the public of the long-term stability necessary to protect and enforce an easement into the future. For example, a new Native land trust can form a partnership with another private land trust, tribe, or public agency. Placeholder mechanisms, such as naming a tribal trust or Native land trust as a back-up grantee, can help ensure that potential successors are committed to protecting indigenous values.

3. *Perpetuity and the changed circumstances attack.*

As noted above, one of the vulnerabilities of conservation easements is that changed circumstances can undermine the perpetuity of the easement.[180] Perhaps the most widespread critique of conservation easements is that their perpetuity fosters "dead hand" control.[181] In other words, opponents argue that the current generation of grantors and land trusts is tying the hands of future generations to adapt to new scientific knowledge and technologies, conform to changes in cultural values, and confront changed environmental conditions in and around protected lands.[182]

Tribes or Native land trusts should enjoy a better defensive stance than non-Native land trusts or public agencies in defending against attacks on the "circumstances" of an easement. The intergenerational perspective of tribal people, their capacity to

180. *See* discussion *supra* Section I.I.

181. *See* Mahoney, *supra* note 65, at 769-81.

182. *See id.* at 744-69. Professor Mahoney writes:

> [T]he assumption that the present generation is competent to engage in perpetual land use planning reflects an unduly bounded conception of the changes that are likely to occur in nature itself, in scientific knowledge, and, last but certainly not least, in cultural attitudes. Conservation servitudes are ill-suited to adapt to such changes. Indeed, there is a certain irony in the fact that the number of acres under conservation easement has been growing rapidly at a time when old conceptual models of natural and cultural stability have begun to give way to more dynamic ones.

Id. at 753.

adapt to changing environmental and societal conditions, and their ancient knowledge of ceded lands make tribes and Native land trusts better situated than other land trusts to design, draft, and defend conservation easements in a way that protects against the changed circumstances argument.[183] Tribes, more than other property owners, are positioned to say how environmental and cultural conditions have evolved over hundreds of years. If they seek to defend a conservation easement as relevant, courts may give deference to their traditional knowledge as an evidentiary matter.[184] This defense against changed circumstances will be particularly important as climate change threatens landscapes.

D. *Native Management of Resources*

One of the central objectives of a tribal trust movement is to provide mechanisms for tribes to resume management of aboriginal lands and resources. As explained in the companion piece to this Article, historically, tribes worked with Earth's natural processes to facilitate abundance and natural wealth through the generations. As a result of attempts toward conquest, the management of such resources turned abruptly to consumptive and exploitative practices by federal and state trustees. Consequently, many resources are in a state of extreme degradation and heading towards collapse.[185] Re-vesting tribes with the role of resource manager may convey benefits to society extending well beyond the tribal interests involved.

This section explores the avenues of tribal management

183. For an alternative critique of Professor Mahoney, *see* Thompson, *supra* note 71, at 617-18 (arguing that conservation easements' perpetuity helps reduce transaction costs of land conservation, avoids property owners' future temptations, ensures effective private and public ordering, and helps solve a "temporal tragedy of the commons").

184. Of course, if environmental or land use conditions change to such an extent that a conservation easement fails to fulfill its original purpose, it may be counterproductive—for both the land trust's reputation and the accountability of the land trust movement as a whole—for a holder to defend the easement. *See* Cheever, *Property Rights*, *supra* note 44, at 448 (arguing that the doctrine of changed circumstances actually is advantageous to land trusts where an easement is rendered pointless, since the "easement holder and possessory holder may sell their interest and divide the proceeds subject to a prearranged formula set forth in the easement").

185. *See* MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: SYNTHESIS 1 (2005), *available at* http://www.millenniumassessment.org/documents/document.356.aspx.pdf (reporting that the U.N.-sponsored international research team found that roughly sixty percent of the life-supporting ecosystems on Earth are being degraded or used unsustainably).

provided by each model. As Part I of this Work points out, the new genre of tribal conservation easements is likely to emphasize restorative capabilities. Tribes across the country are invoking their traditional knowledge in pursuit of restoration goals. This restoration function requires a different kind of easement than the prototypical conservation easement, which reflects a "hands off" approach to management. Monitoring provisions may serve as a platform for tribal management. A central concern, therefore, is the extent to which each model not only allows the basic access required for monitoring but also the necessary discretion for affirmative restoration management by tribes.

1. *The public agency holder.*

In general, public agencies may be less effective at monitoring and managing conservation easements than private organizations.[186] Public agencies often are constrained by bureaucratic inertia and funding shortfalls. However, on the positive side, they have skilled technical staff and the administrative support to engage in responsible stewardship of easements or conservation lands. An initial question, therefore, is the extent to which a particular public agency will prioritize the stewardship of the conservation interests it gains. If the agency does not emphasize this component of property management, any potential for tribal partnering will be constrained at the outset.

Agencies that devote adequate resources to monitoring can create an affirmative role for tribes, but doing so takes careful planning, ideally at the acquisition stage. Because the public agency is the primary holder, there must be clear expectations between the agency and the tribe regarding management. The emerging successes of tribal partnerships with federal and state governments in comanaging public lands outside of reservations highlight the ability of tribes to take a leading role in habitat management and restoration programs. Examples include salmon habitat restoration in the Pacific Northwest,[187] wolf reintroduction

186. *See* BYERS & PONTE, *supra* note 5, at 255 (discussing a study showing that less than one third of public agency easements near San Francisco were monitored annually, and explaining causes of government inattention).

187. For example, the Columbia River tribes have completed at least 110 projects in ceded areas under funding provided by the National Marine Fisheries Service. Columbia River Inter-Tribal Fish Commission, Columbia River Inter-Tribal Fish Commission

in Idaho,[188] and a watershed rehabilitation program in Northern California.[189]

There are established mechanisms for federal agencies to partner with tribes, due to their trust relationship. A federal agency may contract with tribes or enter into a cooperative management agreement.[190] Another avenue, while more cumbersome, is a program funding agreement authorized by the Tribal Self-Governance Act of 1994.[191] The Act allows tribal assumption of activities carried out by agencies within the U.S. Department of Interior.[192] Self-governing tribes are eligible to receive funding from the federal agency to manage the land pursuant to an agreement between the agency and the tribe. Among all of the federal agencies that are eligible to enter into such funding agreements with tribes, the USFWS is most likely to acquire conservation easements and fee lands containing tribal resources.[193] Where this mechanism is used to formalize

Successes under the Pacific Coastal Salmon Recovery Fund, FY 2000- FY 2006, http://www.critfc.org/text/pcsrf/flyer.pdf. The majority of these projects focus on habitat restoration, salmon population monitoring and assessment, outreach, and habitat acquisition. *Id.*

188. In the mid 1990s, the Nez Perce developed a federally-approved wolf management plan under which the tribe carried out wolf reintroduction, monitoring, and habitat restoration on both tribal and federal lands, under the oversight of the USFWS. *See* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 517-18 (1999).

189. The InterTribal Sinkyone Wilderness Council partnered with California State Parks to treat more than forty miles of abandoned logging roads in Sinkyone Wilderness State Park to reduce sediment deliveries into coastal streams and the Pacific Ocean, and to restore native forest and wildlife habitat. *See* California State Parks Partners, at 69, http://www.parks.ca.gov/pages/795/files/07%20caspp%20natural%20resource%20partners.pdf; Sinkyone Watershed Rehabilitation-Tribal Operators Training Program, http://mercury.ornl.gov/metadata/nbii/html/nrpi/www.ice.ucdavis.edu_nrpi_xml_nrpi-9835.html.

190. *See* JAN G. LAITOS, SANDRA B. ZELLMER, MARY C. WOOD, & DANIEL H. COLE, NATURAL RESOURCES LAW 598-99 (2006). These tools were used to allow the Nez Perce Tribe to assume the federal wolf recovery program in Idaho. *See id.* at 601-03.

191. Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. §§ 458aa-458hh (Westlaw 2008)).

192. 25 U.S.C. § 458cc(c) (Westlaw 2008).

193. In 2004, the Department of Interior tapped this authority to negotiate an agreement with the Confederated Salish and Kootenai Indian tribes for biological, fire, and other management across the 18,500-acre National Bison Range Complex in Montana operated by USFWS. Press Release, U.S. Fish and Wildlife Service and the Confederated Salish and Kootenai Tribes Negotiate Annual Funding Agreement for National Bison Range Complex (Dec. 15, 2004) http://www.fws.gov/mountain%2Dprairie/cskt%2Dfws%2Dnegotiation/.

management relationships, it presents an overlay to the conservation easement or other acquisition document. For example, a conservation easement might expressly provide that the public agency will delegate management responsibility to the tribe; the management agreement itself would be the vehicle to express the detailed parameters of the relationship.

The most obvious drawback to the public agency model is that the tribal resource managers are not directly in the driver's seat. Instead, they must operate through a potentially inhibiting process of contracts or agreements with the federal government or other public agencies.[194] Accordingly, where tribal management could be ensured through use of another model, such an alternative may be preferable. However, there may not be any alternative at hand when the acquisition window is closing. A public purchase may be the only way to protect the property before private development destroys the resources. In such cases, tribes have greater potential to serve as conservation managers if the land is in public ownership than if the land is in private ownership.

2. *The tribal holder.*

Tribes are well positioned to undertake management activities on conservation lands or easements. Many tribes have developed extensive resource management programs over the last decade or two and have the staffing and structure to engage in restoration. In some cases, tribal capabilities surpass the federal and state administrative capabilities. Tribal agencies such as the Columbia River Inter-Tribal Fish Commission, the Northwest Indian Fisheries Commission, and the Great Lakes Indian Fish Commission have staff scientists that produce cutting edge scientific research on restorative management. These agencies also have region-wide recovery plans to provide macro-level strategy to member tribes. In these circumstances, the tribal holder model taps tremendous administrative expertise and represents perhaps the most promising way in which tribes can enter the conservation trust movement positioned as restoration managers of aboriginal lands and resources.

194. Commentators have noted that the federal government is "shockingly ineffective at . . . monitoring and enforcing easement requirements." King & Fairfax, *supra* note 9, at 120. This consideration might be less important, however, if a tribe formally agrees to conduct monitoring on behalf of an agency. *See* discussion *supra* Section I.D.2.

Moreover, tribes may use their own institutional framework to translate site-specific monitoring into larger restoration strategies. For example, parcel data on habitat restoration can inform revisions of the management plan for the protected property and also inform recovery efforts for other parcels in the future. Lessons learned from monitoring also can be used in drafting stronger provisions in future conservation easements.[195] Tribes' institutional resources may export the accumulated restoration knowledge to other forums, including other projects in the private and governmental sectors, as well as recovery plans. Over time, the tribal successes might attract landowners seeking to improve land management practices on their own properties through conservation easements. In this sense, the tribal trust model, when used to restore lands and wildlife populations, could also serve as an important grantor recruitment strategy.

Tribes may monitor protected lands more effectively than public agencies. The importance of habitat conservation to tribes should lead to the prioritization of land trust programs within tribal governments. Many tribes already may have members available and willing to monitor properties and ensure compliance with tribal interests. Of course, a tribal government could fail as other governments have failed. It always is worth considering whether a tribal trust model will suffer from the same bureaucratic pitfalls that stifle other governments' monitoring programs—such as inefficient and indifferent bureaucracies, divided loyalties, and inadequate funding.[196]

Where a tribe holds fee title to conservation lands encumbered by an easement held by a third party, it is important to identify potential conflicts between a tribe's active stewardship and restoration of the underlying property and the terms of the conservation easement. For example, restoration of a treaty species' habitat may require management through prescribed fire, but that fire may also destroy habitats for other species. The conflicting management preferences of the tribal fee holder and the third party conservation easement holder must somehow find resolution. These issues should be dealt with in the drafting

195. *See* BYERS & PONTE, *supra* note 5, at 120 (quoting the managing director for the Montana Land Alliance as saying, "We take what we learn from monitoring our easements and use that information to make future easements more concise and defensible").

196. *See id.* at 255.

process to avoid as much future conflict as possible.

3. *The Native land trust.*

Land trusts tend not to suffer from the bureaucratic pitfalls of governmental agencies. In that respect, land trusts offer a flexible model for Native resource management. However, newly established Native land trusts may lack the resources, staffing, expertise, and funding to carry out a successful stewardship, restoration, or monitoring programs. This deficiency can be avoided or mitigated through two strategies. First, such trusts may require grantors to donate funds to support monitoring.[197] Second, the Native land trust may be able to partner with tribes to develop a cadre of volunteers or staff members to carry out monitoring. Establishing a close relationship with tribal scientists also may enable Native land trusts to apply tribal scientific techniques and analysis to landscapes.

Private property owners may not be receptive to the type of affirmative restoration management that interests Native land trusts.[198] While this is potentially a significant hindrance of the Native land trust model at the outset, it is not likely to be a permanent drawback. As Native land trusts assemble success stories on the ground and build goodwill in the community, landowners may be increasingly receptive. Native land trusts strategically can select highly visible properties with clear conservation significance and public benefits as their first-generation projects.[199] The composition of the Native land trust's board also makes an impact, as board members act as spokespersons for the organization and can educate the public about the Native approach to restoration.[200] Ultimately, however, credibility will flow from successful easement management.

197. *See* Pidot, *supra* note 85. Establishing a separate monitoring fund to reduce commingling and assure donors of financial accountability is recommended. *See* BYERS & PONTE, *supra* note 5, at 124-25.

198. Where the Native land trust owns property in fee, of course, this will not be an obstacle.

199. *See* BYERS & PONTE, *supra* note 5, at 37 (describing how the Maui Coastal Land Trust selected a forty-one acre, highly visible, pristine oceanfront property as its first project in 2002).

200. *See* Stern, *supra* note 132, at 582.

4. *The non-Native land trust.*

Non-Native land trusts already may have staffing and resources to engage in monitoring and management. Most will have gained trust with landowners and the community. In these ways, non-Native land trusts carry an advantage over the other models.

The major drawback to this model is that it derives from a Western tradition of conservation that historically does not emphasize active restorative management. Accordingly, the accumulated experience of land trusts does not involve as much active management as one might hope. For the non-Native model to offer a more active management process, non-Native land trusts must incorporate some sort of mechanism, formal or informal, to partner with tribes or Native conservation professionals.[201]

There are several measures available to an established non-Native land trust to promote substantial Native involvement in the management of its conservation easements. First, the trust can invite a tribe or Native land trust to partner with it in monitoring protected lands. The model may mirror the types of partnerships emerging on the sovereign level between the federal government and tribes.[202] Such a partnership could include a coholding agreement, a third-party interest, or a comanagement agreement for a conservation easement.[203] Alternatively, an established trust could agree to adopt a land management plan subject to tribal approval. Second, an established land trust could hire tribal members as staff, or employ Native volunteers, to undertake stewardship and monitoring responsibilities. This would present the added benefit of building the capacity of Indian people in skills relating to conservation easement management so that those individuals can help establish tribal trusts and Native land trusts in the future. Third, an established land trust could invite leaders of the Native community to join its board of directors.

201. *See* Jocelyn B. Garovoy, "Ua Koe Ke Kuleana O Na Kanaka" *(Reserving the Rights of Native Tenants): Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523, 554 (2005) (noting that "[l]and trusts may also seek strategic partnerships with community organizations and individuals who would be interested in carrying out environmental or cultural restoration projects on the property. Making good use of the land with the support of community and educational programs may help insure against claimants emerging later. . . .").

202. *See supra* notes 190-193 and accompanying text.

203. *See supra* Section I.D.

The relative independence of a non-Native land trust from direct tribal influence (as compared to the tribal and Native land trust models) may present some indirect advantages to the Native community. The ability of a non-Native land trust to come forward as a "neutral" party may facilitate otherwise difficult negotiations with a landowner nervous about entering into a conservation easement. The flexibility available in drafting easements and forming partnerships offers all parties to a conservation easement transaction a myriad of potential solutions to contentious situations or timid participants.

E. *Native Access to Resources*

A significant impetus for tribal conservation initiatives is the desire to gain access to resources from which tribal members have been excluded. The desired access may go beyond the monitoring and enforcement access that is contemplated in standard conservation easements.[204] As discussed in the companion piece to this Article, traditional Native access incorporates a "beneficial use" component that varies according to the values of the landscape.[205] For treaty hunting and fishing sites, this beneficial use includes harvest and camping, food processing (cleaning and drying), and other activities related to the economic enterprise. In some cases, treaties secured these various rights as part of an integrated set of rights reserved by the tribes.[206] For sacred sites, desired access often incorporates rituals and ceremonies.

Fee acquisitions and conservation easements differ substantially in providing the mechanisms needed by tribes to regain a presence on their aboriginal lands. Fee acquisition is likely to provide long-term opportunities for traditional lifestyle components incorporating community and family relationships and multiple resource use. This is because the fee simple interest is less restricted than a conservation easement, which expresses time, place, and use constraints in standard access provisions.

204. Access to property subject to standard conservation easements is addressed above. *See* discussion *supra* Section I.G.

205. The U.S. Supreme Court has long recognized tribal "beneficial use" of resources, beyond mere access, in the treaty context. *See* Winters v. United States, 207 U.S. 564, 576 (1908) ("The Indians had command of the lands and the waters—command of all their beneficial use. . . .").

206. *See* NEZ PERCE TRIBE, TREATIES: NEZ PERCE PERSPECTIVES 70-85 (2003).

Nevertheless, the contractual nature of conservation easements enables flexibility in the rights they provide property owners, land trusts, and even third parties, without the costs involved in a fee acquisition. Within the statutory limits discussed in Section I, parties to an easement transaction are free to negotiate for a range of rights.[207] Many basic Native land uses, such as fishing, hunting, and plant gathering, will fit within the statutory parameters.

Two levels of analysis are important in assessing the four models' potential to provide tribal access and beneficial use. The first is each model's ability to secure such access for the holder as part of the transaction. The second analysis concerns public access. Generally, conservation easements require public access only where the primary conservation value of the easement is public recreational or educational use.[208] Other types of conservation easements do not need to allow public access to meet the IRS requirements.[209] At present, few states impose a public access requirement for conservation easements.[210]

While not always the case, general access by members of the non-Indian public has the potential to detract significantly from the beneficial use of tribal members on aboriginal lands. This is particularly true in the case of sacred sites, where the presence of non-Indians or the particular activities of non-Indians may destroy the ability of tribes to perform religious ceremonies or may desecrate the spiritual context of the site itself.[211] Another type of

207. For variations among states in terms of use restrictions in conservation easements, see Mayo, *supra* note 35, at 32-33. In the parlance of conservation easements, landowners negotiate for "reserved rights," while land trusts seek "affirmative rights" as easement holders. *But see id.* at 34 (noting that "the UCEA and some states with nonuniform statutes expressly sanction the imposition of affirmative obligations on the landowner"). Mayo criticizes the failure of some states, including California, Connecticut, Delaware, and Montana, "to specifically authorize conservation easements to impose affirmative obligations on landowners." *Id.*

208. *See* BYERS & PONTE, *supra* note 5, at 21.

209. Garovoy, *supra* note 201, at 571 n.154 (citing I.R.C. § 170(h)(4)(A)(i)-(iv) (West 2005)).

210. *See* Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629, 634 (2002).

211. For example, the climbing activities of non-Indians at Devil's Tower Monument in Wyoming—a sacred site to Plains Indians—is wholly incompatible with Native religious beliefs and ceremonies. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (discussing dispute and affirming a district court ruling that Secretary of the Interior lawfully and legitimately exercised his authority when he approved a National Park Service plan to place a voluntary ban on climbing at Devil's Tower).

incompatibility may arise at sites that provide harvest resources. Where the public is allowed access to tribal fishing or hunting sites, camping and harvest equipment may not be secure against vandalism or theft, or there may be a more intangible cultural interference. While these concerns may not always be present, or may be present only during certain times, tribal conservation professionals should address foreseeable conflicts through clear drafting of transaction documents.

1. *The public agency holder.*

The public agency model differs from the other three in that public agencies must serve a public constituency. Depending on the circumstances, an easement provision that provides for Native beneficial use to the exclusion of all other uses may be problematic. Excluding the general public from public lands, even if done for the purpose of protecting Native religious and ceremonial use, draws the agency into a constitutionally uncertain realm.[212] Nevertheless, where a tribe's access is secured by treaty, the public agency may have more latitude in excluding the public if such exclusion is necessary to fulfill the purposes of the treaty.

Where the public agency simply holds a conservation easement on land acquired by a land trust or tribe, many of the public access issues fall away. It is often feasible and desirable for a tribe or land trust to acquire land that has a preimposed easement held by a public agency.[213] If the conservation easement is drafted to allow Native access (as long as it does not interfere with the conservation objectives), there is seemingly no problem with a public agency holding such an easement. The easement may or may not give public access across the underlying fee.

An example of this conservation structure comes from the Sinkyone Wilderness in northwestern California. The InterTribal Sinkyone Wilderness Council holds 3845 acres of coastal forest land.[214] One of the Council's objectives in acquiring the land was to support its use by descendants of Native Sinkyone families who had lived there for millennia and were driven off during the era of

212. Public access to Devil's Tower National Monument, for example, has been the subject of contentious litigation. *See id.*

213. *See* Wood & Welcker, *supra* note 2.

214. For background, see *id.*

genocide in the mid-1800s. The California State Coastal Conservancy, a public agency, holds two conservation encumbrances across the property, securing the right of limited public access and requiring the Council to protect Native American cultural resources. Two non-Native land trusts hold easements on the same property to ensure restricted timber management. The easements allow establishment of traditional villages using local, traditional construction methods and materials. When the villages are completed, Native families will be permitted to stay in them for brief periods of time on a rotating basis. In this manner, the conservation easements specifically address and support the tribal effort to reconnect Native families to their aboriginal lands.

2. *The tribal holder.*

The tribal holder model is likely to support considerable Native beneficial use through purchase of the entire fee.[215] In the conservation easement context, however, the success of a tribe in negotiating for access rights will depend, to a great extent, on the objectives of the landowner. Particularly where a grantor is donating the easement, the tribe may have little leverage in negotiating for beneficial use rights. The tribe may enjoy leverage only in areas where no other land trusts are working, or where the tribe enjoys superior financial and technical resources to gain landowner cooperation. However, even where a landowner is unwilling to grant a tribe use rights, a well-designed monitoring program may offer a useful starting point for tribes. As the monitoring relationship grows, a landowner may voluntarily invite tribal access to lands for purposes other than monitoring.

Through a strategic acquisition program, a tribe may take advantage of opportunities in which access issues are less problematic.[216] Corporate property owners may be less averse to granting access to large tracts of land. For example, timber companies seeking working forest conservation easements (WFCEs) may be amenable to granting tribal access to swaths of

215. If a purchase is bifurcated between fee title and a conservation easement, as was the case of the Sinkyone Wilderness, the conservation easement should be drafted in a manner that allows Native beneficial use.

216. Garovoy, *supra* note 201, at 550-51 (discussing questions a land trust should ask in considering acquisitions).

"unused" timber lands, particularly where a tribe is purchasing the easements.[217] Alternatively, a tribe already may enjoy access over a property through treaty or other means. For example, Pacific Northwest tribes that retain treaty access rights to traditional fishing grounds may seek to acquire conservation easements on those properties.[218] Tribal property rights are antecedent, and therefore superior, to the landowner's rights.

Nevertheless, entering into conservation easements at treaty harvest sites raises some concern. Though such sites face growing threats from development, some tribes refrain from pursuing private conservation mechanisms there since they already hold such rights through federal Indian law. The concern raised by these tribes is that conservation easements at treaty sites would send a message to the private community that tribes lack legal rights at those sites and therefore have to resort to private mechanisms to secure any access prerogative. Tribes facing this issue tend to limit their private conservation programs to sites that do not have clear treaty access.

The concern creates a dilemma, because it may exclude tribes from the most fruitful management opportunities. The treaty sites are likely to be focal points of enduring traditional knowledge. Moreover, to the non-Indian public, they are the visible geographic markers of Indian life and continuing tradition. By excising such treaty sites from private acquisition programs, tribes may be forsaking some of the most promising areas for success stories that can fuel a tribal trust movement. The legitimate concern of tribes may be met by using the conservation easement as an educational and clarifying tool for underlying treaty rights. Drafters may frame the introductory clauses to showcase the legal standing of treaty rights and to underscore that the easement does not substitute for, or eliminate, any legal rights but rather delineates management relationships between the tribe and the landowner. As a general matter, the terms of conservation easements may never weaken or overcome underlying sovereign property or regulatory interests.[219]

217. *See* BYERS & PONTE, *supra* note 5, at 206-09 (describing WCFEs and public use).

218. *See supra* note 206 and accompanying text.

219. *See* LAITOS, *supra* note 190, at 716.

3. *The Native land trust.*

Native land trusts are perhaps best positioned to acquire the kind of property interests necessary for indigenous beneficial use of aboriginal lands. Due to their flexible nature and relative detachment from tribal bureaucracy and intra-tribal politics, Native trusts should be able to create workable structures allowing family use of aboriginal lands.[220]

Where a Native land trust acquires fee title, access-related conflicts with non-Native interests are unlikely. However, as in the tribal holder model, access may be more problematic where a Native land trust seeks a conservation easement allowing Native beneficial use on privately held property. Realistically, a Native land trust may initially only be able to secure indigenous access to a protected property for monitoring purposes. But as the trust develops Native beneficial use on its fee lands, public education and outreach programs could showcase the value of such use to a broader public. Such an effort might recruit landowners willing to donate conservation easements allowing such use.

As a bridge strategy, one alternative for the Native land trust (and tribal holders as well) is to seek a license for Native beneficial use. A license entitles one to use land owned by another, and is subject to revocation.[221] Thus, it is not permanent, as are most conservation easements. A license could enable temporary Native access for religious ceremonies, for example, on a property subject to a conservation easement that did not grant robust access rights. In other cases, a trail easement may suffice to provide access to a narrow, but culturally significant, strip of land.[222] As trust and confidence develop between the parties, the Native trust may be able to secure a conservation easement formalizing fuller beneficial use access.

4. *The non-Native land trust.*

For property owners disinclined to grant Native access to their

220. The InterTribal Sinkyone Wilderness Council's property is an excellent example of such flexibility, even where two easements held by non-Native land trusts and two offers to dedicate held by a state agency encumber the Council's land. *See* Fishman, *supra* note 46.

221. RESTATEMENT (FIRST) OF PROPERTY § 512 (1944).

222. *See* BYERS & PONTE, *supra* note 5, at 215-16.

protected lands, a non-Native land trust may offer a viable solution. A non-Native land trust could negotiate with a landowner to allow limited access to Native beneficiaries for specific purposes, with the understanding that the land trust would be responsible for ensuring that access rights were respected by all parties. Assuming the land trust has a solid base of goodwill in the community, it may be positioned as the best negotiator to gain this kind of access. However, a non-Native land trust with preexisting priorities may be unwilling to spend the time and resources to secure indigenous access. Given that established non-Native land trusts are creatures of a Western conservation model that does not prioritize beneficial use of resources, efforts to negotiate for Native beneficial access using this model will be pioneering.[223]

The access protocol of the non-Native land trust may complicate use of this model. Some land trusts simply open all of their acquisitions to public access. Where public access interferes with Native beneficial use, this option may not be desirable. However, some land trusts prefer to exclude the public, except by invitation. For these land trusts, the challenge will be to carve out an exception for Native beneficial use.

F. *Enforcement*

A critical question with respect to any conservation easement is the extent to which the easement holder enforces the conservation conditions. The enforcement question gains increasing significance as time passes and new generations come into ownership. Later generations may resent the easement restrictions and seek to maximize the market value of the land through development.

Enforcement issues operate differently with respect to fee ownership. When a government agency or land trust owns property in fee, there may be no direct mechanism to prevent the agency or land trust from improperly managing the property. The exception is where the land is encumbered by a conservation easement held by a third party. As noted in Section II.C.1, such

223. *See* Garovoy, *supra* note 201, at 543 (discussing the situation in Hawaii, where "many land trust holdings are likely to be attractive settings for traditional Hawaiian gathering and religious practices. In lieu of litigation, land trusts and Hawaiians may negotiate agreements where sensitive habitat and endangered species are present in an area that Hawaiians wish to use for gathering purposes.").

restricted fee ownership may be an attractive option for tribes seeking to purchase property at a reduced price.

1. *The public agency holder.*

Of the four models, a public agency may be in the worst position to enforce a conservation easement on private land, for two reasons. First, federal agencies must often rely on the Justice Department for enforcement actions and other litigation. The Justice Department may not be inclined to prioritize enforcement of conservation easements given its many other obligations. Second, due to political concerns, public officers may be hesitant to enforce conservation easement restrictions on private land.[224] Public agencies often are loathe to enforce even their own regulations on private property.[225] Because conservation easements are embedded in the owner's title and therefore enmeshed with private property rights, and because the easement restrictions do not spring from regulatory law, owners of restricted property may claim they are being singled out for excessive governmental action. Such a characterization has no basis, but that fact alone may not preclude its assertion.

Thus, the political context in which enforcement might be necessary is an important consideration for tribes deciding whether to pursue public agency involvement.[226] Third-party enforcement rights[227] established at the time of conveyance may overcome these barriers and make the public agency model more attractive. Tribes or Native land trusts could be named enforcement parties in the conservation easement.[228]

2. *The tribal holder.*

Many tribes are seemingly well-positioned and motivated to enforce a conservation easement on private land. Most have an established team of in-house attorneys and therefore have the resources to enforce easements. Moreover, since most

224. *See* Cheever, *Property Rights*, *supra* note 44, at 450 (emphasizing that "[p]ublic agencies holding easements may . . . be subject to political pressure from landowners").

225. *See id.*

226. *See* FAIRFAX & GUENZLER, *supra* note 42, at 112-13 (discussing the functioning of various public-private trusts in polarized political environments).

227. *See supra* note 97 and accompanying text.

228. *See* discussion *supra* Section I.H.

conservation easements held by tribes will secure vital assets—whether fish or wildlife habitat or cultural resources—tribes likely will prioritize enforcement of the easement. That is not to say that tribes are immune from political influence. Like any sovereign, they receive considerable pressure from both their members and non-tribal constituents on a wide range of decisions. Concerns that the tribe may appear "heavy handed" or that it should not spend resources on court actions may preclude enforcement in particular instances. Nevertheless, of all four models, this one holds the most promise for productive enforcement.

Where a tribe holds fee title that is encumbered by a conservation easement held by another party, the enforcement shoe is on the other foot. In this case the tribe may be the target, rather than the initiator, of action to enforce a conservation easement. This possibility triggers concerns of sovereign immunity. In general, tribes, like any other sovereign, enjoy immunity from lawsuits. This feature of the tribal holder model must be considered at the outset of any transaction that encumbers tribal land with a conservation easement. Partners and funders of such transactions will need assurance that the conservation easement can be enforced and that sovereign immunity will not pose an insurmountable barrier. Tribes, on the other hand, likely will not welcome any transaction that undermines this well-recognized attribute of sovereignty.

There are two ways around this barrier. First, a tribe may decide to waive its sovereign immunity for the purposes of the conservation easement. Some tribes may agree to such a waiver if the resource protected by the conservation transaction is critical and the waiver is a make-or-break issue in the deal. Tribes not willing to waive their immunity may establish a 501(c)(3) tribal organization to acquire the conservation property subject to the easement.[229] Such organizations can waive sovereign immunity without affecting the immunity of the tribe.[230]

229. *See supra* notes 152-53 and accompanying text.

230. This method was used in the InterTribal Sinkyone Wilderness transaction. The fee title was burdened with conservation easements held by private land trusts. The encumbered fee was conveyed to the InterTribal Sinkyone Wilderness Council, established as a 501(c)(3) organization governed by representatives of the Council's participating member tribes. For the easements, the Council waived its own inherent sovereign immunity, which it possesses by virtue of being a tribal consortium formed by and for—and comprised strictly of—federally recognized Indian tribes. This waiver by the Council,

3. *The Native land trust.*

Native land trusts' motivation to enforce easements may be diluted by a lack of resources, particularly where enforcement requires outside legal counsel. Just as in the case of stewardship and monitoring, setting aside funding for enforcement is an essential task for a nascent land trust. Requiring grantors to donate funds to support enforcement is an accepted practice that should not deter potential grantors.[231] Where financial and human resources are limited, the Native land trust might pool legal resources with other land trusts.

Third-party enforcement could play an important role for a newly created Native land trust, which, like any small trust, may face limited funding and external pressures.[232] Pursuant to negotiations with the property owner, a land trust could name the state government, a tribe, or an established land trust as a third-party enforcer. In some cases, particularly where indigenous relations with a state government are problematic, government involvement may not be desirable.[233] Hence, the optimal arrangement may involve a Native land trust granting a tribe the rights of third-party enforcement.

however, does not affect in any way the sovereign immunity held by each of the Council's member tribes. Since the Council is the entity owning and managing the land, such waiver appears to grant all of the protection needed to allow enforcement of the conservation easement. *See* Wood & Welcker, *supra* note 2.

231. *See* FAIRFAX & GUENZLER, *supra* note 42, at 187 (describing how the Napa County Land Trust requires each grantor to make a donation to the trusts' Easement Defense Fund). Fairfax and Guenzler describe how a defense fund can be managed for long-term growth rather than to maximize current income, so that the trust has sufficient funds to defend against succeeding owners of burdened property, who are more likely to challenge conservation easements. *Id.* at 187-88. A complementary approach is for a land trust to draft an easement so as to impose a fee, payable to the trust's enforcement fund, on each sale of the protected property. *See* McLaughlin, *Land Trusts*, *supra* note 7, at 472 n.65 (describing such an arrangement between the Jackson Hole Land Trust and a homeowners' association).

232. *See* Cheever, *Property Rights*, *supra* note 44, at 450 ("In the close world of small communities, small land trusts may be pressured to amend easements to benefit large local landowners at the expense of conservation values.").

233. *See* King & Fairfax, *supra* note 9, at 97 n.147 ("Land trusts generally have deep concerns about any third-party enforcement. They conclude correctly that they cannot count on attorneys general to help them when they need help, or to stay out when they do not want to pursue issues in court.").

4. *The non-Native land trust.*

Given its non-Native membership and constituencies, an established non-Native land trust may face more complicated decisions in weighing how and when to enforce against violations of an easement promoting tribal values. Because a non-Native land trust's mission is not solely to protect Native values, as time passes and the trust experiences shifts in management, funding, board membership, and programmatic activities, the emphasis on protecting the Native-focused easements in the trust's portfolio may diminish. For example, if an infraction is one that does not directly impinge on conservation, or if the violating landowner enjoys political support in the community, a land trust may decline to spend significant resources or attract community hostility by enforcing certain easement terms. As in the Native land trust situation, the optimal third-party enforcer may be a tribe itself, which in many cases already has the financial and technical capacity to bring legal challenges. By negotiating these third-party enforcement rights, tribes can ensure that an established non-Native land trust—and its grantors—fulfill their legal obligations to protect tribally significant properties.

IV. SEEDING A TRIBAL TRUST MOVEMENT

Four institutional and legal initiatives would greatly infuse a tribal trust movement. First, the Land Trust Alliance (LTA), an organization that has served an indispensable role in the mainstream conservation trust movement, should devote resources towards supporting a tribal role. The land trust movement has grown rapidly on the grassroots level, in part due to the structure and support offered by LTA, which provides information-sharing, research, lobbying assistance, web resources, advocacy, a nationwide rally, and many other services to land trusts across the country. The structure also provides support at the regional and state levels through regional and state land trust associations. The national cohesiveness provided through LTA to an otherwise scattered grassroots movement enables synergies and partnerships that fueled the movement's meteoric rise. So far, however, tribes and Native interests have not been part of LTA's activities. By fostering greater tribal involvement, LTA will stimulate private conservation even more and help introduce a much needed Native perspective into the broader environmental movement.

Second, Congress should reform funding programs such as the Forest Legacy Program and the Land and Water Conservation Fund to provide explicitly that tribes be considered as candidates for direct federal grants. Public funding mechanisms are vital to the land trust movement, which has gained force as a "second generation" of environmental law in the wake of glaring deficiencies in first generation environmental statutes. Yet in creating funds to support second generation projects, Congress has overlooked tribes. This same oversight plagued the first generation statutes until Congress finally amended most to allow tribes to assume "Treatment as States" programs under the primary laws. In the same fashion, Congress must delineate a clear role for tribes as recipients of funding related to states.

Third, states should amend their laws regarding what entities may hold conservation easements to provide expressly for tribal holders. Currently only California has a statute recognizing tribes as legitimate holders of conservation easements.[234] Although there seems little doubt that tribes qualify as holders in states that have adopted the UCEA,[235] in other states tribes' status may be less certain. Regardless, any state that explicitly includes tribes as holders not only assures hesitant property owners about tribal legitimacy, but also signals to the land trust community that tribal participation in the land trust movement is supported by the legislature.

Fourth, federal agencies should turn to conservation trust mechanisms as a means by which to fulfill affirmatively their trust obligation to protect tribal resources. For too long, the federal government has staunchly opposed tribal efforts to enforce the trust obligation, with the result that tribal resources are being destroyed without any protection offered by the trustee.[236] Conservation trust projects represent an opportunity for federal agencies to bring resources, partnerships, and funding to the table in efficient transactions that protect tribal interests. While such a role should not be viewed as replacing the traditional trustee

234. *See supra* note 175 and accompanying text.

235. *See supra* notes 33 and 36 and accompanying text.

236. For example, tribes in the Klamath River Basin of southern Oregon and northern California have had to resort to lengthy litigation to assert claims based on the government's trust obligation to protect their fishing rights. *See* Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*, 36 Envtl. L. Rep. (Envtl. Law Inst.) 10,163, 10,177-85 (2006).

obligation to defend a trust against injury, the support of the trustee in conservation transactions may result in enormous, untapped opportunities for tribes to protect their resources.

V. CONCLUSION

This Work has explored the terrain of an emerging tribal trust movement that occurs at the intersection of federal Indian law and natural resources law. Tribes and Native groups can use tools from property law to put privately held lands into conservation. As the companion piece to this Article explained, such an effort is likely to both enhance the conservation trust movement, which currently lacks an Indian presence, and provide a practical means of regaining Native environmental sovereignty on aboriginal lands lost over the past several centuries.

A tribal trust movement will gain force and momentum through successful projects. It is therefore important to structure projects in a manner that holds the most promise for both successful conservation and also fulfillment of uniquely tribal interests. The companion piece to this Article suggested four broad models of tribal engagement in the conservation trust movement. Invariably, such models are points of departure only, as each has a myriad of different iterations. This Article has examined these models according to criteria important to both conservation and tribal objectives. No single model is the best or the worst. A plethora of additional factors beyond those discussed herein are relevant to any transaction. Each model must be evaluated according to the strengths and drawbacks it offers given the environmental and institutional contexts. In many cases, skilled drafting and creation of partnerships may address potential deficiencies.

Whatever models ultimately shape the movement, one thing seems clear. The return of tribes as trustees on their ancestral landscapes is now as crucial to the majority society as it is to Native America. The entire planet and its ecosystems are at risk due to effects of global warming, which puts a premium on all natural assets.[237] Yet the lands and resources which tribes successfully

237. Leading climate scientists warn that Earth is in "imminent peril" from climate change. *See* James Hansen et al., *Climate Change and Trace Gases*, 365 PHIL. TRANSACTIONS ROYAL SOC'Y A, 1925, 1949 (2007).

managed for millennia are continually depleted, polluted, and otherwise degraded with no end in sight—largely under the management of federal and state trustees. At a time when future human welfare depends on a dramatic paradigm shift in natural resource management, the role of tribes as trustees offers long-term hope of sustainability on this continent once again. As Indian law scholar Rennard Strickland has written:

> History suggests that if mankind is to survive, the next five hundred years must be rooted in the pre-Columbian ethic of the Native American. The second American quincentenary belongs to the Indian. The continuation of the past, the conqueror's exploitation of the earth, can mean only one thing. No one, Indian or non-Indian, will survive.[238]

238. Morse Center for Law and Politics, Indigenous Theme of Inquiry, Memorial Placard (June 2007).