

Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation

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As land is absorbed for urban purposes, open land areas disappear with finality. Thus, when the need for permanent open space is greatest the raw land is no longer there.¹

I. INTRODUCTION

Public concerns about problems caused by sprawling urban development, from the loss of cherished open spaces and environmental degradation to haphazard development patterns and traffic gridlock, have created a groundswell of support among Americans for land conserva-

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1. Max S. Wehrly, *Preface to William Whyte, Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 1 (1959). In his Preface, Wehrly also made this prediction:

By the year 2000, we may expect to find the United States a nation of some three hundred and twenty million persons. About four fifths of these people will be living in tremendous urban concentrations roughly divided between ten huge super-metropolitan regions and 285 smaller metropolitan areas with populations ranging from 100,000 to 5,000,000. Thus growth could mean the absorption for urban use of additional land area equivalent to the State of Illinois or over seven times that of New Jersey!

Id. Wehrly's population prediction wasn't far off the mark; the current United States population is estimated in excess of 295,000,000. See U.S. POPClock Projection, at <http://www.census.gov/cgi-bin/popclock> (last visited Mar. 6, 2005).

tion.² The phenomenal growth of private, nonprofit land trusts over the past two decades has been largely a response to these concerns.³

Transactions involving conservation easements have produced a large portion of the growth of the land trust movement.⁴ A conservation easement is an interest in land, created by voluntary agreement between a landowner and a land trust (or another qualified easement holder), that restricts the uses and activities that may take place on the property.⁵ Unlike most other land use controls, such as the regulation of private property through zoning ordinances, conservation easements are generally intended to last forever, or to “endure in perpetuity.”⁶ In only a few decades, the conservation easement has emerged from obscurity and is now one of the most popular methods of preserving open spaces and natural lands.⁷

Meanwhile, advances in ecological science are transforming human understanding of how the natural world works.⁸ The static, “equilibrium” view of nature as unchanging is yielding to a dynamic model based on the conclusion that “natural systems change incessantly.”⁹ Yet, conservation easements traditionally have been drafted as unchanging legal agreements between landowners and easement holders, reflecting the obsolete model of nature as “static and unchanging.”¹⁰ The conventional conservation easement imposes fixed land use restrictions that, unlike the land, the circumstances of the landowner’s life, and prevailing scientific thought, do not change over time. While commentators have praised con-

2. See The Trust for Public Land, *Land Vote 2003*, at http://www.tpl.org/tier3_cdl.cfm?content_item_id=12030&folder_id=2406 (last visited Feb. 10, 2004); see also Press Release, Smart Growth America, Americans Want Growth and Green; Demand Solutions To Traffic, Haphazard Development, (Oct. 16, 2000), at <http://www.smartgrowthamerica.org/newsroom/pressrelease101600.html> (last visited Feb. 10, 2004).

3. See PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 13–14, 17 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) [hereinafter PROTECTING THE LAND].

4. LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS 2000, at <http://www.lta.org/newsroom/census2000.htm> (last visited Mar. 6, 2005) [hereinafter CENSUS 2000].

5. See WASHINGTON REAL PROPERTY DESKBOOK, § 81.1, § 107.5 (Wash. State Bar Ass’n et al. eds., 3rd ed. 1997).

6. See NELSON BILLS ET AL., THE NORTHEAST REGIONAL CENTER FOR RURAL DEVELOPMENT, PENNSYLVANIA STATE UNIVERSITY, CONSERVATION EASEMENTS AS ENCUMBERED OWNERSHIP: ISSUES AT HAND 12 (2004), available at <http://www.cas.nercrd.psu.edu/Publications/RDPAPERS/rdp25BW.pdf> (last visited Mar. 9, 2005).

7. See CENSUS 2000, *supra* note 4.

8. COMM’N ON LIFE SCIENCES, SETTING PRIORITIES FOR LAND CONSERVATION 5 (1993), available at <http://books.nap.edu/books/0309048362/html/5.html> (last visited Jan. 9, 2005).

9. *Id.* This dynamic model, according to the authors, “has profound consequences for conservation efforts.” *Id.*

10. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 756 (2002).

servation easements for their adaptability to a wide variety of landscapes and landowners,¹¹ this flexibility typically ends once an easement is finalized.¹² Traditional conservation easements are flexible during the drafting process but become inflexible once they are signed by both parties.¹³ As a result, such static conservation easements may fail to adequately accommodate future events such as change in the land itself, change in a landowner's use of the land, or an advance in ecological science.¹⁴

Compared to traditional, static conservation easements, dynamic conservation easements capable of accommodating change over time are better suited to serving their unique conservation purposes. As a result, they are more likely to fulfill their promise to protect the land in perpetuity. For the purposes of this Comment, a "static conservation easement" is an easement whose terms provide unchanging land use restrictions. By contrast, a "dynamic conservation easement" is one whose terms provide land use restrictions that may change over time. Part II of this Comment provides a primer on land trusts and their use of conservation easements and discusses problems that arise from the perpetual nature of conservation easements. Part III examines arguments for and against dynamic conservation easements, illustrates their benefits in the context of working landscapes like timberland, farmland, and ranchland, and discusses the application of adaptive management to dynamic conservation easements. Part IV presents conclusions about the effective use of dynamic conservation easements by land trusts. Throughout this Comment, examples from the State of Washington will be used to illustrate the relevant principles of law and the realities of development and conservation.

II. CONSERVATION EASEMENTS AND THE PROBLEM OF PERPETUITY

Before discussing the merits of dynamic conservation easements, it is important to understand how land trusts use traditional, static conservation easements to protect land in perpetuity. Section A introduces the reader to the rapid growth of the land trust movement and the increased use of conservation easements in the land trust community. Section B discusses the purpose of conservation easements. It reviews the common law, Washington statutory law, and federal tax law that pertains to con-

11. See, e.g., Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 261 (2002); John Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 322 (1997); Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 7-11 (1989).

12. See Mahoney, *supra* note 10, at 753.

13. See *id.*

14. *Id.*

servation easements, and outlines some common features of conservation easements. Section C examines the challenge of permanently protecting land in the face of constant change. Finally, Section D evaluates the strengths and weaknesses of static conservation easements.

A. The Land Trust Movement

Both land development and land conservation are flourishing in the United States.¹⁵ Between 1992 and 2001, the rate of urbanization and development of rural land jumped from 1.4 million to 2.2 million acres per year, with the bulk of development occurring on forestland, cropland, and pastureland.¹⁶ At the same time, private land trusts were successfully protecting land from development at an unprecedented rate.¹⁷ Between 1998 and 2003, land trusts set aside twice the number of acres they had previously protected, at a rate of 800,000 acres per year.¹⁸ In this climate of accelerating change, the rapid growth in the number and capacity of land trusts has positioned them at the forefront of the movement to preserve open space in the United States.¹⁹

Land trusts represent a unique blend of both public and private efforts to conserve land.²⁰ Typically, land trusts are organized as private, nonprofit corporations, recognized as public charities under § 501(c)(3) of the Internal Revenue Code.²¹ Land trusts conserve land for the benefit of the public by acquiring and holding property interests and by assisting

15. Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 592-93 (2001).

16. NAT. RES. CONSERVATION SERV., 2001 ANNUAL NATIONAL RESOURCES INVENTORY: URBANIZATION AND DEVELOPMENT OF RURAL LAND (July 2003), at <http://www.nrcs.usda.gov/technical/land/nri01/urban.pdf> (last visited Feb. 9, 2004) (reporting that "between 1997 and 2001, almost 9 million acres were developed, of which 46 percent came from forest land, 20 percent from cropland, and 16 percent from pastureland").

17. CENSUS 2000, *supra* note 4.

18. Land Trust Alliance, *Private Land Conservation in U.S. Soars*, Nov. 18, 2004, at http://www.lta.org/newsroom/pr_111804.htm (last visited Mar. 6, 2005).

19. See Konrad Liegel & Gene Duvernoy, *Land Trusts: Shaping the Landscape of Our Nation*, 17 NAT. RESOURCES & ENV'T 95, 95 (2002) (calling land trusts "major players in open space preservation" and arguing that "[l]and trusts concretely influence growth patterns of metropolitan areas and the character of rural landscapes, not through zoning and regulatory controls, but through direct land transactions. In this regard, they are more akin to local land development companies than to typical environmental organizations that advocate for more stringent land use controls and development restrictions").

20. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U.L. REV. 1077, 1077-78 (1996) (arguing that "the land trust movement furthers the public good in ways that other more 'public' aspects of the environmental protection movement cannot because it possesses a 'private magic'").

21. J. DEIHL & T. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC EASEMENT PRESERVATION PROGRAMS* 6 (1988).

other organizations and government agencies in land transactions.²² The Land Trust Alliance, an umbrella organization that supports member organizations of the land trust movement through trainings, strategic planning, lobbying services, and publications,²³ defines a land trust as “a nonprofit organization that, as all or part of its mission, actively works to conserve land by undertaking or assisting direct land transactions—primarily the purchase or acceptance of donations of land or conservation easements.”²⁴

While land trusts use a wide variety of methods to conserve land, three techniques are used most frequently: (1) acquisition of fee simple ownership; (2) acquisition of a conservation easement; and (3) acquisition and transfer of ownership (fee simple or conservation easement) to another nonprofit organization or governmental agency.²⁵ Land trusts can acquire fee simple ownership or a conservation easement through either purchase or donation—in other words, by either buying an interest or accepting an interest as a donation from the landowner.²⁶ The successful negotiation and acquisition of fee simple ownership or a conservation easement is not the only step in preserving a piece of property, however. Before finalizing an acquisition, land trusts typically prepare a baseline documentation report of the property’s natural and manmade features and conservation values.²⁷ Land trusts generally use the term “stewardship” to refer to the various management activities they undertake after acquiring interests in land.²⁸ These activities include monitoring the property by inspecting it and comparing the baseline report to current conditions; managing access to and use of the property, and sometimes

22. Liegel & Duvernoy, *supra* note 19, at 95; WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.5.

23. See Land Trust Alliance, *About LTA*, at <http://lta.org/aboutlta/index.html> (last visited Mar. 8, 2004).

24. CENSUS 2000, *supra* note 4.

25. See *id.* Other methods include “providing funding to other groups for land acquisition . . . negotiating with conservation buyers . . . [and] facilitating negotiations for land to be acquired by another nonprofit organization or a public agency.” *Id.*

26. *Id.*

27. See DEIHL & BARRETT, *supra* note 21, at 63, 72 (describing IRS regulations requiring easement donors seeking tax benefits to provide the donee with documentation of the property’s condition prior to the time of the gift); see also Treas. Reg. § 1.170A-14(g)(5)(i) (as amended in 1999).

28. See generally BRENDA LIND, THE CONSERVATION EASEMENT STEWARDSHIP GUIDE: DESIGNING, MONITORING, AND ENFORCING EASEMENTS (1991) (providing guidance to land trusts regarding baseline documentation, stewardship funds, easement enforcement, and monitoring techniques).

actively restoring the property's natural processes; and, in the case of conservation easements, enforcing easement restrictions.²⁹

Land trusts have increasingly relied on the conservation easement to prevent the conversion of land to developed uses.³⁰ By 1990, land trusts had used conservation easements to protect 450,000 acres.³¹ By 2000, conservation easements had been used by land trusts to protect nearly 2.6 million acres, representing an almost fivefold increase in their use.³² And by 2003, conservation easements had been used to protect more than five million acres, tripling the number of acres protected three years earlier.³³ As discussed in the following section, the popularity of conservation easements can be attributed to the voluntary nature of their restrictions, their adaptability to a variety of situations, and the range of benefits they provide.

B. Conservation Easements

A conservation easement is a voluntary legal agreement that restricts the development and future use of a piece of property in order to protect its conservation values.³⁴ Conservation easements are “purely discretionary” and cannot be imposed on a landowner by anyone, not even the government.³⁵ Some landowners are willing to donate a conservation easement purely for the emotional satisfaction of knowing that a treasured piece of property will be protected.³⁶ However, most people who donate or sell conservation easements are at least partly motivated by incentives, such as federal and state tax breaks, that encourage their use,³⁷ and sometimes by the land trust's ability to offer estate planning assistance.³⁸ Conservation easements are attractive to land trusts because

29. See Columbia Land Trust, *Questions and Answers About Conservation Easements*, at <http://www.Columbialandtrust.org/facts/conserves.htm> (last visited Mar. 6, 2005).

30. See CENSUS 2000, *supra* note 4.

31. *Id.*

32. *Id.*

33. LAND TRUST ALLIANCE, NATIONAL LAND TRUST CENSUS 2003, at <http://www.lta.org/census/index.shtml> (last visited Mar. 6, 2005).

34. PROTECTING THE LAND, *supra* note 3, at 9.

35. Adam E. Draper, *Conservation Easements: Now More Than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 255 (2004). But see *Smith v. Town of Mendon*, 2004 N.Y. LEXIS 3854, at *16–20 (holding that town planning board's conditioning of approval for proposed building on landowner's acceptance of a conservation restriction did not effect an unconstitutional taking).

36. PROTECTING THE LAND, *supra* note 3, at xxi.

37. See *id.*

38. See Julie A. McClafferty et al., *Private Landowners as Stewards of Biodiversity: An Analysis of the Ecological Value & Socioeconomic Feasibility in Virginia* 1, Feb. 16, 2004, available at http://www.cmiweb.org/human/publications/Cons_Easmts_Final_Report.pdf (last visited Mar. 9, 2005).

they create new opportunities to protect species and natural communities and reduce the need for state, federal, and nonprofit dollars in the management of protected lands.³⁹ In addition, conservation easements benefit local communities because properties subject to conservation easements typically remain on local tax rolls, while landowners are able to derive taxable income from production on working lands and “[j]obs dependent upon resource production, tourism and other uses are protected.”⁴⁰

Conservation easements typically are created by the landowner’s conveyance of a deed that splits fee simple ownership of property into possessory and development rights, with the landowner (the “grantor”) retaining possessory rights and relinquishing certain development rights to an organization (the “grantee”) qualified to hold conservation easements.⁴¹ In accordance with an easement’s unique purpose, its restrictions are tailored to meet the needs of the landowner while also advancing the mission of the land trust.⁴² Once the easement has been negotiated, properly drafted, and recorded, the land trust enforces its restrictions⁴³ by periodically monitoring the property and, if necessary, enjoining prohibited uses and requiring the restoration of damaged areas of the property.⁴⁴

Conservation easements can serve a variety of purposes, from the protection of forests, wetlands, endangered species habitat, and beaches to the preservation of scenic and historic areas and buildings.⁴⁵ Such “conservation purposes” generally fall into one of four categories: (1) conservation for production of economically valuable commodities, such as food and timber (or conservation on “working landscapes”); (2) conservation for human use, such as recreation; (3) conservation of high-value natural areas that represent a unique example of natural beauty or ecological function; or (4) conservation of whole ecosystems, water-

39. *See id.*

40. *See* C. Edwin Meadows, Jr. & Donald J. Mansius, *Conservation Easements as a Forest Management Strategy*, 3(1) MAINE POL’Y REV. 39, 39–46 (1994), available at <http://www.umaine.edu/mcsc/MPR/Vol3No1/Meadows/Meadows.htm> (last visited Mar. 10, 2005).

41. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4.

42. *See* DEIHL & BARRETT, *supra* note 21, at 7.

43. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(4).

44. *See* Northwest Wilderness Programs, Grant Deed of Conservation Easement, section IV.B, D (Apr. 29, 2002), King County Recorder’s Office, available at <http://146.129.54.93:8193/search.asp?cabinet=opr> (recording number 20020429002194) (last visited Mar. 25, 2005) [hereinafter *NWWP Conservation Easement*].

45. *Id.* According to the Uniform Conservation Easement Act, which provides a model for state statutes, the purposes of a conservation easement may include “retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving historical, architectural, archaeological, or cultural aspects of real property.” UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996).

sheds, or habitat systems.⁴⁶ In a 1959 paper that coined the term “conservation easement,” urban planner William Whyte observed that “[a]nother term may well prove better, but ‘conservation easement’ has a certain unifying value: It does not rest the case on one single benefit—as does ‘scenic easement’—but on the whole constellation of benefits: drainage, air pollution, soil conservation, historic significance, control of sprawl, and the like.”⁴⁷

Thus, the primary benefits of conservation easements are the benefits provided to the public by the protection of the property’s conservation values, the emotional and economic benefits provided to the landowner, and the various benefits to the land trust community. At the time of Whyte’s seminal paper, it was progressive, perhaps even radical, to argue that preventing the development of land could benefit the public. The notion of permanent protection of land challenges the common law doctrines of the past century,⁴⁸ and even today it remains a controversial goal.⁴⁹ But a growing recognition of the “fundamental inexorability of population increase and land development,”⁵⁰ and of the public benefits of land conservation, has caused lawmakers to reevaluate their priorities in making land use decisions.⁵¹ In recent decades, local, state, and federal legislatures have taken steps to balance the philosophies of the past with present-day realities by enacting statutes that authorize and encourage the use of land preservation tools like the conservation easement.⁵²

Although the term “conservation easement” is now widely used, the label has proven more durable than any single attempt to articulate the legal nature of a conservation easement. In the technical language of property interests, conservation easements have been characterized as

46. Linda Hollis & William Fulton, *Open Space Protection: Conservation Meets Growth Management*, The Brookings Institution Center on Urban and Metropolitan Policy (April 2002), available at <http://www.brook.edu/es/urban/publications/hollisfultonopenspace.pdf> (last visited Feb. 22, 2005).

47. William Whyte, *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. I, 8 (1959).

48. See Tapick, *supra* note 11, at 265–66.

49. Levin, *supra* note 15, at 637.

50. *Id.*

51. See Tapick, *supra* note 11, at 272.

52. See, e.g., WASH. REV. CODE § 84.34.200 (2004):

The legislature finds that the haphazard growth and spread of urban development is encroaching upon, or eliminating, numerous open areas and spaces of varied size and character, including many devoted to agriculture, the cultivation of timber, and other productive activities, and many others having significant recreational, social, scenic, or esthetic values. Such areas and spaces, if preserved and maintained in their present open state, would constitute important assets to existing and impending urban and metropolitan development, at the same time that they would continue to contribute to the welfare and well-being of the citizens of the state as a whole.

“statutorily authorized negative servitudes in gross.”⁵³ This definition alludes to both common law and statutory elements.

The following discussion begins with an analysis of the enforceability of conservation easements under common law, and then examines the statutory and case law of Washington to illustrate the interplay between common law, statutory law, and case law. This section also discusses the federal tax implications of conservation easement donations and concludes by outlining the anatomy of the legal instruments that convey conservation easements.

1. Conservation Easements Under Common Law

Common law servitudes are “private property interests that confer nonpossessory rights in land possessed by others.”⁵⁴ At common law, courts classify servitudes as either affirmative or negative.⁵⁵ Affirmative servitudes allow the holder to make active use of another’s property, while negative servitudes allow the holder to restrict the types of activities that can be performed on the land.⁵⁶ Because conservation easements restrict the use of land, they would likely be classified as negative servitudes under common law.⁵⁷ Common law also categorizes servitudes as either “appurtenant” or “in gross.”⁵⁸ An “appurtenant” servitude is designed to benefit the owner of an adjacent parcel of land, while the benefits of a servitude “in gross” flow to a person or group of people without reference to land ownership.⁵⁹ Because the primary benefits of conservation easements flow to the general public rather than to an adjacent landowner, they would probably be categorized as “easements in gross.”⁶⁰ Thus, as common law “negative servitudes in gross,” conservation easements are understood as private property interests that prevent certain uses of land for the benefit of the public.

Common law has further classified servitudes by dividing them into three categories: easements, real covenants, and equitable servitudes.⁶¹ However, as we will see, perpetual conservation easements do not fit neatly into any of these categories.⁶² Thus, they may fail to comply with

53. Dana & Ramsey, *supra* note 11, at 3.

54. JAMES L. WINOKUR ET AL., *PROPERTY AND LAWYERING* 578 (2002).

55. Tapick, *supra* note 11, at 267.

56. *Id.*

57. *Id.* at 268.

58. PAUL GOLDSTEIN, *REAL PROPERTY* 672 (1st ed. 1984).

59. *Id.*

60. *See id.*; *see also* Kiernat v. Chisago County, 564 F. Supp. 1089, 1093 (D. Minn. 1983).

61. GOLDSTEIN, *supra* note 58, at 670–73.

62. *See* Dana & Ramsey, *supra* note 11, at 12.

the particular requirements that common law imposes for the enforcement of easements, real covenants, and equitable servitudes.⁶³

Easements confer upon their holder a right to “limited use or enjoyment” of another’s property and usually offer the holder more legal protection than real covenants or equitable servitudes.⁶⁴ Traditionally, however, courts at common law have disfavored the use of both negative easements and easements in gross.⁶⁵ Common law recognizes only three types of negative easements: easements to protect the flow of “light and air,” easements to protect structural support provided by a building on adjacent property, and easements to protect the flow of an artificial stream.⁶⁶ Although modern courts have sometimes recognized other types of negative easements such as “view” and “solar” easements by analogy to these three types of easements, conservation easements have no such “ready analogue in the traditional negative easements recognized at common law.”⁶⁷ Common law has also placed limitations on the duration of easements held in gross, generally prohibiting the establishment of perpetual easements in gross.⁶⁸ For these reasons, under common law, Washington courts have disfavored the enforcement of negative easements in gross.⁶⁹

Covenants and equitable servitudes are typically viewed by courts as contracts regarding the use of land rather than as actual property interests.⁷⁰ Traditionally, real covenants were enforced by courts of law and equitable servitudes were enforced by courts of equity.⁷¹ At law and at equity, courts have placed limitations on the ability of covenants and equitable servitudes to bind successor landowners, that is, “to run with the land” in perpetuity.⁷² In order for a real covenant to run with the land, for instance, common law requires that the covenant’s terms “touch and concern” an adjacent parcel of land and that both vertical and horizontal “privity of estate” exist between the grantor and grantee of the covenant.⁷³ Because perpetual conservation easements fail to satisfy these rules governing the enforcement of real covenants at law, they probably

63. Tapick, *supra* note 11, at 266.

64. *Id.*

65. *Id.* at 267–68.

66. Dana & Ramsey, *supra* note 11, at 13.

67. *Id.*

68. Tapick, *supra* note 11, at 268.

69. *See, e.g.,* Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry Dock Co., 102 Wash. 608, 618, 173 P. 508, 511 (1918); Green v. Lupo, 32 Wash. App. 318, 323, 647 P.2d 51, 54 (1982).

70. Tapick, *supra* note 11, at 268, 270.

71. *See* Dana & Ramsey, *supra* note 11, at 16.

72. *See* William Stoeckel, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 867–81 (1977).

73. *See id.* *See also* Leighton v. Leonard, 22 Wash. App. 136, 139, 589 P.2d 279, 281 (1978).

would be unenforceable under common law as real covenants.⁷⁴ Although equitable servitudes provide some relief from these rules by dropping the requirement of horizontal privity, the “touch and concern” rule remains, making the enforceability of conservation easements as equitable servitudes unlikely.

In view of the discrepancies between the requirements of common law servitudes and the nature of conservation easements, several commentators have concluded that conservation easements would be unenforceable under common law.⁷⁵

2. Conservation Easements Under Washington Statutory Law

Over the past four decades, concerns about the enforceability of conservation easements under common law have led state legislatures across the country to pass laws that attempt to bypass common law requirements in order to authorize conservation easements.⁷⁶ Although the terms of enabling statutes authorizing conservation easements vary from state to state, most statutes contain several common elements, including a legislative declaration of policy, an authorization to acquire conservation easements as property interests, and an attempt to shield conservation easements from certain common law doctrines. The statutory law of Washington provides a useful illustration of these elements.

The Washington Legislature acted early in the movement to authorize conservation easements when it passed the 1970 Open Space Tax Act (the “OSTA”).⁷⁷ The text of the OSTA begins with a policy declaration in favor of open space preservation:

[I]t is in the best interest of the state to maintain, preserve, conserve, and otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops, and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well being of the state and its citizens.⁷⁸

The legislative goal of the OSTA was to encourage owners of open space and agricultural property to maintain their land in its current state by reducing economic pressures to convert the land to other uses.⁷⁹

The OSTA authorizes the acquisition of property interests called “conservation futures” that limit the future use of certain types of land.⁸⁰

74. Dana & Ramsey, *supra* note 11, at 16; Tapick, *supra* note 11, at 269.

75. See, e.g., Dana & Ramsey, *supra* note 11, at 12; Tapick, *supra* note 11, at 271.

76. See PROTECTING THE LAND, *supra* note 3, at 70–74.

77. WASH. REV. CODE ch. 84.34 (2004).

78. § 84.34.010.

79. PROTECTING THE LAND, *supra* note 3, at 382.

80. Section 84.34.210 provides the following:

Because conservation futures include both fee simple and lesser interests,⁸¹ they encompass the modern concept of a conservation easement as a less than full fee interest.⁸² Conservation futures can be acquired in a number of ways, including purchase, lease, and donation.⁸³ The OSTA authorizes a variety of organizations, such as government entities and “nonprofit nature conservancy” corporations (including most land trusts), to acquire conservation futures.⁸⁴

The OSTA imposes two requirements on a nonprofit organization seeking to acquire conservation futures. First, the organization must qualify as tax exempt under § 501(c) of the Internal Revenue Code.⁸⁵ Second, one of the organization’s principal purposes must be either (1) “the conducting or facilitating of scientific research”; (2) “the conserving of natural resources, including but not limited to biological resources, for the general public”; or (3) “the conserving of natural areas including but not limited to wildlife or plant habitat.”⁸⁶

In 1979, the Washington Legislature passed a real property statute that further clarified the statutory status of conservation easements by classifying them as real property interests.⁸⁷ This law, applying only to less than full fee interests, declares that a “development right, easement, covenant, restriction, or other right . . . to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross,” constitutes a real property interest.⁸⁸ By authorizing the acquisition of an interest to “limit the future use of” land and providing that such an interest may be “appurtenant or in gross,” the statute effectively circumvents problems that could arise from the common law bias against negative servitudes or servitudes in gross.

Any county, city, town, metropolitan park district, metropolitan municipal corporation, nonprofit historic preservation corporation as defined in RCW 64.04.130, or nonprofit nature conservancy corporation or association, as such are defined in RCW 84.34.250, may acquire by purchase, gift, grant, bequest, devise, lease, or otherwise, except by eminent domain, the fee simple or any lesser interest, development right, easement, covenant, or other contractual right necessary to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve, selected open space land, farm and agricultural land, and timber land as such are defined in chapter 84.34 RCW for public use or enjoyment.

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. § 64.04.130.

86. *Id.*

87. *Id.*

88. *Id.*

However, it is unclear whether other common law doctrines might interfere with the enforcement of conservation easements.⁸⁹ For example, some commentators have argued that courts should apply the doctrine of changed conditions to extinguish conservation easements when circumstances related to the land or the landowner have changed.⁹⁰ At common law, this doctrine “allowed a court to terminate a real covenant or equitable servitude when changed conditions in or around the burdened land frustrated the purpose of the restriction or created an undue hardship on the owner of the burdened land.”⁹¹ Others contend that the doctrine of changed conditions “should not apply as long as the easement serves its stated purpose.”⁹² The Restatement (Third) of Property has taken a similar position, declaring that the doctrine of changed conditions should only be used to terminate a conservation easement when the easement can no longer serve any conservation purpose, and then only “on payment of appropriate damages and restitution.”⁹³

State courts have not resolved the debate over the application of the doctrine of changed conditions to conservation easements. Commentary to the Uniform Conservation Easement Act declares that, because the application of the doctrine of changed conditions “is problematic in many states,” the Act “leaves intact the existing case and statute law” of each state regarding the doctrine’s application.⁹⁴ But some state courts have raised the possibility that the doctrine might apply to easements under certain circumstances. For example, in one case upholding the enforcement of a deed restriction prohibiting the construction of buildings on an eight-acre portion of a property, the Connecticut Supreme Court noted that “changed circumstances, such as use of the defendant’s prop-

89. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 81.2.

90. See, e.g., Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 483–84 (1984).

91. Jeffrey A. Blackie, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1188 (1989).

92. *Id.* at 1190. Blackie distinguishes conservation easements from common law servitudes in two ways. First, he argues that “the conservation easement’s public and environmental purposes appear to preclude termination based on a judicially implied intent of the parties to limit their duration.” *Id.* Second, he reasons that “conservation easements, unlike common law servitudes, exist now by virtue of state enabling statutes, are conveyed by a recorded deed, are granted in perpetuity, and generally do not provide any method for termination.” *Id.*

93. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 (2000). The comment to this section of the Restatement offers a plain statement of the policy rationale for such heightened protection of conservation servitudes: “There is a strong public interest in conservation and preservation servitudes.” *Id.*, cmt. a (arguing that “[s]tatutes have been enacted to eliminate questions about their enforceability in all but three states, and their creation is subsidized indirectly by tax deductions and directly through purchases by public agencies and nonprofit corporations. Their importance, underscored by statutory requirements that they be perpetual, will continue to increase as population growth exerts ever-greater pressures on undeveloped land, ecosystems, and wildlife.”).

94. UNIF. CONSERVATION EASEMENT ACT, *supra* note 45, § 3 cmt.

erty for other than residential purposes,” might invalidate such a restriction.⁹⁵

Washington courts have not had the opportunity to comment on the application of the doctrine of changed conditions to conservation easements. However, Washington courts may apply the doctrine of changed conditions to extinguish a restrictive covenant “if the character of the neighborhood has so changed as to make it outmoded.”⁹⁶ Although Washington courts have used another common law doctrine, the doctrine of abandonment, to extinguish a right of way easement,⁹⁷ they have not spoken to the application of the doctrine of changed conditions to either easements in general or conservation easements in particular.

Thus, neither Washington’s case law nor its statutory law eliminates the possibility that conservation easements will face common law challenges. However, drafters of conservation easements can mitigate such risks by striking a proper balance between avoiding potential conflicts with common law and meeting statutory requirements.⁹⁸

3. The Federal Tax Implications of Conservation Easement Donations

Donors of conservation easements who seek a federal tax benefit⁹⁹ must meet requirements in addition to those arising from common law and statutory law.¹⁰⁰ Donations of conservation easements may entitle the landowner to tax benefits such as “an income tax deduction, gift/estate tax reduction, and property tax relief.”¹⁰¹ But in order for a landowner to realize these tax benefits, the donation must comply with the principles of charitable gift law and qualify as a tax-deductible charitable donation under § 170(h) of the Internal Revenue Code.¹⁰²

95. *Harris v. Pease*, 135 Conn. 535, 541, 66 A.2d 590, 592 (1949) (finding that the deed restriction “created a servitude upon the eight-acre tract in the nature of an easement”).

96. *City of Seattle v. Martin*, 111 Wash. 2d 727, 740, 765 P.2d 257, 264 (1988) (Callow, J. dissenting).

97. *See, e.g., King County v. Squire Inv. Co.*, 59 Wash. App. 888, 895, 801 P.2d 1022, 1025 (1990).

98. *See WASHINGTON REAL PROPERTY DESKBOOK*, *supra* note 5, § 81.2. *See discussion in Part II.B.4, infra.*

99. In general, conservation easement donations will be more attractive to donors subject to a high rate of income tax. *See Konrad Liegel, The Impact of the Tax Reform Act of 1986 on the Lifetime Transfers of Appreciated Property for Conservation Purposes*, 74 CORNELL L. REV. 742, 751–52 (1989).

100. Liegel & Duvernoy, *supra* note 19, at 126.

101. *Id.* at 125 (noting that “[a] sale of land or of a conservation easement at less than fair market value—a ‘bargain sale’—also entitles the landowner to potential tax benefits on the gift portion of the conveyance that can be used to offset the capital gains tax associated with the sale portion of the conveyance.”).

102. *Id.* at 126.

Charitable gift law imposes two key requirements on donors seeking a tax deduction for the donation of a conservation easement.¹⁰³ First, the donation must be a “‘true’ gift for which no bargained-for-benefit is anticipated.”¹⁰⁴ Although a donor may not deduct “quid pro quo gifts of conservation easements, such as where a developer deeds a conservation easement to a city as part of its subdivision approval,”¹⁰⁵ a donor possesses the requisite “donative intent” if the anticipated personal benefit “includes only ‘psychic satisfaction,’ or ‘incidental economic or personal benefit.’”¹⁰⁶ Second, the donation must be “complete and irrevocable, without strings or contingencies.” For example, a donor seeking a charitable deduction may not condition the donation on receipt of such a deduction or include a reversionary interest in the transfer of the gift.¹⁰⁷

Section 170(h) imposes additional requirements on conservation easement donors seeking a tax benefit.¹⁰⁸ To qualify as a tax-deductible charitable donation, a conservation easement must be donated “exclusively for conservation purposes,” which the Code defines in four broad categories.¹⁰⁹ A deduction will be allowed only if the donation is made *exclusively* for one of these purposes.¹¹⁰ In addition, Treasury Regulations provide that “a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests.”¹¹¹

103. *Id.*

104. *Id.* (citing *Commissioner v. Duberstein*, 363 U.S. 278 (1960)).

105. *Id.* (citing Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 1999); *Hernandez v. Commissioner*, 490 U.S. 680, 690(1989)).

106. *Id.* (citing Treas. Reg. § 1.170A-7(b)(1) (as amended in 1994); *Ackerman Buick, Inc. v. Commissioner*, 32 T.C.M. (CCH) 1061 (1973)).

107. *Id.*

108. *Id.*

109. I.R.C. § 170(h)(4)(A) (2004) (defining “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”).

110. Liegel & Duvernoy, *supra* note 19, at 126.

111. Treas. Reg. § 1.170A-14(e)(2) (as amended in 1999). Selective timber harvesting is permissible under these regulations “if conducted in a manner that does not impair significant conservation interests.” Priv. Ltr. Rul. 95-37-018 (June 20, 1995) (finding that “Taxpayer’s timber harvesting and other potential activities (constructing buildings or roads) will in some cases result in dislocation of wildlife. However, the property will contain enough forested areas so that wildlife dislocation resulting from Taxpayer’s activities generally will be temporary. Further, wetland areas and bird of prey nesting sites will be granted special protection from timber activities. Consequently, despite the dislocation of wildlife that such activities entail, we conclude that the activities do not impair significant conservation interests”). In addition, a deduction will not be denied merely because a donor

Finally, the conservation purpose must be “protected in perpetuity” in order for the gift to be deductible.¹¹²

As we will see in Part III, section A, *infra*, the requirements for tax-deductible gifts of conservation easements can provide additional ammunition to those who wish to challenge the validity of conservation easements.¹¹³ Land trusts should pay close attention to these requirements when drafting the easement instrument and when monitoring and enforcing easement restrictions.

4. The Anatomy of Legal Instruments That Convey Conservation Easements

In Washington, as in other states, the structure and content of instruments conveying conservation easements will vary widely depending on factors such as the landowner's interests and the size, geographic location, and natural features of the land.¹¹⁴ However, a Washington court will be more likely to enforce a conservation easement that adheres to the following guidelines:¹¹⁵

- First, the instrument conveying the easement should be in the form of a deed.¹¹⁶ Because Washington law classifies conserva-

receives an “incidental benefit” as a result of the donation. Treas. Reg. § 1.170A-14(e)(1) (as amended in 1999).

112. I.R.C. § 170(h)(5)(A) (2004). However, a charitable deduction is not defeated by a remote future event that impairs the conservation values of the deduction “if on the date of the gift it appears that the possibility that such an act or event will occur is so remote as to be negligible.” Treas. Reg. § 1.170A-14(g)(3) (as amended in 1999).

113. This is especially true today when, in response to several high-profile cases of abuse of tax deductions for conservation easements, an influential joint congressional committee has recently recommended severely limiting, and in some cases eliminating, the deductions that landowners can take for donating a conservation easement. Joe Stephens, *Panel Advises Ending Tax Breaks for Easements*, WASH. POST, Jan. 28, 2005, at A12, available at <http://www.washingtonpost.com/wp-dyn/articles/A42697-2005Jan27.html?sub=AR> (registration required) (last visited Feb. 5, 2005); see also STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 277, J.C.S. DOC. NO. 02-05 281 (2005), available at <http://www.house.gov/jct/s-2-05.pdf> (last visited Feb. 5, 2005) (“Modify Charitable Deduction for Contributions of Conservation and Facade Easements,” a proposal that “eliminates the charitable contribution deduction with respect to facade and conservation easements relating to personal residence properties, substantially reduces the deduction for all other qualified conservation contributions, and imposes new standards on appraisals and appraisers regarding the valuation of such contributions.”).

114. See WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.5.

115. The following list of elements is not intended to be exhaustive, but rather to introduce the reader to the kinds of terms used to create conservation easements. For a more detailed look at the structure of conservation easements, see, for example, Model Conservation Easement, in DEIHL & BARRETT, *supra* note 21, at 156–65; Grant of Conservation Easement and Declaration of Restrictive Covenants, in PROTECTING THE LAND, *supra* note 3, at 516.

116. A recorded deed is one factor distinguishing a conservation easement from a common law servitude. Blackie, *supra* note 91, at 1189.

tion easements as interests in real property,¹¹⁷ conservation easements must be conveyed by deed.¹¹⁸

- Second, the instrument should provide a description of the property's significance and articulate the conservation purpose of the easement. Before describing the property's unique qualitative significance,¹¹⁹ the easement should define in general terms the conservation values to be protected.¹²⁰ Similarly, before detailing the specific purpose of the restrictions contained in the conservation easement, the instrument should set out its general purpose to protect the land in perpetuity.¹²¹
- Third, the instrument should make reference to legislatively declared policies, such as those contained in the OSTA, favoring land conservation.¹²² A general reference to such policies can be used to introduce specific legislative declarations.¹²³
- Fourth, the instrument should set out a clear statement of the grantor's charitable motive and intent to create an easement running with the land.¹²⁴ Such a statement of express intent, along with references to legislative findings, reduces the risk that a court will subject a conservation easement to the vagaries

117. WASH. REV. CODE § 64.04.130 (2004).

118. See § 64.04.010 ("Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.").

119. See DEIHL & BARRETT, *supra* note 21, at 169–70.

120. An example of such easement language is the following:

The Protected Property possesses natural (forest and wildlife habitat), open space, scenic, recreational, and educational values that are of great importance to Grantor, Grantee, the people of King County and the people of the State of Washington. These values are referred to herein as the "Conservation Values" of the Protected Property.

Treemont LLC, Deed of Conservation Easement, 1–2 (Aug. 29, 2003), King County Recorder's Office, available at <http://146.129.54.93:8193/search.asp?cabinet=opr> (recording number 20030829004801) (last visited Mar. 10, 2005) [hereinafter *Treemont Conservation Easement*].

121. For example, "[t]he Grantor is conveying the property interest conveyed by this Easement for the purpose of ensuring that, under the Grantee's perpetual monitoring, the Conservation Values of the Protected Property will be conserved and maintained in perpetuity, and that uses of the Protected Property that are inconsistent with these Conservation Values will be prevented or corrected." *Id.* at 2.

122. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(4).

123. For example, "[t]he legislatively declared policies of the State of Washington support the preservation of the Protected Property for open space, scenic and passive recreational purposes." *NWWP Conservation Easement*, *supra* note 44, § I.G. In Washington, specific declarations might include the Revised Code of Washington, sections 36.70A.090, 64.04.130, 84.34.010, and 84.34.210, as well as any open space plans or programs adopted by the local county or city.

124. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(4). For example, "Grantor expressly intends that this Easement runs with the land and that this Easement shall be binding upon Grantor's successors and assigns." *NWWP Conservation Easement*, *supra* note 44, § II.C.

of common law.¹²⁵ For example, an expression of charitable intent may protect against the threat of termination under the doctrine of changed circumstances by enabling a court to perpetuate the general conservation purpose of the easement despite conditions that make it impossible to enforce specific restrictions.¹²⁶ Moreover, an easement that does not include a statement of intent that the easement run with the land may be vulnerable to challenges by future property owners who wish to avoid restrictions imposed by the easement.¹²⁷

- Fifth, the instrument should include an operative “grant of easement” containing the necessary words of conveyance and reciting the consideration that supports the grant.¹²⁸
- Sixth, the grant of easement should be followed by a description of the “rights, restrictions, permitted uses, and reservations that will govern the future use of the land.”¹²⁹ This section spells out precisely how the land may and may not be used and will define the scope of monitoring and enforcement of the conservation easement by the land trust.¹³⁰

125. See WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(4) (citing *Loose v. Locke*, 25 Wash. 2d 599, 171 P.2d 849 (1946)).

126. *Id.* (citing *Matter of Booker*, 37 Wash. App. 708, 682 P.2d 320 (1984)).

127. *Id.*

128. *Id.* For example:

For the reasons stated above, in consideration of the mutual covenants, terms, conditions, and restrictions contained in this Easement, Grantor hereby voluntarily grants, conveys, and quit claims to Grantee a conservation easement in perpetuity over the Protected Property, consistent with the purpose as defined in this Easement, subject only to the restrictions contained herein.

NWWP Conservation Easement, *supra* note 44 at § II.A. Some drafters choose to include a second reference to the enabling legislation in the grant of easement:

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, and for other good and valuable consideration, the receipt of which is hereby acknowledged by Grantee, Grantor and Grantee agree as follows . . . Grantor voluntarily grants, bargains, sells, conveys and confirms to Grantee, and Grantee accepts, as permitted by [WASH. REV. CODE §] 64.04.130 and [WASH. REV. CODE] ch. 84.34, a conservation easement in perpetuity over the Protected Property consisting of the rights in the Protected Property, hereinafter enumerated, subject to the restrictions set forth herein, and subject to the Permitted Exceptions set forth on Exhibit C hereto.

Treemont Conservation Easement, *supra* note 120, at 3–4.

129. WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(4).

130. *Id.* This section can be drafted in either of two ways. First, and more typically, the easement can “prohibit certain activities and to reserve to the property owner all other rights not inconsistent with the purpose of the easement.” *Id.* § 81.3. Second, a less common approach used by some federal agencies is to “expressly allow certain activities and then prohibit all others.” *Id.* The approach taken by drafters of conservation easements will depend on both “a property owner’s own development and financial needs and an easement recipient’s perspective on enforcement.” *Id.*

- Seventh, the instrument should include “a waiver by the grantor of potential common law-based claims, such as adverse possession” and “a liberal interpretation rule of construction in favor of the grant.”¹³¹
- Eighth, the instrument should include a clear statement of executory limitation and assignment restrictions that provide for the forfeiture of the easement to another holder and limit transfer to specific organizations qualified to hold such interests under state and federal law.¹³²
- Finally, the instrument should include “express procedures as to the exclusive remedy for terminating and for amending the easement.”¹³³

These final two elements look to the future and provide the conservation easement with some degree of adaptability to unanticipated changes that might occur. Nevertheless, if the conservation easement is drafted with static restrictions, it is likely that change will eventually prevent the restrictions from fulfilling their intended purpose.

C. The Problem of Perpetuity and Coping with Change

Conservation easements are ordinarily intended to be *perpetual* interests in land. While practical considerations may sometimes lead land trusts to acquire a “term easement” that automatically expires after a fixed number of years, most conservation easements are granted “in perpetuity.”¹³⁴ Perpetual conservation easements are preferred for two primary reasons.¹³⁵ First, as previously discussed, landowners seeking a federal tax deduction for a donated conservation easement are required to make their gift perpetual.¹³⁶ Second, land trusts and their supporters prefer perpetual conservation easements simply because they would like to see the land protected “*forever* (or at least for a very long time).”¹³⁷

Land trusts that use perpetual conservation easements face a fundamental paradox of land conservation: how to truly preserve land in perpetuity in the face of perpetual change.¹³⁸ On the one hand, conserva-

131. *Id.* § 81.2.

132. *Id.* § 107.4(4).

133. *Id.* § 81.2.

134. Dana & Ramsey, *supra* note 11, at 23 (quoting T. BARRETT & P. LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA* 5 (1983)).

135. *Id.* at 27.

136. Treas. Reg. § 1.170A-14(a) (as amended in 1999) (“To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity.”).

137. Dana & Ramsey, *supra* note 11, at 23.

138. See WASHINGTON REAL PROPERTY DESKBOOK, *supra* note 5, § 107.4(3) (“The dynamic nature of land and land ownership challenges the drafter of a conservation easement to make the

tionists may seek to preserve aspects of the status quo to some degree of certainty by legally restricting the use of the land. In doing so, they would effectively limit the options of future generations by making certain land use decisions.¹³⁹ On the other hand, conservationists may also hope to preserve options, both for current landowners, by providing economic incentives for particular types of land use that are compatible with conservation values, and for future generations, by preventing de facto restrictions on the use of land like the conversion of forestland into residential subdivisions.

Critics of perpetual conservation easements argue that such perpetual restrictions are unwise because they will burden future generations by either limiting their range of land use choices or forcing them to expend resources to remove the restrictions.¹⁴⁰ According to this view, perpetual conservation easements will either inhibit individual liberty or cause an economically inefficient result.

However, such critics tend to overlook the potential benefits of conservation easements. It is true that perpetual conservation easements restrict the choices of future generations by imposing legal barriers to development. But conservation easements may actually preserve more options than they eliminate because, unlike legal restrictions on land use, the development of land is often impossible to reverse.¹⁴¹ The National Academy of Sciences has declared that “the conversion of land from its natural state to human use is the most permanent and often irreversible effect that humans can have on the natural landscape.”¹⁴² Critics fail to consider that the benefits of “free alienation”—the rights of future generations to make decisions about the use of private property—must be weighed against the benefits of “free contracting”—the freedom of individual landowners to enter into agreements regarding their property.¹⁴³

Similarly, while some perpetual conservation easements may ultimately impose costs on future generations by preventing development or increasing the cost of developing a particular parcel of land, they may

instrument both sufficiently certain in its restrictions to assure protection of the conservation values involved and sufficiently flexible to meet the unforeseen changes that are likely to occur over time.”).

139. See Mahoney, *supra* note 10, at 744.

140. *Id.* (arguing that conservation easements “impose significant potential costs on future generations by deliberately making non-development decisions hard to change”).

141. See David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 344 (1995) (arguing that “[l]egal arrangements, unlike physical modification, can always be reversed”).

142. NATIONAL ACADEMY OF SCIENCES, GROWING POPULATIONS, CHANGING LANDSCAPES: STUDIES FROM INDIA, CHINA, & THE UNITED STATES 2 (2001), available at <http://www.nap.edu/execsumm/0309075548.html> (last visited Mar. 20, 2004).

143. See Dana & Ramsey, *supra* note 11, at 24.

also create economic efficiencies¹⁴⁴ and allow future generations to avoid the economic and social costs of failing to protect precious natural lands.¹⁴⁵ Critics of conservation easements stress this generation's limited capacity to predict the land use desires of the next generation, but some seem to want to have it both ways, making their own predictions that this generation's decisions about land preservation "will almost certainly fail to reflect contemporary cultural values and advances in ecological science."¹⁴⁶ And while the future economic costs of conservation easements are purely conjectural,¹⁴⁷ the social, economic, and ecological effects of unchecked development are immediate and well documented.¹⁴⁸ In Washington, for example, the Governor's Office recently published a study concluding that "[t]he quantity, quality, and interconnectedness of terrestrial and aquatic habitats in the Puget Sound region are all threatened by development"¹⁴⁹ and that "[p]rotecting a living and functioning Puget Sound is critical to the region's economy and quality of life."¹⁵⁰

Critics also tend to overstate the inflexibility of conservation easements. An interest conveyed in perpetuity will not necessarily last "forever." Rather, a perpetual conservation easement should "potentially be of infinite duration, but that is very different than *actually* being of infinite duration."¹⁵¹ As previously noted, most conservation easements will include terms allowing for their voluntary modification or termination, and courts retain some power to modify or terminate perpetual easements.¹⁵²

144. *Id.* at 26

145. See generally GRETCHEN C. DAILY & KATHERINE ELLISON, *THE NEW ECONOMY OF NATURE: THE QUEST TO MAKE CONSERVATION PROFITABLE* (2002) (describing the emergence of an economy that recognizes the economic value of natural systems).

146. Mahoney, *supra* note 10, at 744.

147. See Dana & Ramsey, *supra* note 11, at 27.

148. See, e.g., U.S. ENVIRONMENTAL PROTECTION AGENCY, ABOUT SMART GROWTH: WHAT ARE THE CHALLENGES ASSOCIATED WITH CURRENT DEVELOPMENT PATTERNS?, at http://www.epa.gov/smartgrowth/about_sg.htm (last visited Mar. 10, 2004).

149. PUGET SOUND ACTION TEAM, STATE OF THE SOUND 2004 31, at http://www.psat.wa.gov/Publications/StateSound2004/State_Sound_base.htm (last visited Jan. 28, 2005).

150. *Id.* at 60.

151. DEIHL & BARRETT, *supra* note 21, at 130. One commentator has taken issue with this characterization, arguing that "[t]o assert that conservation servitudes are not permanent is, in effect, to admit that the programs amount to a government giveaway for owners of eligible lands." Mahoney, *supra* note 10, at 779. However, the assertion that conservation easements are *potentially* not permanent (while this potential is remote) is not the same as the assertion that conservation servitudes are not permanent at all. In any event, any windfall to landowners would likely be prevented by tax regulations entitling an easement holder to a portion of the proceeds in any subsequent sale or exchange of the property following the termination of the easement. See Treas. Reg. § 1.170-A-14(g)(6) (as amended in 1999).

152. See Dana & Ramsey, *supra* note 11, at 34-42.

Some conservation easements should, in fact, be terminated. As critics of conservation easements have pointed out, the ability of humans to predict the future is limited.¹⁵³ If the purpose of an easement can no longer be fulfilled, it should be extinguished.¹⁵⁴ For example, if the purpose of a conservation easement is to protect a working ranch, but in fifty years the ranch is an “urban waste surrounded by a mountain city of five million people—absurd for ranching, unavailable as a park under the terms of the easement, a dump and breeding ground for all manner of urban ills, and loved only by the open-space crazed principles of the anachronistic land trust,” then the easement should be terminated.¹⁵⁵ Similarly, if Washington’s volcanic Mount Rainier were to erupt,¹⁵⁶ transforming much of the landscape in central Puget Sound, the purpose of a number of conservation easements would probably become impossible to fulfill, and under such circumstances these easements should be terminated as well.

Conservation easements that no longer serve their purpose may be modified or terminated in a number of ways. First, the land trust and the landowner might simply agree to amend or extinguish the easement.¹⁵⁷ Second, if the land trust refused to extinguish the easement and the landowner took the matter to court, a court could apply the *cy pres* doctrine, allowing it to “reform the grant to support the general goal of conservation.”¹⁵⁸ Third, if it were impossible to reform the grant to support conservation generally, a court could also permit or require the landowner to

153. See Mahoney, *supra* note 10, at 753.

154. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, *supra* note 93, § 7.11, cmt. a (arguing that “[i]t is inevitable that, over time, changes will take place that will make it impracticable or impossible for some conservation servitudes to accomplish the purpose they were designed to serve. If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land”).

155. Cheever, *supra* note 20, at 1100.

156. See NAT. & CULTURAL RES. DIV., NAT’L PARKS SERV., DECADE VOLCANO, at <http://www.nps.gov/mora/ncrd/decade.htm> (last visited Mar. 7, 2004) (describing how Mount Rainier is “representative of one or more volcanic hazards: it is geologically active as evidenced by surface manifestation of heat (geothermal activity), it has had recent volcanic events (last eruption was about 150 years ago), and it is likely to erupt again, based on past history”).

157. Under such an agreement, the landowner would not be required to compensate the land trust for the value of the easement, but if the original transaction involved a charitable deduction, the land trust would be entitled to a portion of the proceeds in any subsequent sale or exchange of the property. Treas. Reg. § 1.170-A-14(g)(6) (as amended in 1999).

158. Blackie, *supra* note 91, at 1217. See also Puget Sound Nat’l Bank v. Easterday, 56 Wash. 2d 937, 948–49, 350 P.2d 444, 450 (1960) (holding that the *cy pres* doctrine “applies in situations where a testator has evidenced a dominant intent to devote his property to some charitable use but the circumstances are such that it becomes impossible to follow the *particular* method he directs, and the courts then sanction its use in some other way which will, as nearly as may be, approximate his general intent”) (quoting Duncan v. Higgins, 129 Conn. 136, 26 A.2d 849 (1942) (alteration in original)).

purchase the easement from the land trust.¹⁵⁹ Fourth, if land subject to a conservation easement is needed for a public purpose like roads or schools, the government may take the land by exercising its power of eminent domain.¹⁶⁰

Thus, unanticipated changes can sometimes be accommodated by a voluntary or judicially imposed modification or termination of the conservation easement. In some cases, however, while the specific purpose of a conservation easement can still be fulfilled, the static terms of the easement will no longer serve their intended purpose. This is because conservation easements with static terms “implicitly assume that protected lands will be immutable.”¹⁶¹ The following section provides examples of static conservation easements and evaluates their strengths and weaknesses in greater detail.

D. The Traditional Model: Static Conservation Easements

Static conservation easements have several apparent advantages, such as the relative ease of drafting static rather than dynamic terms, and the perception that inflexible terms will guarantee the fulfillment of the easement’s purpose in perpetuity. However, a closer examination of static conservation easements reveals that unyielding terms can create more problems than they solve. In the long run, static terms in conservation easements may limit the easement’s effectiveness in meeting the landowner’s goals while also failing to protect the property’s conservation values.

The inflexibility of static conservation easements can create problems in a variety of ways. Consider the following hypothetical situations:

- Advances in science and technology spawn new, more sustainable forestry techniques that are not permitted by the terms of a static conservation easement.
- A land trust wants to ensure that the practices of future owners of a farm will continue to uphold the current owner’s high standards for agricultural practices, but the current owner is wary of being bound by rigid standards.
- A conservation easement restricts the use of a Colorado ranch to the raising of cattle. People stop raising cattle in the area, and no one will buy the ranch from the landowner’s son.¹⁶²

159. *Id.*

160. See Levin, *supra* note 15, at 594–95.

161. Mahoney, *supra* note 10, at 756.

162. See Cheever, *supra* note 20, at 1099.

- An owner of 10,000 acres of timberland donates a conservation easement that keeps the land in working forestry by extinguishing development rights, but ten years later the bottom drops out of the timber market, rendering the property economically valueless.
- A property subject to an agricultural easement is made unsuitable for farming by climate change.¹⁶³
- A static riparian easement¹⁶⁴ creates a buffer against development along a river to protect habitat for migrating or spawning salmon by referring to a map and a metes and bounds description that establishes the precise location of the buffer. One hundred years later, salmon still spawn on the river but the river has shifted fifty feet to the west. While the value of the salmon habitat remains, the terms of the easement no longer serve the purpose of protecting salmon habitat.

In situations where static terms cease to serve their conservation purpose, a land trust would likely seek an amendment to the easement.¹⁶⁵ Some landowners would refuse to accept an amendment and instead would seek to have the easement extinguished. Even if the landowner agreed to an amendment, the process of amending an easement would impose costs on the land trust.¹⁶⁶ In either case, the inflexible terms of the easement would produce a result contrary to the interests of the land trust. However, had the conservation easement been designed to anticipate such changes, the land trust could avoid both the costs of amending the easement and the possibility of unnecessary termination.

Static conservation easements may fail to accommodate future changes in at least three ways. First, static conservation easements are not capable of adapting to changes in the land itself. The environmental consciousness of the 1960s grew out of the notion that natural systems tend to seek balance, but ecologists in the past two decades have begun to see the environment as “in a process of constant change rather than in

163. See generally FOOD & AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, TWO ESSAYS ON CLIMATE CHANGE & AGRICULTURE (2000), at <http://www.fao.org/DOCREP/003/X8044E/x8044e00.htm> (last visited Mar. 6, 2005).

164. See, e.g., Evan Goldsmith, Sample Riparian Easement, in *Beyond Municipal Boundaries: Designing a Regional Land Conservation Strategy in Washington County, Rhode Island* (M.A. thesis, Brown University), at http://www.envstudies.brown.edu/thesis/2001/goldsmith/writeup/Dreamweaver/products_WCLTC/sample_riparian_easement.html (last visited Feb. 13, 2004).

165. DEIHL & BARRETT, *supra* note 21, at page 121–25.

166. *Id.*

search of a stable end-state.”¹⁶⁷ A perpetual conservation easement that ignores this reality may fail to achieve its stated purpose if the land changes in such a way that the restrictions no longer protect the property’s conservation values. Second, static easements fail to make adequate provision for changes in the landowner’s use of the land.¹⁶⁸ The way people use land is constantly changing, and land ownership and management challenges often demand flexibility, particularly in terms of economic considerations. Third, static easements are not designed to adapt to advances in ecological science. For instance, a static conservation easement that imposes a fixed management practice for forestry, ranching, or agriculture, rather than incorporating flexible, periodically updated management standards, may bar the landowner from using the land in more environmentally friendly and economically productive ways.

As critics of conservation easements have argued, inflexible terms in conservation easements can be a detriment to landowners, to land trusts, and to society.¹⁶⁹ Static conservation easements may burden a landowner by forcing him to choose between living with an obsolete restriction on the use of his property or expending resources in an attempt to have the easement terminated.¹⁷⁰ Static conservation easements may also prove counterproductive to land trusts if the easement’s conservation purposes are defeated by an unnecessarily inflexible instrument. Finally, static terms in conservation easements may deprive society of the environmental, economic, and quality-of-life benefits provided by conservation easements.

III. THE USE OF DYNAMIC CONSERVATION EASEMENTS TO ACCOMMODATE UNFORESEEN CHANGES

In an ideal world, “the law does not fly in the face of nature, but rather acts in harmony with it.”¹⁷¹ Instruments conveying a conservation easement are, within the framework provided by the state’s common and statutory law and the federal tax code, a form of self-made law—a creature of both state and federal law, and private, contractual law. This sec-

167. Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 848 (1994) (arguing that “environmental law is just beginning to adapt to the new paradigm”).

168. *See, e.g.,* Farrier, *supra* note 141, at 347 (observing that “conservation easements in practice focus narrowly on the imposition of land-use restrictions and fail to take adequate account of the need for ongoing management”).

169. *See* Mahoney, *supra* note 10, at 757.

170. *Id.* at 744.

171. *See* Harper v. Tipple, 21 Ariz. 41, 44, 184 P. 1005, 1006 (1919) (quoting Lamar v. Harris, 117 Ga. 997, 44 S.E. 868 (1903)).

tion demonstrates how a practitioner drafting a conservation easement can allow the instrument to act in harmony with nature by designing it as a dynamic, living embodiment of the conservation purpose rather than a static, fixed set of restrictions that may one day become outdated. Section A evaluates arguments for and against dynamic conservation easements. Section B discusses how dynamic conservation easements can be used to protect working landscapes. Section C explores the use of adaptive management principles in drafting dynamic conservation easements.

A. The New Model: Dynamic Conservation Easements

Naturally, the drawbacks of static conservation easements can also be seen as the benefits of dynamic conservation easements. The problems created by inflexible terms in static easements may be avoided by the introduction of flexible, dynamic terms. Landowners benefit from dynamic conservation easements because dynamic terms permit adaptation to changes in the land and in the owner's use of the land. Land trusts benefit from dynamic conservation easements because a flexible easement instrument is more likely to fulfill its conservation purpose. By posing a smaller potential burden to the property owner, dynamic conservation easements may also open the land trust's doors to greater numbers of landowners. Most importantly, dynamic conservation easements benefit society by ensuring that recreational areas, wildlife habitat, open spaces, and natural resources are preserved for future generations.

Notwithstanding these benefits, several arguments can be offered against the use of dynamic conservation easements. For example, 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. And the rapid growth of the land trust movement has led to a proliferation of relatively cheap resources—such as publications containing legal advice and sample easement documents and conferences featuring panels of expert practitioners¹⁷²—that should alleviate any concerns land trusts may have about the difficulty or expense of drafting dynamic conservation easements.

More often, land trusts might worry that dynamic conservation easements offer a less certain outcome than static conservation easements. Specifically, land trusts may question the ability of dynamic conservation easements to withstand challenges to the easement's validity. A

172. See generally Land Trust Alliance, at <http://www.lta.org> (last visited Mar. 6, 2005).

landowner who is discontented with the restrictions imposed by a conservation easement is most likely to challenge the easement based on either (1) the eligibility of the easement holder or (2) the circumstances surrounding the conveyance or continued enforcement of the easement.¹⁷³ The following discussion demonstrates how, when faced with either type of challenge, a dynamic conservation easement would in fact fare better than an easement with static terms.

1. Eligibility of the Easement Holder

Challenges based on the eligibility of the easement holder can be grounded in either federal tax law or state law.¹⁷⁴ As previously discussed, in order to acquire and hold conservation easements in Washington, a land trust must qualify as exempt from federal taxation under I.R.C. § 501(c) and must have “as one of its principal purposes the conducting or facilitating of scientific research; the conserving of natural resources . . . or the conserving of open spaces.”¹⁷⁵ These requirements can be used to attack the eligibility of the holder of a conservation easement.

For example, a third-generation landowner of a property burdened by a conservation easement might argue that the land trust did not or does not qualify as tax exempt under section 501(c).¹⁷⁶ Although acceptance of a land trust by the Internal Revenue Service as a “qualified organization” creates a presumption in favor of qualification, this presumption may be overcome if there are “substantial changes in its character, purposes, or methods of operation.”¹⁷⁷ Changes that result in the presence of a single, substantial nonexempt purpose “will destroy the exemption regardless of the number or importance of truly [exempt] purposes.”¹⁷⁸ The landowner’s argument may be stronger if the land trust’s activities “benefit for-profit organizations with which they maintain a business relationship” and the landowner’s lawyers are able to portray the land trust “as a clique of local landowners who have manipulated the state conservation easement statute and federal tax law for their own personal ends and financial gain.”¹⁷⁹

The case law in this area illustrates how an easement holder’s activities can be used to challenge its eligibility to hold easements. In one

173. See Cheever, *supra* note 20, at 1093–96.

174. See *supra* Part II.B.

175. WASH. REV. CODE § 84.34.250 (2004).

176. See Cheever, *supra* note 20, at 1093–94.

177. *Id.* at 1094 (quoting BRUCE R. HOPKINS, *THE LAW OF TAX EXEMPT ORGANIZATIONS* § 36.1 (6th ed. 1992)).

178. *Id.* at 1094 (citing *Better Bus. Bureau v. United States*, 326 U.S. 279, 283 (1945)).

179. *Id.* at 1094–95.

case, the United States Tax Court held that a nonprofit, low-income housing organization was ineligible for tax-exempt status because the organization's non-exempt purpose was substantial and because owners of for-profit entities in partnership with the organization would benefit from the organization's tax-exempt activities.¹⁸⁰ Similarly, in *McLennan v. United States*, the Internal Revenue Service challenged a charitable deduction taken for the contribution of a scenic easement, arguing that the land trust had "committed private inurement and ceased to be a charitable organization" because its scenic easement program had "conferred direct benefits on plaintiff and other grant participants."¹⁸¹ In both cases, the attack on the conservation easement was essentially collateral; rather than attacking the easement itself, the challenger attacked the organization that held the easement.

A landowner might also argue that the land trust did not or does not have "as one of its principal purposes the conducting or facilitating of scientific research; the conserving of natural resources . . . or the conserving of natural areas" as required by the conservation easement enabling statute, the Revised Code of Washington, section 64.04.130. Although Washington courts have not spoken to this precise issue, the Washington Board of Tax Appeals addressed a similar question in *County of Klickitat v. State*, holding that a property owned by a land trust was not exempt from property taxation under the Revised Code of Washington, section 84.36.260.¹⁸² This statute provides exemption from *ad valorem* taxes for certain real property interests that are used exclusively for conservation purposes.¹⁸³ Looking to the land trust's stated purposes, overall track record, and actions with regard to the property in question, the court held that it had failed to prove "that the property is used and effectively dedicated primarily for any of the nature conservancy purposes specified in the exempting statute."¹⁸⁴ Although the exempting statute in this case provides a more exacting standard than the enabling statute, the court's reasoning shows how the requirements regarding an easement holder's eligibility could be used to attack the validity of a conservation easement.

A dynamic conservation easement is more likely than a static easement to withstand such attacks on the validity of the easement. Challenges to the eligibility of the easement holder turn on questions of the organization's purposes, its track record, and its activities related to the

180. *Housing Pioneers v. Comm'r*, 65 T.C.M. (CCH) 2191 (1993).

181. 23 Cl. Ct. 99, 103 (1991).

182. *County of Klickitat v. State*, 2002 Wash. Tax LEXIS 405, at *2 (2002).

183. WASH. REV. CODE § 84.36.260 (2004).

184. *Klickitat*, 2002 Wash. Tax LEXIS 405, at *2.

property. A mere statement of the organization's tax-exempt conservation purposes—such as a mission statement, tagline, or slogan posted on a web site—might be insufficient when its past or present actions suggest that the organization is failing to carry out an exempt purpose or that it also pursues non-exempt purposes. Indeed, in order to accept tax-deductible donations of conservation easements, a land trust must have a commitment to protect the easement's conservation purposes and the resources to enforce its restrictions.¹⁸⁵ Thus, a land trust that fails to implement consistent stewardship practices may be risking its status “as a charitable organization under state law and its tax exempt status under federal law.”¹⁸⁶ As we will see in Part III.B, *infra*, dynamic conservation easements are geared toward ensuring stewardship practices that fulfill the organization's charitable purpose while also documenting the activities that make the organization eligible to hold conservation easements. This is because the purposes and restrictions in dynamic conservation easements are more closely linked to the land trust's monitoring and enforcement activities.

2. Circumstances Surrounding the Easement

Challenges based on the circumstances surrounding the easement can be grounded in charitable gift and federal tax law, state law, common law, and public policy.¹⁸⁷ As previously discussed, charitable gift law and federal tax law require that (1) the donation of a conservation easement be a true gift for which no bargained-for benefit is anticipated, and (2) the easement be donated exclusively for conservation purposes. State law also requires that, in order to constitute a real property interest, a conservation easement must be acquired and held “for open space purposes.”¹⁸⁸ Finally, in some cases the common law and public policy may also subject a conservation easement to attack.

The circumstances surrounding the *conveyance of the easement* can be used to attack its eligibility for a deduction or its enforceability under state law. In *McLennan*, the Internal Revenue Service argued that the landowner “lacked the requisite donative intent and exclusive conservation purpose in conveying the scenic easement to the Conservancy.”¹⁸⁹

185. Treas. Reg. § 1-170A-14(c) (as amended in 1999).

186. Melissa K. Thompson, *The Legal Case for Conservation Easement Stewardship*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 10 (Land Trust Alliance ed., 2002) (arguing that “[i]n the decades and centuries ahead, good stewardship practices may mean the difference between the survival and extinction of conservation easements, between uncurbed sprawl and open spaces”).

187. See *supra* Part II.B.

188. WASH. REV. CODE § 64.04.130 (2004).

189. *McLennan v. United States*, 23 Cl. Ct. 99, 101 (1991).

Although the court held that it had no jurisdiction over the issue of the land trust's tax-exempt status, it concluded that "the facts underlying the issue of donative intent/exclusive conservation purpose warrant further ventilation."¹⁹⁰ The court denied the landowner's motion for summary judgment and held that "[p]laintiff bears the burden of proving at trial that the McLennans transferred the easement to the Conservancy with the requisite donative intent and exclusive conservation purpose."¹⁹¹ A similar challenge might be brought under state law, with the attacker arguing that the conservation easement was not acquired for "open space purposes."¹⁹²

The circumstances surrounding the *continued enforcement of the easement* may provide additional grounds for an attack. When changed conditions in or around the land frustrate the purpose of the restriction, the doctrine of changed conditions may allow a court to alter or terminate a conservation easement.¹⁹³ Under some circumstances, a court may also be persuaded that public policy considerations favor the modification or invalidation of perpetual conservation easements. For instance, a court might consider the public policy disfavoring "dead hand" control of land when deciding whether changed circumstances warrant the termination of a conservation easement.¹⁹⁴

Because dynamic conservation easements encourage sound stewardship practices, they are more likely to survive challenges based on the circumstances surrounding the easement.¹⁹⁵ By carefully documenting all aspects of the acquisition and enforcement of the easement, a land trust can collect evidence of the landowner's donative intent and the property's unique conservation values.¹⁹⁶ Furthermore, because the terms of dynamic conservation easements explicitly anticipate changed circumstances, dynamic easements are less vulnerable to judicial termination by application of the doctrine of changed conditions. Finally, by creating a

190. *Id.* at 105.

191. *Id.*

192. *See* § 64.04.130.

193. *See supra* Part II.B.

194. *See* Tapick, *supra* note 11, at 281.

195. *See generally* Adam Block et al., Trends in Easement Language and the Status of Current Monitoring on Working Forest Conservation Easements 30 (2004) (Master's project, University of Michigan), available at <http://www.snre.umich.edu/ecomgt/pubs/wfce/wfcecomplete.pdf> (last visited Feb. 6, 2005) (noting that, "[b]y making stewardship and monitoring part of the conservation strategy from the beginning, the conservation of a particular area is likely to be more efficient and effective over time.").

196. The recent proposal by the Joint Committee on Taxation to drastically cut the current tax deductions for land conservation underscores the need to document the public benefits of conservation easements and avoid the appearance of any impropriety. *See* STAFF OF JOINT COMM. ON TAXATION, *supra* note 113 and accompanying text.

process for active monitoring of—and adaptation to—changes in the land and the landowner's activities, dynamic conservation easements avoid the appearance of imposing unreasonable restrictions that a court might view as dead-hand control of the land.

*B. Using Dynamic Conservation Easements to
Protect Working Landscapes*

The purchase of conservation easements is the tool most often used to protect working landscapes.¹⁹⁷ Working landscapes provide economic benefits to private landowners in the form of income (and sometimes tax breaks) while also producing important natural resources, such as food and timber, and conservation benefits like clean air and water.¹⁹⁸ Although dynamic terms can be used in an easement on virtually any type of property, working landscapes provide a vivid illustration of the intersection of these seemingly divergent private and public interests. In addition, dynamic conservation easements can be especially useful to land trusts seeking to protect the conservation values of ever-changing working landscapes.

Sensitivity to the inevitability of changes in the land and the way people use it is critical in the context of working landscapes. According to one New York dairy farmer, “[i]f there’s anything constant about agriculture, it’s that it’s constantly changing.”¹⁹⁹ Agricultural practices have changed dramatically over time and will probably continue to evolve.²⁰⁰ In addition, farmers and ranchers historically have relied on a variety of non-agricultural activities to “close the gap between ranch income and expenses.”²⁰¹ Because farming and ranching are businesses, and many elements of agriculture are interconnected with an unpredictable global marketplace, farmers and ranchers need the ability to adapt their businesses to shifting economic conditions.²⁰² Owners of timberland face similar difficulties. Connie Best, managing director of the Pacific Forest Trust, observed that forests are “a naturally dynamic ecosystem. Then

197. Hollis & Fulton, *supra* note 46, at 24.

198. See James N. Levitt, *Innovating on the Land: Conservation on the Working Landscape in American History* 14–16 (Mar. 16, 2001) (unpublished paper, available at <http://www.nga.org/cda/files/INNOVLAND.pdf> (last visited Feb. 9, 2004)).

199. Fred Huneke, *quoted in* Judy Anderson & Jerry Cosgrove, *Agricultural Easements: Allowing a Working Landscape to Work*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 12 (Land Trust Alliance ed., 1998).

200. *See id.*

201. Brenda Lind, *Protecting Working Ranchlands with Conservation Easements*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 7 (Land Trust Alliance ed., 2002). These non-agricultural activities range from “machinery repair, farm stands, antique shops, hunting, guiding and guest services” to “small plumbing or cabinet making businesses.” *Id.*

202. *See id.*

you add the element of human impact and management, and suddenly, you've got a pretty complex challenge for drafting an easement."²⁰³

Working landscapes are quite different from other types of conservation land, such as open space and wildlife habitat (although working landscapes often encompass open space and wildlife habitat values).²⁰⁴ The use of working landscapes generally is active and intensive and tends to change over time. Management of working landscapes often requires knowledge of specialized types of property interests, such as water, mineral, and timber rights.²⁰⁵ In addition, the interests of landowners and land trusts in the preservation of working landscapes are often quite different. Typically, the landowner is concerned primarily with the economic viability of the land, the potential for restrictions to interfere with and increase the cost of operations, regulatory issues such as threatened or endangered species, and other issues concerning the use of the land, such as hunting and fishing rights.²⁰⁶ In contrast, the land trust is concerned primarily with land preservation issues, such as wildlife habitat protection and restoration, surface water and soil conservation, invasive species management, and the use of chemicals and pesticides.²⁰⁷

Drafters of conservation easements can address both the landowner's and the land trust's unique concerns regarding working landscapes by introducing terms that make the easement dynamic. A number of different types of clauses, working in concert, provide the mechanisms by which dynamic conservation easements may adapt to change on productive agricultural lands and working forestland.

1. Dynamic Conservation Easements on Agricultural Lands

The Washington Legislature has recognized the importance of agricultural lands to the people of Washington, declaring the following:

[I]t is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence adequate open space lands for the production of food, fiber and forest crops, and to assure the use

203. See Kendall Slee, *Evolving Easements on Working Forestlands*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 16 (Land Trust Alliance ed., 2002).

204. See Cascade Land Conservancy, Conservation Agenda, at <http://www.cascadeland.org/conserv/agenda.htm> (last visited Mar. 6, 2005); see also Lawrence R. Kueter et al., Conservation Easements for Working Lands 4 (unpublished presentation, Land Trust Alliance National Rally, Sacramento, California, Oct. 16–20, 2003) (on file with the author).

205. See, e.g., CALIFORNIA RANGELAND TRUST, AGRICULTURAL EASEMENT NARRATIVE: AN OVERVIEW OF THE DOCUMENT AND ITS KEY PROVISIONS 3–4, available at www.rangelandtrust.org/standard_easement_narrative.pdf (last visited Mar. 10, 2005).

206. See generally Kueter, *supra* note 204, at 4.

207. See *id.*

and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens.”²⁰⁸

Because agriculture is constantly evolving, however, the protection of agricultural lands requires a flexible approach.

Agricultural easements should be tailored to reflect current and future farmers’ and ranchers’ needs for economic flexibility and agricultural viability.²⁰⁹ Conservation easements on farmland and ranchland can be made dynamic in several ways.

First, the easement’s purpose clause should be used to provide a flexible standard for the interpretation of easement restrictions over time. At a minimum, the purpose clause should state that the easement’s purpose is to protect “productive” or “working” agricultural land.²¹⁰ The purpose clause might also be drafted to assist land trusts and landowners in balancing multiple easement purposes. For example, the easement’s purpose clause might introduce the dual purposes of agricultural viability and water quality and refer to performance standards to address any tension between the two purposes.²¹¹ In some situations, the easement drafter may prefer to list several purposes of equal importance, such as to “perpetually protect and preserve agricultural lands, encourage sound soil management practices in accordance with normally accepted agricultural practices, preserve natural resources, maintain land in active agricultural use, and ensure affordable resale values of agricultural land.”²¹²

Second, the easement’s definition section should reflect the grantor’s and grantee’s intention that the definition of agriculture adapt to changes in scientific understanding and public policy. For example, the easement might contain a clause stating that agriculture is defined as determined by a specified section of state agricultural law or by a particular agency, such as the Natural Resources Conservation Service or the state’s agriculture department.²¹³

Third, the section that sets out permitted and prohibited uses should not prescribe specific agricultural practices; instead, practices should be tied to regularly updated standards. For example, the easement might define sound agricultural practices as “those practices necessary for the on-farm production, preparation, and marketing of agricultural commodities,” as defined in state agricultural law, or provide for review, upon

208. WASH. REV. CODE § 84.34.010 (2004).

209. Judy Anderson & Jerry Cosgrove, Examples of Agricultural Easement Language 1 (unpublished presentation, Land Trust Alliance National Rally, Austin, Texas, October 28, 2002) (2002) (on file with the author).

210. *See id.*

211. *Id.*

212. Anderson & Cosgrove, *supra* note 209, at 2.

213. *Id.* at 3.

request by the land trust, of particular practices by a local conservation district or agricultural advisory board.²¹⁴ Additionally, the easement might require that agricultural production be conducted in accordance with a periodically updated management or conservation plan—prepared by a qualified agricultural consultant and approved by a conservation district or advisory board—that addresses “soil and water conservation, pest management, nutrient management and habitat protection.”²¹⁵ Depending on the landowner’s needs, land trusts may also choose to include land development plans that permit building envelopes in which the landowner may construct, modify or demolish any farm building without permission from the land trust.²¹⁶ Finally, the land trust might permit limited development outside of the building envelope if a structure meets performance standards—for example, if the structure does not impact important soil resources or harm the property’s agricultural viability.²¹⁷

2. Dynamic Conservation Easements on Working Forests

The term “working forest conservation easement” (“WFCE”) emerged from the increasing awareness of the constantly changing nature of properties that are actively managed for timber harvest and from the awareness of the public benefits generated by working forests.²¹⁸ Many state governments have acknowledged the negative effects of the loss of forestland and now seek to promote the variety of benefits provided by forests, such as water quality protection, stormwater and floodwater retention, soil conservation, and habitat preservation.²¹⁹

214. *Id. See, e.g.*, Snohomish Conservation District, at <http://www.snohomishcd.org/> (last visited Feb. 6, 2005); Snohomish County Agricultural Advisory Board, at <http://www.co.snohomish.wa.us/PDS/901-AgBoard/AgBoardHome.asp> (last visited Feb. 6, 2005).

215. Anderson & Cosgrove, *supra* note 209, at 4.

216. See Anderson & Cosgrove, *supra* note 199, at 2–3.

217. *See id.*

218. See Brenda Lind, *Using Conservation Easements to Protect Working Forests*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 9–12 (Land Trust Alliance ed., 2002).

219. See Levitt, *supra* note 198, at 15. The Washington State Legislature, for example, has issued unambiguous legislative findings in favor of forestry:

It is this state’s policy to encourage forestry and restocking and reforestation of such forests so that present and future generations will enjoy the benefits which forest areas provide in enhancing water supply, in minimizing soil erosion, storm and flood damage to persons or property, in providing a habitat for wild game, in providing scenic and recreational spaces, in maintaining land areas whose forests contribute to the natural ecological equilibrium, and in providing employment and profits to its citizens and raw materials for products needed by everyone.

WASH. REV. CODE § 84.33.010 (2004).

More than half of the nation's forestland is held by ten million non-industrial private owners.²²⁰ According to one report, these privately owned lands "comprise the nation's largest area of the most biologically productive forestland."²²¹ The concentration of vast tracts of valuable forestland in private hands represents an opportunity for land trusts to pursue WFCEs on a landscape scale²²²—to move "beyond the assumption that isolated reserves can meet critical habitat needs" by recognizing the importance of broader protections such as riparian buffers and wildlife corridors—an approach that "means thinking big, in terms of both acres and dollars."²²³ Although land trusts operate independently from state and local governments, some have tapped into policies favoring forestry by creating partnerships with governments and other nonprofits to conserve productive forestland.²²⁴

Despite the growing recognition of the benefits of forestry, however, working forests are being converted to developed uses more quickly than any other type of property.²²⁵ This trend can be seen and felt in the foothills of the central Cascade Mountains in Washington: A 2003 study indicated that more than 100,000 acres of western Washington for-

220. NAT'L COMM'N ON SCIENCE FOR SUSTAINABLE FORESTRY, SCIENCE, BIODIVERSITY, & SUSTAINABLE FORESTRY 11 (2005), available at <http://www.ncseonline.org/ewebeditpro/items/O62F4867.pdf> (last visited Feb. 9, 2005) [hereinafter *NCSSF*].

221. *Id.*

222. See Block, *supra* note 195, at 52.

223. See ANN INGERSON, THE WILDERNESS SOCIETY, CONSERVATION CAPITAL: SOURCES OF PRIVATE FUNDING FOR LAND CONSERVATION 1 (2004), available at <http://www.wilderness.org/Library/Documents/ConservationCapital-PrivateFunding.cfm> (last visited Mar. 10, 2005).

224. Cascade Land Conservancy, a regional land trust based in Seattle, Washington, recently spearheaded an initiative to protect 600,000 acres of forestland in the foothills of the Cascade Mountains. Craig Welch and Warren Cornwall, *Area 12 Times Size of Seattle Sought for Cascades Preservation*, SEATTLE TIMES, January 30, 2004, at B1, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/taxis.cgi/web/vortex/display?slug=land30m0&date=20040130> (last visited Mar. 7, 2004). The Conservancy signed a letter of intent, along with three county executives, the state commissioner of public lands and another nonprofit land trust, to "dedicate staff time, seek federal money and try everything from conservation easements to massive transfers of development rights to keep the Douglas fir-dominated forests from morphing into suburbia." *Cascade Foothills Initiative: Saving our Rivers and Forests*, Letter of Intent between Snohomish County, King County, Pierce County, Washington State Department of Natural Resources, the Trust for Public Land and Cascade Land Conservancy (Feb. 2, 2004), at <http://www.cascadeland.org/whatsnew/documents/CascadeFoothillsLOI1.30.04Final.doc> (last visited Mar. 10, 2004). Letter of Intent between Snohomish County, King County, Pierce County, Washington State Department of Natural Resources, the Trust for Public Land, and Cascade Land Conservancy (Feb. 2, 2004), at <http://www.cascadeland.org/whatsnew/documents/CascadeFoothillsLOI1.30.04Final.doc> (last visited Mar. 10, 2004).

225. NATURAL RES. CONSERVATION SERV., 2001 ANNUAL NATIONAL RESOURCES INVENTORY: URBANIZATION & DEVELOPMENT OF RURAL LAND 1 (July 2003), available at <http://www.nrcs.usda.gov/technical/land/nri01/urban.pdf> (last visited February 9, 2004) ("Between 1997 and 2001, almost 9 million acres were developed, of which 46 percent came from forest land, 20 percent from cropland, and 16 percent from pastureland.").

estland have been lost to urban development since 1985, at a rate of 7000 acres per year.²²⁶

The complex task of managing working forests for both conservation and production gives rise to a host of issues that land trusts should consider when drafting conservation easements for timberland.²²⁷ The primary challenge for drafters of WFCEs is to provide sufficient protection for the property's conservation values "without prescribing techniques and requirements that will become outdated or impractical for the landowner to uphold or for the land trust to monitor."²²⁸ Generally, drafters of WFCEs meet this challenge in two ways: first, by including the maintenance of values such as "silvicultural resources" and "ecosystem health" in the easement's purpose clause; second, by incorporating forestry restrictions established in a separate forest management plan.²²⁹

Additionally, the WFCE instrument must also enumerate the public values and land trust policies that will be protected by the conservation easement.²³⁰ Because most forestlands are "relatively natural habitat or ecosystems,"²³¹ the WFCE instrument should address protection of all forest conservation values of the property.²³² WFCEs should ensure protection of "site-specific forest conservation values, such as habitat and water quality," by including clear language limiting timber harvests.²³³ Toward this end, the easement should give the land trust the right to review and approve individual timber harvests.²³⁴ In addition, the baseline documentation for WFCEs should be more comprehensive than for most conservation easements, and should include a description of the range of a property's conservation values, particularly those values that might be affected by timber harvest.²³⁵

Perhaps most importantly, WFCEs should require the preparation of a professionally prepared forest management plan, reviewed and ap-

226. JANICE L. THOMSON ET AL., THE WILDERNESS SOCIETY, CASCADE CREST FORESTS: FOREST LOSS, HABITAT FRAGMENTATION, AND WILDERNESS, 10 (2003), available at <http://www.wilderness.org/Library/Documents/upload/Cascade-Crest-Forests-Forest-Loss-Habitat-Fragmentation-and-Wilderness-Full-Report.pdf> (last visited Mar. 6, 2005).

227. See *supra* note 111 and accompanying text. See generally Priv. Ltr. Rul. 95-37-018 (June 20, 1995).

228. Slee, *supra* note 203, at 1.

229. See Block, *supra* note 195, at 17.

230. See *id.* at 27-28.

231. See I.R.C. § 170(h)(4)(A) (2004); *supra* note 112 and accompanying text.

232. Laurie Wayburn, *Developing Consensus on Conservation Easements on Managed Forestlands*, in EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 2 (Land Trust Alliance ed., 1999).

233. *Id.*

234. *Id.* at 2-3.

235. *Id.* at 4 (observing that "[m]any [l]and trusts call for inventories of timber as well as biological inventories and characterization of habitats").

proved by the land trust prior to timber harvest, that provides details such as harvest schedules and prescribed management practices.²³⁶ Forest management plans should be subject to periodic reviews and updates to reflect improved knowledge and changing natural conditions.²³⁷ The advantages of incorporating forest management plans into WFCEs include a decreased need to include detailed prescriptive language in the easement itself, increased clarity in guidance for monitoring programs, and increased flexibility in adapting to changes in technology and the landowner's needs.²³⁸ Finally, the sections of WFCEs pertaining to stewardship should provide for comprehensive monitoring programs that measure both environmental health and easement compliance.²³⁹

C. Using Adaptive Management Principles in Drafting Dynamic Conservation Easements

Adaptive management has been defined as “the integration of design, management, and monitoring to systematically test assumptions in order to adapt and learn.”²⁴⁰ As applied to a working forest, for example, this technique treats policies and plans as hypotheses and forest practices as experimental treatments.²⁴¹ An adaptive approach is particularly useful in conservation work, as “[t]he existence of change of any sort, let alone non-linear change, makes adaptability an essential element of conservation projects.”²⁴² Land trusts can use adaptive management to continually develop knowledge about managing resources and ecosystems and to systematically incorporate this knowledge into management plans.²⁴³ Because monitoring and adaptive management reveal which conservation strategies and land use practices are most successful, they can result in more effective protection of conservation values and more efficient use of the land.²⁴⁴

236. *Id.* The terms of a typical forest management plan include “a list of the items to be addressed by the FMP, qualifications of the preparer (usually a professional certified forester), a time-frame for the preparation of the plan, a review and modification time schedule (usually every 5 to 10 years), and a mechanism for easement holder review and/or approval.” Block, *supra* note 195, at 25.

237. Wayburn, *supra* note 232, at 3.

238. Block, *supra* note 195, at 25.

239. *Id.* at 30.

240. Nick Salafsky et al., Adaptive Management: A Tool for Conservation Practitioners, at http://fosonline.org/resources/Publications/AdapManHTML/Adman_1.html (last visited Feb. 10, 2005).

241. NCSSF, *supra* note 220, at 34.

242. *Id.* Under such an adaptive management approach, “conservation strategies are implemented as a deliberate experiment. This approach can establish cause-and-effect relationships and point the way toward optimal strategies.” George F. Wilhere, *Adaptive Management in Habitat Conservation Plans*, CONSERVATION BIOLOGY, 1, 20 (2002).

243. See Block, *supra* note 195, at 34.

244. See *id.* at 31.

Adaptive management principles can be incorporated into a dynamic conservation easement either implicitly, through the use of a management plan such as a forest stewardship plan subject to periodic review and update, or explicitly, by stating that one of the easement's purposes is to apply adaptive management principles to conserve the property.²⁴⁵ In either case, effective monitoring of natural processes and human activities is the foundation for adaptive management.²⁴⁶ Thus, an adaptive management approach in drafting a conservation easement must be "accompanied by aggressive, adequately funded monitoring programs based on clear working hypotheses that provide a steady flow of data for management decision making."²⁴⁷

The conservation easement recently granted over the 788-acre Yainix Ranch, located in Oregon's Sprague River Valley, provides a useful example of how adaptive management principles can be used in conservation easements to monitor and adapt to changing natural conditions and human activities.²⁴⁸ The Yainix Ranch conservation easement was granted to the Klamath Tribes by Taylor Hyde and Becky Hatfield-Hyde, "a multi-generational ranching family whose vision is to restore, sustain and cherish—through partnerships—the wetlands, springs, river and uplands, and rural lifestyles and sense of community of the Yainix Ranch and surrounding areas."²⁴⁹ Sustainable Northwest, a nonprofit organization that helped the landowners pursue their vision by making the conservation easement a reality, approached the project with an understanding that "[e]conomics is the lynchpin of sustainable conservation: stable, resilient ranches have the financial flexibility to devote resources to conservation; struggling ranches focus on the bottom line to the detriment of natural values."²⁵⁰ One of the recitals in the Yainix Ranch conservation easement echoes this concern:

245. For example:

The purpose of this Plan, and updates thereto, is to provide for adaptive management of the Protected Property in a manner that conserves, improves and maintains in perpetuity the Conservation Values of the Protected Property, including the establishment over time of a greater diversity of age classes of trees and mature to late-successional to old growth classes of conifers, and that establishes and protects filtered scenic views from the Residential Use Area consistent with such Conservation Values.

Treemont Conservation Easement, *supra* note 120, at 4.

246. *See* Block, *supra* note 195, at 31 (discussing research indicating that "monitoring is a dynamic process that accounts for changing environmental conditions and land use patterns").

247. *NCSSF*, *supra* note 220, at 35.

248. *See* Taylor Hyde & Becky Hatfield-Hyde, Deed of Conservation Easement (December 2004), Klamath County Clerk's Office (recording number M04-74207) (on file with the author) [hereinafter *Yainix Conservation Easement*].

249. *See id.* § 1.19

250. *See* SUSTAINABLE NORTHWEST, RANGELANDS INITIATIVE, available at <http://www.sustainablenorthwest.org/programs/range.php>

Grantor and Grantee believe that without the protective covenants of this Easement, and the financial support generated from the sale of this Easement, the Ranchland Stewardship and Conservation Values of the Protected Property, in time, easily could be lost to economic pressures. These pressures would threaten Grantor's financial ability to retain ownership of the Protected Property based on livestock returns alone, without resorting to sale, subdivision, development or unsustainable livestock management that could jeopardize or destroy the Ranchland Stewardship and Conservation Values of the Protected Property."²⁵¹

An examination of the conservation easement granted over the Yainix Ranch reveals how dynamic terms in such easements can be used, in effect, to compensate the landowner "for the economic impacts of good stewardship (costs and foregone income)."²⁵²

The Yainix Ranch conservation easement is unique in several ways. First, in addition to *protecting* the ranchland and conservation values of the property and allowing for compatible ranch-related activities, one of the easement's purposes is to "*restore and/or enhance* the Conservation Values of the Protected Property over time to achieve the Conservation Goals (as defined below) on the Protected Property."²⁵³ By establishing measurable conservation goals for the active management and restoration of the property, the Yainix Ranch conservation easement imposes affirmative obligations on the landowner to "progressively restore aquatic, riparian and wetland habitat and functions of the Protected Property over time consistent with maintaining a compatible ranching enterprise."²⁵⁴ One of the easement's objectives, established "in furtherance of" its purposes, is to "[p]rovide for and enforce continual material progress toward

(last visited Mar. 10, 2005).

251. See *Yainix Conservation Easement*, *supra* note 248, § 1.12.

252. See *SUSTAINABLE NORTHWEST*, *supra* note 250.

253. See *Yainix Conservation Easement*, *supra* note 248, § 3.1 (emphasis added).

254. See *id.* § 7.1. Section 7 is entitled "Conservation Goals and Affirmative Obligations of Grantor" and further provides the following:

Every year Grantor will implement conservation and/or management measure on the Protected Property, as described in the Operations Plans provided for in Section 8.1, that are intended to produce Conservation Outcomes, as defined below, and that are indicative and will provide for incremental but material progress toward the Conservation Goals. "Conservation Outcomes" are observable, biophysical changes to the character of the Protected Property resulting from implementation of conservation and/or management measure, which may include, for example, changes in the range or quality, or individual health or vigor of a particular species or community, or character of a particular physical feature such as bank width, riffle length, pool depth or the like. As and after the Conservation Goals are attained, Grantor agrees to maintain the Protected Property so as not to degrade the Conservation Values identified in Updated Baseline Reports referenced in Section 8.2.6. Nothing in this Section shall be construed as requiring Grantor to achieve any conservation protections above the Conservation Goals.

the Conservation Goals . . . until such time as the Conservation Goals are achieved.”²⁵⁵ Collectively, these provisions lay the foundation for an adaptive management framework, set forth in various sections of the easement instrument, within which the landowner and the easement holder may work toward mutually agreed Conservation Goals.

Second, the easement is unique because it requires the landowner periodically to prepare plans and reports, ensuring the regular collection of data needed for making decisions about the adaptive management of the property. For example, the easement provides that “Grantor shall prepare a Restoration Plan annually for the first three (3) years after the Effective Date of this Easement . . . and tri-annually thereafter.”²⁵⁶ The easement also requires that, every ten years until the Conservation Goals are achieved, the easement holder prepare an updated baseline documentation report.²⁵⁷ The purpose of the updated baseline report is to “inventory and assess the condition of the then existing agricultural (including soils) and open space attributes, aquatic, riparian and wetland habitats and ecological functions and upland vegetation” on the property and to measure progress toward the Conservation Goals.²⁵⁸

Finally, the easement is unique in its incorporation of a specific scientific protocol (“Proper Functioning Condition”²⁵⁹) as an “assessment tool for evaluating material progress toward the Conservation Goals resulting from the implementation of Grantor’s Operations Plans.”²⁶⁰ In accordance with the dynamic nature of the Yainix Ranch conservation easement, it permits the parties to the easement to amend it “to specify a more appropriate assessment tool for Compliance Evaluation as provided for in Section 14.”²⁶¹

As we have seen in the example of Yainix Ranch, a practitioner drafting a conservation easement may assist the parties to the easement in moving beyond a static preservation approach by including purposes, such as facilitating active restoration of the property, that anticipate and even require changes in the future condition of the land. In order to

255. See *id.* §§ 3.2.3–4. The Conservation Goals of the easement include “[a] narrower, deeper, more sinuous river channel increasingly connected to an abandoned floodplain,” “[a] high diversity of aquatic, riparian, and wetland native species (plants, fish and wildlife),” and “[s]prings that provide high quality water for fish and other aquatic wildlife.” See *id.* §§ 7.1.1, .2, .5.

256. See *id.* § 8.1.2.1.

257. See *id.* § 8.2.6.

258. See *id.*

259. See D. PRICHARD ET AL., U.S. DEPT. OF THE INTERIOR, RIPARIAN AREA MANAGEMENT: A USER GUIDE TO ASSESSING PROPER FUNCTIONING CONDITION & THE SUPPORTING SCIENCE FOR LOTIC AREAS (1998), available at http://www.or.blm.gov/nrst/Tech_References/Final%20TR%201737-15.pdf (last visited Mar. 10, 2005).

260. See *Yainix Conservation Easement*, *supra* note 248, § 8.3.1.

261. See *id.*

achieve such purposes, the conservation easement must provide procedures for documenting stewardship practices, measuring their effects on the condition of the land, and adapting practices to new circumstances and information. Practitioners drafting dynamic conservation easements should be turning to adaptive management principles and standards defined by best available science²⁶² to evaluate the effectiveness of easement restrictions and restoration obligations over time.²⁶³

IV. CONCLUSION

The use of dynamic terms in conservation easements provides an answer to the most pointed critique of conservation easements: that their inflexibility in the face of change may ultimately impose unreasonable burdens on landowners and the public. Dynamic conservation easements allow land trusts to protect the conservation values associated with a particular property without creating rigid restrictions that may become obsolete. And in most situations, conservation values can be protected more effectively and permanently by an easement with dynamic rather than static terms. As a result, dynamic conservation easements offer a number of benefits to land trusts, to landowners, and to the public.

By introducing dynamic terms, drafters of conservation easements can create a flexible framework for the cooperative stewardship and adaptive management of a protected property by landowners and land trusts. However, while careful drafting can provide the legal framework for a harmonious relationship between landowners and land trusts, diligence by land trust staff is necessary in order to establish and maintain such a relationship. Consistent stewardship practices—including timely preparation of detailed baseline documentation, regular monitoring of the property and interaction with the landowner, and prompt enforcement action upon discovery of any violation—are critical. Ultimately, 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.

262. See FED. HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., FHWA EXEMPLARY ECOSYSTEM INITIATIVES, at <http://www.fhwa.dot.gov/environment/ecosystems/ecoinitc.htm> (last visited Mar. 10, 2005) (describing best available science as the “application of scientifically credible methods, monitoring, and analysis procedures as well as cutting edge approaches and/or technologies (e.g., habitat restoration techniques, habitat connectivity analysis, and GIS applications”); cf. WASH. REV. CODE § 36.70A.172 (2004) (requiring cities and counties planning under the Growth Management Act to “include the best available science in developing policies and development regulations to protect the functions and values of critical areas”).

263. Telephone Interview with Konrad Liegel, Chair of the Environmental & Land Use Department, Preston Gates & Ellis L.L.P. (Mar. 4, 2005).

