

Conservation Easements and Adaptive Management

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Current environmental law ... rests on a simple ecological paradigm which the science has now rejected and replaced with a more complex, open-ended model. The idea that “Nature knows best: leave her alone” fit with the secular-spiritual preservation movement which transformed itself into environmentalism in the 1960s. “Leave her alone” principles derive from classic ecological theories which posited equilibrium as the highest state of natural systems and viewed ecosystems as inherently fragile and thus vulnerable to human degradation.²

Abstract: The perpetual nature of conservation easements makes adaptive management difficult on easement property. Various easement provisions may be used to incorporate adaptive management principles into a conservation easement, but various factors, including state statutory requirements and Internal Revenue Code requirements for deductibility, limit the flexibility of management on conservation easement lands. Jesse Richardson discusses how conservation easements limit implementation of adaptive management principles on protected lands. Case studies of conservation easements that now fail to fulfill the original conservation purpose, but are locked into perpetual conservation, illustrate the limitations of conservation easements. Richardson also discusses likely future conflicts between conservation easements and adaptive management techniques to address such things as sea level rise and the preservation of endangered species habitat. In the conclusion, Richardson proposes several legal and policy changes to reform conservation easements in order to accommodate and facilitate adaptive management on conservation easement lands.

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² Fred P. Bosselman and A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI-KENT L. REV. 847, 847 (1996).

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I. Introduction

Conservation easements are a very popular land conservation tool. The Uniform Conservation Easement Act defines “conservation easement” as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.”³ The use of “easement” is a bit of a legal misnomer, since conservation easements involve negative restrictions on the use of the property.⁴ “Easement” is generally defined as a “right of use over the property of another.”⁵ Common easements include utility easements and easements of ingress and egress (commonly referred to as “rights of way”).

More accurately, such interests in land should be referred to as “covenants” or “servitudes.”⁶ The restrictions in a conservation easement resemble restrictive covenants in many subdivisions. A conservation easement is of unlimited duration unless the deed sets out a different term.⁷

Reliable data is difficult to locate on conservation easements.⁸ However, the number of easements has skyrocketed over the past several years. According to a 2005 census conducted by the Land Trust Alliance, local, state, and national land trusts held easements on 37 million acres, a 54% increase from 5 years earlier.⁹ The actual number of conservation easements is probably much higher, as the Land Trust Alliance included large

³ Unif. Conservation Easement Act § 1(1) (amended 2007), available at http://www.law.upenn.edu/bll/archives/ulc/ucea/2007_final.htm [hereinafter *UCEA*].

⁴ Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1052 (2007).

⁵ Black’s Law Dictionary, 509 (6th Ed. 1990).

⁶ Korngold, *supra* note 4; see also, Julia D. Mahoney, *Land Preservation and Institutional Design*, 23 J. OF ENVTL. L. AND LITIG. 433 (2008) (using the term “conservation servitudes” throughout).

⁷ *UCEA*, *supra* note 3, § 2(c).

⁸ Gerald Korngold, *Private Conservation Easements: Balancing Private Initiative and the Public Interest*, in PROPERTY RIGHTS AND LAND POLICIES 367 (Gregory K. Ingram & Yu-Hung Hong eds, 2009).

⁹ Land Trust Alliance, 2005 National Land Trust Census, <http://www.landtrustalliance.org/about-us/land-trust-census/census/> (last visited March 20, 2010).

national land trusts like the Nature Conservancy and Ducks Unlimited, but failed to count easements held by a number of governmental agencies.¹⁰ The pace of conservation by state and local land trusts more than tripled between 2000 and 2005.¹¹ In addition, the number of land trusts grew to 1,667, a 32% increase from 2000.¹² Federal and state tax incentives spur much of the growth of conservation easements.

The use of conservation easements, however, presents challenges for land managers trying to adapt to emerging environmental problems. In recent years, land managers have been encouraged by academics and policy-makers to follow the principles of adaptive management. “Adaptive management is a formal, systematic, and rigorous program of learning from the outcomes of management actions, accommodating change and improving management.”¹³ Adaptive management entails “the integration of design, management, and monitoring to systemically test assumptions in order to adapt and learn.”¹⁴ The process of adaptive management consists of eight steps: (1) define the problem; (2) determine the goals and objectives for the management of the ecosystems; (3) determine the ecosystem baseline; (4) develop the conceptual models; (5) select future restoration actions; (6) implement and manage; (7) monitor and observe the ecosystem response; and (8) evaluate the restorative efforts and propose remedial actions.¹⁵

Some scholars view adaptive management techniques as essential for environmental protection, since standard approaches in environmental law and management have failed with respect to complex issues like invasive species, nonpoint source pollution, and habitat loss.¹⁶ Both the number of complex issues and the depth of the complexities are likely to dramatically increase in the future and the specter of climate change presents a completely different sort of issue that requires the use of adaptive management.¹⁷

Unfortunately, the implementation of adaptive management techniques faces institutional barriers. “The theory of adaptive management – what is meant by the words – is quite well established. It is the practice of adaptive management – what to do to make those words come true – that has been far more elusive to get on the page.”¹⁸ Ruhl argues that the “hostile environment” in which administrative agencies presently operate make adaptive management impossible.¹⁹ High-stakes litigation, which relies on large amounts of public participation, judicial review, congressional oversight and political maneuvering, presently

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ COMMISSION ON ENDANGERED AND THREATENED FISHES IN THE KLAMATH RIVER BASIN, NATIONAL RESEARCH COUNCIL, ENDANGERED AND THREATENED FISHES IN THE KLAMATH RIVER BASIN: CAUSES OF DECLINE AND STRATEGIES FOR RECOVERY 332 (2004) [hereinafter *NRC Klamath River Report*].

¹⁴ NICK SALAFSKY, RICHARD MARGOLIS AND KENT REDFORD, ADAPTIVE MANAGEMENT: A TOOL FOR CONSERVATION PRACTITIONERS 12 (2001), available at http://www.fosonline.org/Site_Docs/AdaptiveManagementTool.pdf.

¹⁵ NRC Klamath River Report, *supra* note 13, at 333-35.

¹⁶ J.B. Ruhl, *It's Time to Learn to Live With Adaptive Management (Because we Don't Have a Choice)*, 39 ENVTL. L. REP. 10920, 10921 (Oct. 2009).

¹⁷ *Id.*

¹⁸ *Id.* at 10920.

¹⁹ *Id.* at 10921-22.

drives the system.²⁰ For adaptive management to be implemented, the system must be transparent, accountable, and far less adversarial than at present.²¹

The theory of adaptive management shares several characteristics with the use of conservation easements. Both concepts possess fairly short histories, having either originated in or become prevalent in the past thirty-five years. In addition, the popularity of both as a means for environmental protection greatly increased during the same time period.

Adaptive management and conservation easements, however, can at times be diametrically opposed. Adaptive management takes as a given the dynamic, ever-changing character of nature and natural processes. Conservation easements, like most other current environmental law regimes, assume a “static and unchanging” natural environment.²² While adaptive management involves accommodating change through learning, conservation easements generally set out fixed restrictions on land use that purport to govern into perpetuity.²³ Adaptive management embraces and depends upon changing management approaches. Changes to conservation easements prove to be extremely difficult, often requiring court approval.

This article explores whether these two seemingly contradictory approaches can be reconciled to advance environmental protection. Section II presents an overview of adaptive management and conservation easements. Section III examines approaches to drafting conservation easement that can maximize the possibility of adaptive management of the protected lands. Section IV examines judicial doctrines that may hinder or aid in the amendment or termination of conservation easements so that adaptive management processes may be applied to management of the eased property. Section V highlights “rolling easements,” a variant of conservation easements that holds the promise to incorporate adaptive management in the coastal context. Finally, Section VI discusses alternatives to perpetual conservation easements that better allow the implementation of adaptive management to conservation lands.

II. Barriers to Managing Conservation Easement Lands Adaptively

The explicit purpose of a conservation easement is to restrict land use options in the future.²⁴ It is important to note that the term “conservation easement” is a slight misrepresentation of the tool, as conservation practices are not always required.²⁵ In practice, conservation easements extinguish the right to develop the property. In recognition of this true nature of conservation easements, government agencies and land

²⁰ *Id.* at 10921.

²¹ *Id.* at 10922.

²² Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of Future*, 88 VA. L. REV. 739, 756 (2002).

²³ Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE UNIV. L. REV. 883, 884 (Spring 2005).

²⁴ Mahoney, *supra* note 22, at 743-44.

²⁵ Jesse J. Richardson, Jr., *Maximizing Tax Benefits of Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449 (1995).

trusts often call conservation easement purchasing programs “purchase of development rights programs.”

Federal and state tax incentives spur much of the growth of conservation easements, and add to the rigidity of the tool. Section 170(h) of the Internal Revenue Code (IRC) allows a federal income tax deduction for a “qualified conservation contribution,” which includes conservation easements that meet the requirements of the IRC and implementing regulations. The Internal Revenue Service (IRS) bases the value of the donation not on conservation values, but on the value of the forgone development rights. Many states allow a deduction for state income tax purposes and some grant state income tax credits for donations of conservation easements.²⁶ In addition, in theory at least, a donation of a conservation easement reduces the value of the burdened property. Consequently, local real property taxes may be reduced.²⁷

The vast majority of conservation easements are perpetual. For example, in 2003, federal taxpayers deducted a total of \$1.49 billion for contributions of perpetual conservation and historic easements.²⁸ This predominance of perpetual easements results, in part, from the fact that in order to take advantage of the federal income tax benefits afforded to qualifying donations of conservation easements, the easement must be perpetual.²⁹ In addition, land trusts and environmentalists generally express a strong preference for perpetual easements.

The perpetual nature of most conservation easements necessitates a static approach that conflicts with the dynamic nature of ecosystems.³⁰ The restrictions contained in conservation easements, although written at the initiation of the easement, govern into perpetuity. Amendments prove difficult to implement. Other methods to introduce flexibility into these rigid instruments introduce uncertainty and conflict with the intent of easements to freeze the property in time, as discussed in subsequent sections of this paper.

Conservation easements, by design, fail to allow adequate adaption to rapid changes in scientific knowledge and the environment. Nature and scientific knowledge constantly change and huge transformations occur, sometimes abruptly.³¹ Perpetuity proves especially problematic in light of climate change and rising sea levels, which accelerate the rate of change.³² “The touchstone of conservation easements has not been flexibility but rather strict adherence to the status quo. These perpetual property interests are designed to

²⁶ Nicole Sandberg, State Income Tax Deductions for Conservation Easements (2008) (unpublished manuscript, on file with author); CONSERVATION RESOURCE CENTER, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS 9 (2007), available at <http://www.taxcreditexchange.com/documents/StateConservationTaxCreditsImpactandAnalysis.pdf>.

²⁷ Korngold, *supra* note 8, at 365.

²⁸ JANETTE WILSON AND MICHAEL STRUDLER, INTERNAL REVENUE SERVICE, INDIVIDUAL NONCASH CHARITABLE CONTRIBUTIONS 60 (2003), available at <http://www.irs.gov/pub/irs-soi/03inccart.pdf>.

²⁹ I.R.C. § 170, 26 U.S.C. § 170(h)(4)(A)(iii).

³⁰ John Echeverria and Jeff Pidot, *Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect Land*, 39 ENVTL L. REP. 10868, 10874 (2009).

³¹ Mahoney, *supra* note 6, at 442.

³² Echeverria and Pidot, *supra* note 30, at 10874.

forever preserve the current natural or ecological state of the burdened property.”³³ Conservation easements essentially seek to “freeze” the allowable uses of land forever.³⁴

Additionally, when strictly enforced, conservation easements limit land use options in the future and limit the choices of future generations.³⁵ Conservation easements are based on the assumption that so long as humans do not interfere with the land, protected lands will stay the same forever.³⁶ By imposing perpetual, inflexible restrictions that fail to allow for changes, creators of conservation easements assume they are in a better position to make decisions for future generations than the future generations themselves. However, since scientific knowledge is constantly advancing, later generations will almost certainly possess better information with which to make land use decisions.³⁷ Future generations will also have the benefit of learning from the past successes and failures of the present generation. Additionally, because social values may change from generation to generation, choices made in the present may not fit the values of future generations.³⁸

Perpetual conservation easements are appropriate in some circumstances. Where conservation values are extremely high and those conservation values are likely to endure into perpetuity, perpetual protection is warranted. Even the U.S. Congress used such terms as “rare” and “unique” in describing conservation easements eligible for the federal income tax deduction when the legislation was first proposed.³⁹ As an extreme example, the Grand Canyon would be ideal for a perpetual conservation easement. A working farm, however, may not be a good candidate. Unless the farm lies upon extremely valuable soils, for example, the farm’s current conservation values may or may not be present in 20 or 50 years as agriculture and the economics of agriculture change.

In many situations, however, other land use planning tools offer more benefits. For example, more traditional types of land conservation practices, such as zoning, may be better suited to incorporating adaptive management principles. Regulation and fee-simple purchases of land leave the future decisions to future generations and are not as costly to change.⁴⁰ If a local government passes a land use regulation that proves to be ineffective or counterproductive at some future time, or if community values change, the local government need merely amend or repeal the legislation. Staying with the farmland example, if agriculture is no longer economically viable in that area or if development patterns make the land more appropriate for development, the zoning may be changed.

In addition, land use planning and regulation advance over the years,⁴¹ sometimes through adaptive management processes. When land use planning tools are found to be lacking,

³³ Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1574 (2007).

³⁴ Mahoney, *supra* note 6, at 442.

³⁵ Mahoney, *supra* note 22, at 744.

³⁶ Mahoney, *supra* note 6, at 443.

³⁷ *Id.* at 444-45.

³⁸ *Id.*

³⁹ S. Rep. 96-1007, 96th Cong., 2nd Sess. 1980, 1980 U.S.C.C.A.N. 6736, 6743-51 (1980).

⁴⁰ Mahoney, *supra* note 22, 744-45.

⁴¹ Mahoney, *supra* note 6, 444-45.

practices change to obtain better results. For example, Euclidean land use zoning continues to evolve away from strict Euclidean segregation of land uses.

Euclidean zoning involves dividing a land area into different use classifications called zoning districts. Each zoning district allows certain land uses and prohibits others. In Euclidean zoning, strict segregation of land uses result, so that single-family residential areas are separated from multi-family residential areas, which are separated from retail areas, and so on. Cluster development (grouping housing units on one part of the property on small lots, with the remaining portion of the property retained as open space), planned unit development (mixed-use developments planned on a development-level basis), form-based codes (restrictions based on the form of the structure, not use) and other innovations have in recent years introduced much-needed flexibility into zoning.

In fact, conservation easements themselves have benefited from a form of adaptive management and have improved over the decades.⁴² Earlier easements appear primitive in relation to the deeds of today. Through trial and error, the conservation easement industry has learned better ways to draft easements to incorporate the lessons of earlier mistakes.⁴³ Unfortunately, the mistakes made in earlier easements generally are difficult to correct.

III. Drafting Conservation Easements to Incorporate Adaptive Management Principles: The Case of Working Lands

A. Introduction

One means of incorporating adaptive management principles into conservation easements is to draft the easement in a way that will allow for adaptive management. Adaptive management principles can be incorporated into a conservation easement either explicitly or implicitly.⁴⁴

The purpose clause provides the key central framework for the conservation easement.⁴⁵ A purpose clause that expressly states that adaptive management principles shall be applied explicitly incorporates adaptive management.⁴⁶ The drafter, however, may implicitly incorporate adaptive management principles by referring to an external management or conservation plan that may be reviewed and updated periodically.⁴⁷ In either case, adaptive management requires intensive monitoring programs.⁴⁸

⁴² George T. Davis, *Protecting Scenic Views: Seventy Years of Managing and Enforcing Scenic Easements Along the Blue Ridge Parkway* (May 2009) (unpublished Virginia Tech Masters Thesis, on file with author); LAND TRUST ALLIANCE, *AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES* 19 (2007).

⁴³ See, e.g., Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, *RANGELAND ECOLOGY & MGMT.* 63: 167-75 (March 2010).

⁴⁴ Greene, *supra* note 23, at 920.

⁴⁵ Dan Tesini, *Working Forest Conservation Easements*, 41 *URB. LAW.* 359, 359-60 (2009).

⁴⁶ Greene, *supra* note 23, at 920.

⁴⁷ *Id.*

⁴⁸ *Id.*, citing NATIONAL COMMISSION ON SCIENCE FOR SUSTAINABLE FORESTRY, *SCIENCE, BIODIVERSITY, AND SUSTAINABLE FORESTRY* 35 (2005), available at <http://ncseonline.org/ewebeditpro/items/O62F4867.pdf>.

In addition, many conservation easements contain amendment provisions.⁴⁹ These amendment provisions allow the landowner and the easement holder to agree to changes in the conservation easement, so long as the changes do not interfere with the purposes of the easement.⁵⁰ Even without an amendment provision in the easement, an implied power to amend may exist, so long as the amendment is consistent with the purpose of the easement.⁵¹ However, uncertainty surrounds this possibility, and court action may be necessary to determine whether the power to amend exists and, if so, the extent of that power.

Conservation easements on working lands present particular challenges. The conservation values for these lands rest in the production of food or fiber. These values are not inherent in the property itself, nor are these values as unlikely to change in the future as, for example, a very beautiful and natural formation or landmark such as the Grand Canyon. In addition, if the land may not be profitably farmed or forested, the conservation values are greatly diminished. Easements for working lands must therefore balance the need to both protect the conservation values and avoid “prescribing techniques and requirements that will become outdated or impractical for the landowner to uphold or for the land trust to monitor.”⁵²

B. Working Forestland Easements

Working forestlands are often the subject of conservation easements. For example, the U.S. Department of Agriculture’s Forest Service administers the Forest Legacy Program. According to the Forest Service, the Forest Legacy Program “protects ‘working forests’ those that protect water quality, provide habitat, forest products, opportunities for recreation and other public benefits.”⁵³

The application of adaptive management principles to conservation easements appears to be most advanced with respect to forestland. Perhaps not coincidentally, working forestland conservation easements receive the most attention with respect to incorporation of adaptive management techniques. This section describes the ways that adaptive management principles may be included in working forestland easements and also discusses whether adaptive management principles are actually incorporated in practice.

The purpose of a working forestlands conservation easement necessarily addresses conservation values and the production values.⁵⁴ Site-specific conservation values and production values must be balanced in the language of the easement.⁵⁵ Consequently,

⁴⁹ Nancy A. McLaughlin, *Commentary on Gerald Korngold, Private Conservation Easements: Balancing Private Initiative and the Public Interest*, in PROPERTY RIGHTS AND LAND POLICIES 382 (Gregory K. Ingram & Yu-Hung Hong eds., 2009).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Kendall Slee, *Evolving Easements on Working Forestlands*, EXCHANGE, THE JOURNAL OF THE LAND TRUST ALLIANCE 17(2): 5 (1998).

⁵³ U.S. Dept. of Agriculture Forest Service, Forest Legacy Program, <http://www.fs.fed.us/spf/coop/programs/loa/flp.shtml> (last visited July 21, 2010).

⁵⁴ Greene, *supra* note 23, at 918.

⁵⁵ *Id.*

working forestland easements require more detailed baseline documentation than other types of easements in order to properly establish and balance these values.⁵⁶

The goals and objectives section of the easement sets out detailed plans for the property. These plans may be set out very generally with broad parameters, giving the landowner more authority to make decisions.⁵⁷ Alternatively, goals and objectives may be very specifically described, leading to management aimed at a particular desired condition.⁵⁸ More detailed goals and objectives entail more costly monitoring to ensure compliance.⁵⁹

The restrictions and retained rights section of the easement delineates the acceptable means by which the purposes, goals, and objectives may be achieved.⁶⁰ The restrictions and retained rights may be contained within the body of the easement or be included in an external set of restrictions. If the drafter includes the restrictive language within the body of the easement, adaptation to changes in weather, markets and technology may be difficult or impossible.⁶¹ In addition, evolutions in scientific understanding, advancements in technology and changed social conditions cannot be incorporated into such restrictions.⁶² “The worst nightmare of any land manager is to be bound to manage land to its own detriment by an outdated set of restrictions.”⁶³

Further, one may include restrictions within the body of the easement using three different methods. First, the restrictions may merely be written into the body of the easement.⁶⁴ Second, the easement may refer to “sustainable forestry” practices as an imprecise restriction.⁶⁵ Finally, the easement may omit any reference to restrictions and rely on local, state, and federal law.⁶⁶

None of these three practices adequately incorporates adaptive management principles. Listing the restrictions in the easement locks the landowner into practices that may be counterproductive, or worse. For example, an easement may prohibit clearcutting. In the future, however, a situation may arise, perhaps involving a disease or pest, where clearcutting is the best harvesting method to protect the ecological values of the property. The rigid restriction on clearcutting will prevent managers from protecting ecological values to the maximum extent possible.

On the other hand, relying on the vague notion of “sustainable forestry” creates uncertainty and may lead to future disputes over competing notions of what values should be sustained.⁶⁷ Defining “sustainable forestry” in the easement document ties the parties to a

⁵⁶ *Id.*

⁵⁷ Tesini, *supra* note 45, at 360-61.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 361.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 362.

⁶⁶ *Id.* at 361.

⁶⁷ *Id.* at 368.

notion of sustainability that may later prove to be unsustainable.⁶⁸ Finally, while local, state and federal laws change over time, the changes will likely occur for political and other reasons unrelated to adaptive management.

A better option for incorporating adaptive management principles into forestland conservation easements might be to refer to external standards such as best management practices, sustainable forest product certification standards or forest management plans drafted by a certified forester.⁶⁹ The inclusion of sustainable forest product certification standards within the easement holds certain advantages over best management practices or general references to sustainable forestry. These principles represent a high standard, receive regular updates, rely on independent third-party auditors, require regular monitoring, and allow the potential for higher returns on investment through premium product markets.⁷⁰ However, certification standards represent general standards that fail to incorporate specific characteristics of individual parcels.⁷¹ In addition, the certification standards do not necessarily change due to adaptive management techniques. The generality of the standards necessarily implies a lack of site-specific experimentation.

Adaptive management principles may also be incorporated by listing restrictions in a separate forest management plan, which can then be adjusted to adapt to changed conditions.⁷² Some states require forest management plans for the property to qualify to be taxed based on the land's value in use (use-value assessment) as opposed to fair market value.⁷³ A forest management plan sets forth management objectives and specific practices to be used to achieve the objectives. Forest management plans allow a degree of flexibility and adaptation to changing conditions that contrasts sharply with the alternative of attempting to delineate management restrictions within the conservation easement.⁷⁴

Conservation easements incorporating forest management plans generally require that professional foresters prepare the plans. Land trusts generally use three approaches with respect to review and approval of forest management plans: (1) the easement holder may retain the right to review and approve the plan; (2) the easement holder may retain review, but not approval rights, and may give notice of any easement violations; or (3) the easement holder retains no right to review or approve the plan.⁷⁵

Forest management plans offer several advantages over other means of incorporating adaptive management into conservation easements. Forest management plans allow tailoring for individual properties, permit a reduction in prescriptive language included in the easement, and provide clear guidance for future monitoring and enforcement.⁷⁶ Most importantly for adaptive management, forest management plans may be continuously

⁶⁸ *Id.*

⁶⁹ *Id.* at 361.

⁷⁰ *Id.* at 368-69.

⁷¹ *Id.* at 369.

⁷² *Id.* at 361; Greene, *supra* note 23, at 918-19.

⁷³ *Id.*

⁷⁴ Tesini, *supra* note 45, at 369.

⁷⁵ *Id.*

⁷⁶ *Id.*

amended and reformulated to reflect changed conditions, incorporate new technology and knowledge, and respond to disasters.⁷⁷

Even where the possibility of adaptive management exists, the monitoring required to facilitate continuous reformulation of management practices is often lacking. “[M]onitoring is the foundation of ‘adaptive management’ by which new knowledge about managing resources and ecosystems will be developed and systematically incorporated into management plans.”⁷⁸ The cost of perpetual monitoring and stewardship often cause conservation easements to fail.⁷⁹ Fundraising for stewardship often proves more difficult than fundraising for acquisition of conservation easements.⁸⁰ As a result, land trusts tend to focus almost exclusively on acquisition of additional conservation easements, relegating monitoring and stewardship to the lowest funding priority.

In practice, working forest easements in many cases fail in even the attempt to incorporate adaptive management principles. A 2004 survey of non-governmental organizations (for example, land trusts) and government agencies holding conservation easements found that only 63% of organizations and 75% of government agencies allowed harvesting of non-native and undesirable trees.⁸¹ Forty-five percent of organizations and 27% of agencies prohibited clearcutting on working forest easements.⁸² With respect to desires to restrict certain practices in working forestland conservation easements, both organizations and agencies placed high priority on restricting the use of chemicals.⁸³ These restrictions appear in the easement document, foreclosing the use of these practices unless the easement holder utilizes a costly amendment process.

More disturbing with respect to adaptive management, only 44% of the organizational respondents reported completing a baseline forest inventory prior to execution of a working forest conservation easement, while only 38% of agencies completed a forest inventory.⁸⁴ Organizations reported a stewardship or management plan on 62% of working forest conservation easements, while government agencies reported that requirement on 69% of properties.⁸⁵ Survey participants were also asked whether forest records estimating total forestland area and/or number of easements over ten acres were kept.⁸⁶ Only 45% of organizations and 28% of agencies kept such records.⁸⁷

⁷⁷ *Id.*

⁷⁸ Adam Block et al., Trends in Easement Language and the Status of Current Monitoring on Working Forest Conservation Easements 34 (April 2004) (Unpublished University of Michigan Masters Project, University of Michigan), available at <http://www.snre.umich.edu/ecomgt//pubs/wfce/wfcecomplete.pdf>.

⁷⁹ Tesini, *supra* note 45, at 372.

⁸⁰ *Id.*

⁸¹ Michael J. Mortimer, Jesse J. Richardson, Jr., Jeffrey S. Huff, and Harry L. Haney, Jr., *A Survey of Forestland Conservation Easements in the United States: Implications for Forestland Owners and Managers*, 6 SMALL-SCALE FORESTRY 35, 39 (2007), available at <http://www.springerlink.com/content/x60h230682414h41/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

The lack of baseline information and detailed monitoring makes incorporation of adaptive management principles even more difficult in working forestland easements. Even though the incorporation of these principles has advanced further in working forestland easements than in other areas, implementation remains problematic.

The inclusion of restrictions on certain forest practices may result from a lack of expertise on behalf of land trust and government agency staff with respect to forestry practices. Land trust and governmental agency staff often lack education or training in forestry. Consequently, blanket restrictions on techniques like clearcutting and chemical application often focus on “hot button” issues and fail to consider scientific evidence that supports these practices.

Failure to include appropriate baseline reports and failure to monitor reflect a common focus on acquisition of more and more easements in order to “prevent” development. Politically, a land trust or government agency can garner more support by focusing on acquisition activities. As mentioned above, baseline information and monitoring involve more mundane tasks that often fail to receive adequate funding.

C. Working Farmland Easements

Many conservation easements seek to protect working farmland. The donors desire to see the agricultural use continue into perpetuity. Working farmland easements prove more difficult than forestland easements with respect to incorporation of adaptive management principles. While forestland easements basically limit themselves to one “crop,” timber, working farmland conservation easements may involve a broad range of agricultural products and production processes. Drafting to include this broad range of possibility proves to be problematic.

The purpose clause again is important and should be drafted broadly to allow flexibility.⁸⁸ If more than one purpose supports the easement, each purpose should be stated and a standard for resolving conflict between the purposes should be included within the document.⁸⁹

A district court case from Kentucky, *The Nature Conservancy v. Sims*,⁹⁰ illustrates the importance of the purpose clause. Sims purchased a 100.10-acre tract from The Nature Conservancy (TNC) in 2001 and placed a conservation easement on the property one week later. Based on an inspection of the property in 2005, TNC filed a complaint seeking injunctive relief for several alleged violations of the easement. TNC alleged that Sims violated the terms of the easement by filling and re-grading a sinkhole located behind the residence with soil excavated from a pond on the property. Sims claimed he filled the hole because it was too difficult and dangerous to farm around the sides of the basin of the sinkhole.

⁸⁸ Greene, *supra* note 23, at 915.

⁸⁹ *Id.*

⁹⁰ 2009 WL 602031 (E.D. Ky. March 5, 2009).

The purpose of the easement was to “assure that the [property] will be retained forever substantially undisturbed in its natural condition and to prevent any use of the [property] that will significantly impair or interfere with the Conservation Values of the [property].”⁹¹ Paragraph 2.5 of the easement prohibited “ditching; draining; diking; filling; excavating; removal of topsoil, sand, gravel, rock or other materials; or any change in the topography of the land in any manner *except in conjunction with activities otherwise specifically authorized herein*.”⁹² Paragraph 3.2 stated, in pertinent part, that “[n]otwithstanding the foregoing provisions of paragraph 2, the Residential/Agricultural Area of the Protected Property ... may be used for commercial agricultural purposes [including a list of agricultural activities, including growing crops]...”⁹³ Prior to the filling the sinkhole, Sims was growing crops around, and possibly in, the sinkhole.⁹⁴ The court, focusing on the purpose clause, found that the plain language of the easement made Sims’ interpretation unreasonable.

In addition to clearly stating the purpose, the easement should include definitions of “agriculture” and other terms that allow for changes over time as the industry adapts to changing conditions.⁹⁵ Agriculture is a dynamic and changing industry that encompasses a broad and uncertain category of activities. Wind turbines, biodiesel production, and solar power generation are all potentially agricultural-related. A wide-range of activities may fall under the rubric of “agri-tourism”, like hayrides, haunted houses and corn mazes, and may also be included.

Furthermore, future definitions of “agriculture” may include activities that we cannot envision today. Producers must change activities in response to market and other forces. Even if the purpose clause of the easement allows changes from one type of agriculture to another or from forest uses to agriculture, the easement likely lacks the ability to address advances in science due to the prohibition on any development.⁹⁶

Agricultural conservation easements typically include restrictions relating to farm and ranch structures, farm worker housing, rural enterprises and commercial operations, and subdivision.⁹⁷ The restrictions on farm and ranch structures may be expressed as impervious surface restrictions.⁹⁸ Any of these restrictions could seriously impede adaptive management of the property. For instance, some agricultural activities, like intensive poultry production, involve high percentages of impervious surfaces.

Therefore, the prohibited and permitted uses should not be specifically set out. Instead, the uses should be tied to external standards that are updated regularly or have an external

⁹¹ *Id.* at *2.

⁹² *Id.*

⁹³ *Id.* (emphasis added).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Mahoney, *supra* note 6, at 758-59.

⁹⁷ Renee J. Bouplon and Jane Ellen Hamilton, Drafting Agricultural Conservation Easements, presentation at the 2004 National Land Conservation Conference (Land Trust Rally) in Providence, Rhode Island (on file with author).

⁹⁸ *Id.*

body with expertise in agriculture review particular practices for acceptability.⁹⁹ Like working forest easements, the easement could require operation pursuant to a management or conservation plan. In addition, land development plans could be included within the easement that establish building envelopes within which farm buildings could be constructed and altered without permission.¹⁰⁰ The easement could allow development outside the envelope if performance standards, addressing issues such as soil quality or agricultural viability, are met.¹⁰¹

However, since agriculture encompasses a much broader array of activities than forestry these plans must anticipate a much more diverse set of possibilities. A tension exists between restrictions that land trusts may want to place in easements and the flexibility required to allow adaptive management. Like clearcutting in forestry, some agricultural best management practices are not always acceptable to land trusts and other environmental organizations.

D. Difficulty and Expense of Incorporating Adaptive Management Provisions

Some scholars dismiss concerns about the difficulty and expense of drafting “dynamic” conservation easements to accommodate adaptive management.¹⁰² Greene asserts that the “proliferation of relatively cheap resources—such as publications containing legal advice and sample easement documents and conferences featuring panels of expert practitioners—... should alleviate any concerns that land trusts may have about the difficulty or expense of drafting dynamic conservation easements.”¹⁰³

In reality, the more seriously one takes the adaptive management approach, the more difficult the drafting becomes. If an external plan is incorporated by reference, the initial drafting cost and difficulty is reduced. However, updates to the plan and the active management of the property will be costly. If the purpose clause limits the purposes to those that become economically unviable in the future, but require active management, enforcement becomes more difficult. In addition, each conservation easement is negotiated individually, resulting in a lack of uniformity that complicates interpretation, monitoring and enforcement.¹⁰⁴ Adaptive management necessarily entails more specific drafting and planning, exacerbating this issue and further increasing the monitoring and enforcement costs for the easement holder.

A broader concern is the fact that the land which seems best suited for conservation today may well be needed for affordable housing or commercial development in the future.¹⁰⁵ Climate change may cause a species to migrate to a new area or disease may devastate a

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Greene, *supra* note 23, at 908.

¹⁰³ *Id.*

¹⁰⁴ JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS (POLICY FOCUS REPORT): A CRITICAL EXAMINATION AND IDEAS FOR REFORM, 8-10 (2005).

¹⁰⁵ Korngold, *supra* note 4, at 1063; Jesse J. Richardson, Jr., *Conservation Easements: Smart Growth or Sprawl Promotion?*, AGRICULTURAL LAW UPDATE 23(9): 4-5, at 4 (Sept. 2006).

forest reducing the protected parcel's habitat values.¹⁰⁶ The purpose clauses for most existing conservation easements undoubtedly prohibit the conversion of the protected land into a dramatically new use based on changing development or environmental needs.

Indeed, conservation easements explicitly seek to prevent pressures to convert land to development purposes. However, conversion of a particular parcel to development may promote not only the public good in general, but environmental interests as well. For example, if a particular parcel is under easement and unable to be developed, the development may occur instead on another, nearby parcel with higher ecosystem values that is not under an easement.¹⁰⁷

In conclusion, although incorporating adaptive management principles into conservation easements may further adaptive management goals, any measures will be limited. Reference to external plans maximizes flexibility, but increases costs and is ultimately limited by the purposes of the conservation easement.

IV. Amendment and Termination of Conservation Easements

“Most conservation easements are written to last in perpetuity. Any change to any conservation easement should be approached with great caution and careful scrutiny.”¹⁰⁸

Another method for adapting easements is the use of amendment and termination clauses. This section discusses the various forms of amendment and termination, as well as barriers to accomplishing adaptive management principles through such mechanisms.

A. Amendments and Terminations by Agreement

The Land Trust Alliance sets out seven principles which it believes should guide the amendment of conservation easements.¹⁰⁹ According to the Alliance's guidelines, amendment policies should only be as flexible as necessary and amendments to easements should:

- 1) Clearly serve the public interest and be consistent with the [holder's] mission;
- 2) Comply with all applicable laws and regulations;
- 3) Not raise concerns about the holder's tax-exempt or charitable status;
- 4) Not result in private inurement or impermissible private benefit;
- 5) Be consistent with the conservation purpose(s) and intent of the easement;
- 6) Be consistent with the intent of the donor or grantor of the of the easement and any funding agencies; and,
- 7) Have a net beneficial or neutral effect on the relevant conservation values

¹⁰⁶ Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 589 (2004).

¹⁰⁷ Richardson, *supra* note 105.

¹⁰⁸ LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 9 (2007).

¹⁰⁹ *Id.* at 17.

protected by the easement.¹¹⁰

The Land Trust Alliance also urges that the following issues be considered:

- Effect on stewardship and administration of the easement;
- Engagement of stakeholders, other owners or other involved parties;
- Consideration of conflicts of interest;
- Resolution of title issues;
- Concerns about real property tax issues;
- Acquisition of additional expert advice;
- Supplementation of baseline documentation and related cost; and
- Completion of required tax forms.¹¹¹

The guidance recommends a written amendment policy to facilitate application of the important principles.¹¹² The policy should consider the relevant tax provisions, including private inurement and private benefit prohibitions, state conservation easement enabling statutes, and state law governing charitable organizations.¹¹³

The guidance fails to mention any consideration of the frustration of the original purpose or any indication of an adaptive management process. The Land Trust Alliance seems to discourage relaxing restrictions on one parcel in exchange for additional or new restrictions on a different parcel.¹¹⁴ In fact, the Land Trust Alliance has some concerns that such bargains may violate applicable law and lack the necessary court review.¹¹⁵ For example, IRS regulations provide that the original deduction taken by the donor remains unaffected so long as the termination results from an “unexpected change” that “makes impossible or impractical the continued use of the property for conservation purposes.”¹¹⁶ The termination must occur in a judicial proceeding and the portion of the funds resulting from any subsequent sale or disposition of the property must be allocated to the holder of the easement and must be used in a manner that as closely as possible conforms to the conservation purpose of the original conservation easement.¹¹⁷

B. Court Amendments or Terminations

1. Conservation Easements as Charitable Trusts: The Cy Pres Doctrine

The ability of a court to change the terms of a conservation easement or terminate an easement depends in part upon the determination of the true nature of the conservation easements. Two main schools of thought presently exist. The predominant view holds that conservation easements form charitable trusts. Proponents of this view believe that perpetual conservation easements are “special, very powerful land protection tools” and

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 18.

¹¹² *Id.*, at 21.

¹¹³ *Id.*, at 23-32.

¹¹⁴ *Id.*, at 17.

¹¹⁵ *Id.*

¹¹⁶ 26 C.F.R. § 1.170A-14(g)(6)(i) (2007).

¹¹⁷ *Id.*

that “substantial” amendment or termination should be subject to significant barriers.¹¹⁸ Others argue that conservation easements are negative covenants, which would give courts much more flexibility in amending easements.

If conservation easements are charitable trusts, the doctrine of cy pres should apply to amendment or termination of conservation easements, at least where the amendment contravenes the purpose of the easement.¹¹⁹ This position finds support in the Uniform Conservation Easement Act, the Restatement (Third) of Property Servitudes, the Uniform Trust Code, federal tax law, and case law.¹²⁰ The doctrine of cy pres states that courts should interpret the provisions of wills to conform to the intent of the testator where literal construction is impossible or impractical.¹²¹ The doctrine, however, constrains the latitude of the courts in making these interpretations. The doctrine requires that the terms of the document be construed to comply with the donor’s intent as closely as possible.¹²²

The Third Restatement of Property supports this view, providing that private conservation servitudes are not terminated under the changed circumstances doctrine (discussed below in Section IV.B.2.).¹²³ The Third Restatement of Property holds that if attainment of a particular conservation purpose becomes impracticable, the cy pres doctrine should be applied to modify the conservation easement.¹²⁴ Only if no conservation purpose is possible with modification of the easement should the easement be terminated.¹²⁵

If conservation easements are charitable trusts, several factors support the requirement of court approval of substantial amendments or terminations of conservation easements. The significant public investment in conservation easements, the value of development rights extinguished by easements, political and other pressures to modify or terminate easements, increasing scarcity of undeveloped land, and the giving of deference to the intent of the easement donor all militate towards requiring court approval.¹²⁶

2. Conservation Easements as Negative Covenants

Others argue that conservation easements are negative covenants, giving courts much more flexibility in amending easements. Negative covenants, for example, can be amended by courts upon a showing of changed circumstances, relative hardship, and violations of public policy. These doctrines could add some flexibility to perpetual conservation easements.¹²⁷

The doctrine of changed circumstances dictates that a court should not enforce a covenant if enforcement will not bring the intended benefits due to changed circumstances.¹²⁸ Changed

¹¹⁸ McLaughlin, *supra* note 49, at 380.

¹¹⁹ *Id.* at 382; *see also* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L. Q.* 673 (2007).

¹²⁰ *Id.*

¹²¹ Korngold, *supra* note 4, at 1078.

¹²² *Id.*

¹²³ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000).

¹²⁴ *Id.* §§ 7.11(1), (2).

¹²⁵ *Id.*

¹²⁶ McLaughlin, *supra* note 49, at 382.

¹²⁷ Korngold, *supra* note 4, at 1076-81.

¹²⁸ *Id.* at 1077.

circumstances may apply to a conservation easement if conservation easements are viewed as negative restrictions.¹²⁹ For example, suppose a conservation easement states a purpose of protecting endangered species habitat. If, due to global climate change, the species migrates off of the property or becomes extinct, the purpose of the easement could no longer be attained.

The doctrine of relative hardship employs a sort of balancing test, allowing a court to deny an injunction enforcing a covenant, and to instead grant damages where the harm from injunctive relief would be great compared to the benefits.¹³⁰ However, unlike the similar balancing test employed in nuisance cases, the balancing does not include a consideration of the public interest.¹³¹ In addition, courts generally enforce covenants through injunctive relief, regardless of whether irreparable harm or monetary loss is shown.¹³² Changes to this policy would be required for the doctrine to make conservation easements more adaptable.¹³³

Courts generally refuse to enforce covenants that violate public policy.¹³⁴ However judicial statements on this issue are few in number and often contained in a portion of the court opinion not necessary to the final decision, or “dicta.”¹³⁵ Such statements are not binding or authoritative in future cases. Given the favored position of conservation easements in public policy and the fact that courts would likely have to balance competing public interests in such a case,¹³⁶ declaring that a conservation easement violates public policy is unlikely. Therefore, the public policy exception likely provides no additional adaptability for conservation easements.

C. Eminent Domain

Eminent domain provides another vehicle by which static conservation easements may be terminated and the property use converted to reflect changed circumstances. Although conservation easements held by government agencies may not be condemned by inferior (or lower) units of government,¹³⁷ land subject to privately held easements can be.

The literature is split with respect to the ease by which governments should be able to condemn conservation easement lands. On one hand, the use of eminent domain allows the public to change plans “imposed on [the public] by private organizations.”¹³⁸ On the other hand, the public invests a great deal in conservation easements and eminent domain may frustrate that investment.¹³⁹ In addition, McLaughlin asserts “the danger is ... that land

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1078-79.

¹³² *Id.* at 1079.

¹³³ *Id.*

¹³⁴ *Id.* at 1080.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ For example, a local government could not condemn land where the state government holds a conservation easement.

¹³⁸ Korngold, *supra* note 4, at 1082.

¹³⁹ Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1904-07 (2008).

protected by conservation easements will become the path of least resistance for condemning authorities.¹⁴⁰

D. State Statutes

Because conservation easements cannot be created under the common law (judge-made law expressed in court decisions), each state must adopt an enabling statute allowing the use of conservation easements. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Conservation Easement Act (UCEA) in 1981. Uniform laws are not binding, but provide models for states that are crafting their own laws. The UCEA has been adopted in some form by 27 states and the District of Columbia.¹⁴¹ Twenty-two states, most of which adopted enabling statutes before 1981, have enabling authority not based on the UCEA.¹⁴² North Dakota has not enabled the use of conservation easements.¹⁴³

The UCEA addresses amendment and termination in two places. First, § 2(a) states that easements “may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.”¹⁴⁴ Section 3(b) relates to court amendments and provides that the provisions of the act do not “... affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.”¹⁴⁵

Section 2(a) is amenable to different interpretations.¹⁴⁶ The 2007 Comments to the Model Act support a narrow interpretation.¹⁴⁷ These comments suggest that any amendments should be subject to the *cy pres* principles.¹⁴⁸ Some scholars, however, interpret § 2(a) much more broadly.¹⁴⁹ This interpretation finds that conservation easements are subject to the same rules for amendment and termination as standard easements. Easements are treated as contracts under the law and amendments and terminations are freely allowed by agreement of the parties.¹⁵⁰

¹⁴⁰ McLaughlin, *supra* note 49, at 383.

¹⁴¹ ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF CONSERVATION EASEMENT ENABLING STATUTES (2010), available at <http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ UCEA, *supra* note 3, § 2(a).

¹⁴⁵ *Id.*

¹⁴⁶ Levin, *supra* note 141, at 17-18.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 19 (citing C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397, 440 (2009)); Gerald Korngold, *supra* note 4, at 1048; Mary Ann King and Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 104-107 (2006); Adam E. Draper, *Conservation Easements: Now More Than Ever- Overcoming Obstacles to Protect Private Land*, 34 ENVTL. L. 247, 264 (2004); Erin McDaniel, *Property Law: The Uniform Conservation Easement Act: An Attorney's Guide for the Oklahoma Landowner*, 55 OKLAHOMA L. REV. 341, 347 (2002)).

¹⁵⁰ Levin, *supra* note 141, at 19.

Little existing case law interprets state laws on the amendment or termination of conservation easements. One Illinois case involved the amendment of a conservation easement that brought a new 809 square foot area into the easement in exchange for removing an 809 square foot area.¹⁵¹ The new area was visible from the road, unlike the original area, which arguably meant that the amendment enhanced the public value of the easement. The Illinois enabling statute is silent on amendment and termination. The appellate court found that the easement allowed for amendments, but that the amendments must be consistent with the original easement. Since the original easement prohibited any structures in the removed 809-square foot portion, the court reasoned that the amendment was inconsistent with the original easement and thus invalid.

Even if one manages to amend or terminate a conservation easement, the negotiations and legal hurdles create substantial transaction costs.¹⁵² In addition, easement holders have goals and motivations that do not necessarily coincide with the public good.¹⁵³ Present law and policy makes reliance on amendments or termination of conservation easements very unlikely. Even more unlikely is the prospect of incorporating adaptive management principles into amendment and termination procedures and policies.

V. Rolling Easements: Tailoring Conservation Easements for Coastal Areas?

The legal theory supporting the concept of rolling easements is based on the public trust doctrine. The public trust doctrine is a common law doctrine that grants states sovereignty over the beds of navigable water bodies and creates an implied easement over those lands for the benefits of the public.¹⁵⁴ The Texas Supreme Court first coined the term “rolling easement” in upholding the Texas Open Beaches Act (TOBA).¹⁵⁵ Texas law provides that the state owns coastal land seaward of the mean high tide mark.¹⁵⁶ The TOBA provides, in part, that “if the public has acquired a right of use or easement to or over an area ... the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.”¹⁵⁷ Over the years, Texas courts have found that the public has acquired the right of use to this larger area in some parts of the coast of Texas.¹⁵⁸ The Texas Supreme Court referred to right of the public to use (in this case, access) certain coastal beaches in Texas as a rolling easement because as the sea advances inland, the boundaries of the easement move with the sea, or “roll.”

The term “rolling easement” holds several different meanings. More formally, a rolling easement consists of “an arrangement under which property owners have no right or

¹⁵¹ Bjork v. Draper, 886 N.E.2d 563 (Ill. App. Ct., 2008).

¹⁵² Mahoney, *supra* note 22, at 777.

¹⁵³ *Id.*

¹⁵⁴ James G. Titus, Rising Seas, *Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches without Hurting Property Owners*, 57 MD. L. REV. 1279, 1364-68. (1998).

¹⁵⁵ Feinman v. State, 717 S.W.2d 106 (Tex. App. 1986).

¹⁵⁶ Luttet v. State, 159 Tex. 500, 324 S.W.2d 167, 187 (1958).

¹⁵⁷ TEX. NAT. RES. CODE ANN. §§ 61.001 to 61.178.

¹⁵⁸ Seaway Co. v. Att’y Gen., 375 S.W.2d 923, 936-37 (Tex. Civ. App. 1964); Matcha v. Mattox, 711 S.W.2d 95, 101 (Tex. Civ. App. 1986); Feinman v. State, 717 S.W.2d 106, 113 (Tex. App. 1986).

expectation of holding back the sea if their property is threatened.”¹⁵⁹ In other words, the term rolling easement has been used to refer to “a broad collection of arrangements under which human activities are required to yield the right of way to naturally migrating shores.”¹⁶⁰ Rolling easements allow the property to be used as the landowner sees fit so long as the land remains dry.¹⁶¹

Rolling easements may be acquired through eminent domain purchases or by statutory provision.¹⁶² Rolling easements could also be purchased through voluntary transactions or donated. Acquisition of rolling easements should cost substantially less than a purchase of the property by the government as the ocean infringes upon the property due to the uncertainty of sea level rise and the ability of the landowner to use the property productively in the intervening years.¹⁶³

At present, statutory provisions in several states create de facto rolling easements. Maine,¹⁶⁴ Massachusetts,¹⁶⁵ and Rhode Island¹⁶⁶ have statutes prohibiting armoring. These provisions shift the risk of sea level rise to the landowner. A more controversial aspect of the Texas Open Beaches Act is its requirement that structures encroaching on public lands following beach erosion must be removed.¹⁶⁷ South Carolina has also used a rolling easement in a limited context. In 1992, the U.S. Supreme Court remanded a case to the South Carolina Supreme Court to determine whether a taking had occurred with respect to David Lucas’ property.¹⁶⁸ The takings claim arose from a required setback for habitable structures on the beach. The South Carolina Coastal Council settled the case by purchasing the property from Mr. Lucas.¹⁶⁹ The Council then sold the property, but imposed a condition that a rolling easement governed the location of construction on the property.¹⁷⁰

A. Implementing Rolling Easements Through Conservation Easements

Rolling easements could be implemented as a form of conservation easement.¹⁷¹ The conservation easement could be donated, sold, or required to acquire development or subdivision permissions. The latter method refers to an “exaction.”¹⁷² Such easements could prohibit hard coastal armoring and, like the Texas Open Beaches Act, require removal of

¹⁵⁹ U.S. CLIMATE CHANGE SCIENCE PROGRAM, COASTAL SENSITIVITY TO SEA-LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION¹⁴⁵ (2009), available at <http://www.epa.gov/climatechange/effects/coastal/sap4-1.html> [hereinafter *Coastal Sensitivity Report*].

¹⁶⁰ Titus, *supra* note 154, at 1313.

¹⁶¹ Coastal Sensitivity Report, *supra* note 159, at 146-47.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Maine Coastal Sand Dunes Rule, 335 ME. CODE R. §3(b)(1).

¹⁶⁵ 310 MASS. CODE REGS. § 10.30.

¹⁶⁶ See, Rhode Island Coastal Resource Management Program §300.7(D) (rev. Dec. 2008), available at <http://www.crmc.ri.gov/regulations/RICRMP.pdf>.

¹⁶⁷ TEX. NAT. RES. CODE ANN. §§ 61.001 - 61.178.

¹⁶⁸ Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

¹⁶⁹ Titus, *supra* note 154, at 1337.

¹⁷⁰ *Id.*

¹⁷¹ Coastal Sensitivity Report, *supra* note 159, at 145.

¹⁷² *Id.*

structures that encroach on public lands. The easement document could define the boundary by reference to the distance from the mean high tide line or some other similar measure. Therefore, the easements would “roll” as the ocean moves inward. Acquiring rolling easements in this manner, which would involve compensation to landowners, might be more politically acceptable than imposing similar requirements through statutory provisions such as the Texas Open Beaches Act.

Research supports the position that rolling easements provide economic benefits as compared with armoring of the shoreline, mainly through increased property values.¹⁷³ One set of scholars suggests that, particularly given these economic benefits, compensation should be provided to landowners that bear the risk of losing structures due to sea-level rise.¹⁷⁴ Other scholars, however, argue that compensation is not appropriate.¹⁷⁵

Relying on voluntary donations or sales could, however, prove problematic. Since sea level encroachment is uncertain and likely to occur far into the future, the reduction in property value would have to be discounted to present value. Thus, the easement would likely cause little reduction in value, minimizing purchase prices and tax benefits. Landowners would hold little incentive to voluntarily impose such restrictions on their property.

In addition, governments or land trusts would need to be able to accurately forecast the impacts of sea level rise to efficiently implement the program. Present oceanfront property provides an obvious target for rolling easements. However, some inland properties will also be impacted. Forecasting the timing and location of the impacts would be difficult, hindering full implementation of rolling easements.

Mandatory exactions or eminent domain purchases appear to offer more promise of implementation. However, eminent domain purchases would likely face political opposition. Mandatory exactions, where enabled, may be more feasible. But, home purchasers may resist assuming the risk of sea level rise causing encroachment onto their property. To make even compensated rolling easements politically acceptable, an insurance-type product may need to be developed to compensate landowners who lose their homes due to sea level encroachment. Compensation, however, would neutralize cost savings to the government from the use of rolling easements.

Rolling easements allow adaptive management for coastal easements in at least one respect by moving the boundary of the easement in response to sea level changes. This flexibility offers advantages over present conservation easements, which contain rigid boundaries. However, rolling easements have presently only been implemented through regulatory mandates. Using voluntary incentives to encourage donation or sale of rolling easements is

¹⁷³ See, Craig E. Landry, Andrew G. Keeler, and Warren Kriesel, *An Economic Evaluation of Beach Erosion Management Alternatives*, 18 MARINE RES. ECON. 105 (2003); WARREN KRIESEL AND ROBERT FRIEDMAN, COASTAL HAZARDS AND ECONOMIC EXTERNALITY: IMPLICATIONS FOR BEACH MANAGEMENT POLICIES IN THE AMERICAN SOUTHEAST: A HEINZ CENTER DISCUSSION PAPER (2002), available at <http://www.heinzctr.org/publications/PDF/Externalities.pdf>.

¹⁷⁴ Landry, *supra* note 173, at 121.

¹⁷⁵ Meg Caldwell and Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L. Q. 533, 576 (2007).

likely to fail for lack of meaningful incentives. Mandating the use of rolling easements through eminent domain or mandatory exactions is also likely to face political opposition.

B. Incorporating “Rolling” Boundaries: Rolling Conservation Easements

Rolling boundaries could be incorporated into standard conservation easements. The most likely situation would be in connection with endangered species habitat or corridors preserved for wildlife migration.¹⁷⁶ For example, a conservation easement protecting endangered species habitat could define the boundaries of the easement by referring to the portion of the property actually used as habitat by the endangered species.

Two obvious issues immediately arise with this scenario. First, the easement would not protect areas that the species may migrate to in the future. Note, however, that existing conservation easements protecting endangered species habitat also fail in this respect. Second, the boundary could roll only to the property line. Unless a similar easement was obtained on adjoining properties, once the species migrated off the subject property, the protections would disappear (just as in existing conservation easements).

These shortfalls could be remedied by incorporating another aspect of rolling easements. A state could, similar to the Texas Open Beaches Act, declare that any endangered species habitat becomes public property and any structures must be removed. Unfortunately, this approach would result in a plethora of lawsuits claiming a taking of private property for public use without just compensation. Unlike coastal areas, which have historically been subject to the public trust doctrine and considered public property, no such doctrine applies to endangered species habitat. Landowners challenging rolling easements for endangered species habitat as unconstitutional takings would likely succeed.

C. Impact of Rolling Easements on Conservation Easements

Incorporation of rolling easement concepts into conservation easements to make “rolling conservation easements” offers some promise. However, implementation of the theory proves problematic in practice. The present use of regulatory mandates and prohibitions may be the only way to implement rolling easements. In addition, the concept is likely not amenable to transfer to situations not involving coastal properties. Although rolling easements for endangered species habitat, for example, remains theoretically possible, implementation would be complex. Rolling conservation easements share many of the flaws of standard conservation easements. The use of different tools may prove more beneficial than more tinkering around the edges of conservation easements.

In fact, rolling easements may negatively impact conservation easements in some cases. For example, suppose a land trust or governmental agency acquires a conservation easement along the coast. As sea level rises and the tides encroach upon the land, the portion of land under conservation easement decreases. With the uncertainty raised by climate change, this migration of the sea landward raises real concerns with respect to the efficacy of obtaining conservation easements in coastal areas. Should public funds be expended to

¹⁷⁶ At least one pair of scholars has suggested a rolling easement approach to preserving animal migration corridors. See, Robert L. Fischman and Jeffrey B. Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA. ENVTL. L. J. 173, 214 (2010).

obtain a conservation easement on land that will eventually be under water and subject to state ownership? Use of conservation easements in these situations seems inefficient and wasteful.

VI. More Adaptive Alternatives to Conservation Easements

Given the difficulties of incorporating adaptive management principles into perpetual conservation easements, the possibility of other options should be explored. This section discusses less-than-perpetual conservation easements and payments for ecosystem services as two possible options. Both options are currently in place in some form. However, institutional and other factors presently favor perpetual conservation easements.

A. Less-Than-Perpetual Easements

1. Term Easements

Many state enabling statutes allow conservation easements for a term less than perpetuity. Less than perpetual easements are commonly referred to as term easements. However, as the federal income tax benefits only accrue for perpetual easements, the vast majority of conservation easements are perpetual.¹⁷⁷ In addition, most land trusts will only accept perpetual easements.¹⁷⁸

Term easements are a better fit for the model of adaptive management than perpetual easements. For example, a term easement for a 20-year term could be reevaluated at the end of the period and new management techniques applied. In the alternative, the holder of the easement could decide that the property no longer offers the conservation benefits necessary to justify the easement, and the easement can be terminated without a costly court process.

The major criticism of term easements involves cost.¹⁷⁹ McLaughlin alleges that landowners receive an “economic windfall” with term easements.¹⁸⁰ This concern appears to arise from an objection to the fact that the landowner would receive a payment for conveying the term easement, and at the end of the term, the restrictions no longer apply. However, no economic windfall results from payments for term easements. The fair market value of a 30-year term easement approaches the fair market value of a perpetual easement.¹⁸¹ The values are similar since benefits received far into the future must be discounted to the present day value. Many existing programs like the Conservation Reserve Program,

¹⁷⁷ Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 424 n.6 (2005).

¹⁷⁸ *Id.*

¹⁷⁹ COLORADO COALITION OF LAND TRUSTS, TERM EASEMENT WHITE PAPER (2001), available at http://www.ctahr.hawaii.edu/awg/downloads/rp_AFT_TermEasements.pdf; McLaughlin, *supra* note 119, at 708-709.

¹⁸⁰ *Id.* at 710.

¹⁸¹ *Id.* at 675.

Conservation Reserve Enhancement Program, and the Wildlife Habitat Incentive Program are forms of term easements.¹⁸²

2. Term-Terminable and Terminable Conservation Easements

McLaughlin raises two other possible types of term easements: “terminable conservation easements and “term-terminable conservation easements.”¹⁸³ A terminable conservation easement is a conservation easement that allows the holder of the easement and the landowner to agree to terminate the easement at some time in the future. Terminable conservation easements could be conditionally terminable or freely terminable.¹⁸⁴

Conditionally terminable conservation easements would contain conditions within the easement that, when met, would allow the holder and the landowner to agree to terminate the easement.¹⁸⁵ For example, the easement could state that if the purposes of the easement become impossible or impractical (the *cy pres* standard), the easement holder and landowner could agree to terminate the easement without court approval.¹⁸⁶

A freely terminable conservation easement would contain provisions allowing the easement holder and the landowner to agree to terminate the easement at any time.¹⁸⁷ Presumably, the easement holder would first determine that the easement termination is consistent with the public or charitable mission of the holder.¹⁸⁸ In addition, the holder would presumably receive cash or some other compensation in exchange for agreeing to release the easement. This “horse trading” would give the holder a great deal of discretion.¹⁸⁹ It is important to note, however, that uncertainty arises as to when the termination is consistent with the purpose of the holder.¹⁹⁰

The ability to easily terminate conservation easements would raise questions as to whether local governments and land trusts should be granted such broad discretion to terminate or modify conservation easements without court intervention; whether non-perpetual easements would “crowd out” other types of land use planning, such as regulation, contrary to the public good; and, whether creation of private markets in development rights would promote the public good.¹⁹¹ In addition, the terminations and modifications may be so controversial that land trusts and local governments would seek approval from the courts or the state attorney general even without the requirements.¹⁹²

A term-terminable easement differs in some respects from a terminable easement. Like the terminable easement, a term-terminable easement contains no set termination date.

¹⁸² Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. OF AG. L. 163, 180 (2007).

¹⁸³ McLaughlin, *supra* note 119, at 708-12.

¹⁸⁴ *Id.* at 710.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 711.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 711-12.

¹⁹² *Id.* at 712.

However, at the end of a set time period, the holder of the easement (perhaps the local government) has the option of renewing the easement or terminating the easement in exchange for a cash payment from the landowner.¹⁹³ Term-terminable conservation easements offer more flexibility than perpetual easements and more control and less cost than a term easement.¹⁹⁴ Term-terminable easements may be appropriate, for example, in situations where land at the urban-rural fringe should be conserved for a time, but will be needed for development at some future point.

B. Green Payments and Smart Payments

A green payment is a payment that “efficiently links the production of environmental goods and services with the opportunity to derive an income over and above the cost of producing these goods and services.”¹⁹⁵ For example, green payments provide a way to supplement the incomes of farmers while avoiding limitations on commodity subsidies.¹⁹⁶ Such payments are linked to positive externalities resulting from agriculture and not tied to the production of commodities.

A related concept is that of “smart payments.” Smart payments would be based on local and regional land use plans and would entail payments to landowners occupying land that should not be developed immediately.¹⁹⁷ A type of payment could be created that would combine green payments and smart payments to compensate landowners for providing environmental services and contributing to smart development patterns.

These types of payments hold several advantages over perpetual conservation easements. Instead of relying on volunteers tempted by tax benefits, these payments could be targeted to the most desirable lands. Payments could be based on contract periods as short as one year, allowing changes based on adaptive management principles. Payments could be based on actual conservation benefits, instead of the federal income characteristics of the recipients. The governmental entity paying the benefits could cap the benefits, necessitating a prioritization of conservation lands.¹⁹⁸

C. Payments for Ecosystem Services

“Ecosystem services are components of nature, directly enjoyed, consumed, or used to yield human well-being.”¹⁹⁹ Ecosystem services have also been defined by describing the functions that natural ecosystems perform that provide critical human life-support services, including:

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 710.

¹⁹⁵ William J. Even, *Green Payments: The Next Generation of U.S. Farm Programs?*, 10 *DRAKE J. AG. L.* 173, 173 (2005).

¹⁹⁶ *Id.*

¹⁹⁷ Richardson, *supra* note 182, at 181.

¹⁹⁸ *Id.* at 181-82.

¹⁹⁹ Brian C. Steed, *Government Payments for Ecosystem Services: Lessons from Costa Rica*, 23 *J. OF LAND USE AND ENVTL. L.* 177, 179 (2007) (citing JAMES BOYD AND SPENCER BANZHAF, *RESOURCES FOR THE FUTURE, WHAT ARE ECOSYSTEM SERVICES?* 8 (2006)).

- Purification of air and water;
- Mitigation of droughts and floods;
- Generation and preservation of soils and renewal of their fertility;
- Detoxification and decomposition of wastes;
- Pollination of crops and natural vegetation;
- Dispersal of seeds, cycling and movement of nutrients;
- Control of the vast majority of potential agricultural pests;
- Maintenance of biodiversity;
- Protection of coastal shores from erosion by waves;
- Protection from the sun's harmful ultraviolet rays;
- Stabilization of the climate;
- Moderation of weather extremes and their impacts; and
- Provision of aesthetic beauty and intellectual stimulation that lift the human spirit.²⁰⁰

The concept of payments for ecosystem services (PES) is a relatively well-developed idea that offers an attractive alternative to perpetual conservation easements. PES programs involve voluntary transactions where a governmental or other entity purchases ecosystem services from a landowner.²⁰¹ The support for PES programs comes from the ability to save money by paying landowners to provide equivalent services as traditional infrastructure, such as maintenance of water quality, at a lower cost.²⁰² PES thus constitutes neither a subsidy nor a payment for undefined benefits, as with conservation easements.²⁰³ Instead, PES provides payments for services rendered.²⁰⁴

V. Conclusion

Conservation easements “do not fit well with our need for institutions and practices that can adjust with ease to shifting climate and landscape, advances in knowledge, and evolving societal norms.”²⁰⁵ Conservation easements lack the ability to truly incorporate adaptive management because future events or advances in knowledge may show that the fundamental purpose of the easement, to prohibit development, is misguided.²⁰⁶

Drafting easements to incorporate adaptive management principles presents daunting challenges. Attempts to amend or terminate existing easement face even bigger hurdles, whether or not court approval proves necessary. Innovative changes to basic conservation easement principles, like rolling easements, offer promise. However, these innovations present additional complexities and limitations in implementation.

²⁰⁰ *Id.* at 179 (citing GRETCHEN DAILY, ED., NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (1997)).

²⁰¹ *Id.* at 178.

²⁰² J.B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVTL. L. J. 424, 429 (2008).

²⁰³ *Id.* at 440.

²⁰⁴ *Id.*

²⁰⁵ Mahoney, *supra* note 22, at 444-45.

²⁰⁶ Mahoney, *supra* note 6, at 758.

Instead of mandating or encouraging perpetual easements, regulations should limit the terms of easements. Instead of tinkering around the edges of conservation easements, alternative tools should be examined. Alternatives such as less-than-perpetual easements and payments for ecosystem services not only are more amenable to adaptive management principles, but promote other purported goals of conservation easements more readily.

Less-than-perpetual easements provide managers with more flexibility and a better opportunity to incorporate adaptive management principles than perpetual easements. Cost does, however, present a barrier with respect to term easements. Term-terminable and terminable easements also offer more flexibility, but the transaction costs to terminate those easements would be substantial.

Green payments and smart payments also offer promise. In theory, these payments would allow an adaptive management approach to land conservation. In addition, the payments could be tailored to compensate for conservation benefits received. Present law bases compensation, whether payments or tax benefits, for perpetual easements on development value. Development value has no relationship to conservation value. In addition, the present system of tax incentives fails to prioritize conservation alternatives and relies on volunteers. A green payment or smart payment system could prioritize and target more valuable properties from a conservation perspective. Unfortunately, funding may prove to be a significant barrier to green payments or smart payments.

Payments for ecosystem services provide the most promising alternatives. These programs are already in place in some areas. Research is being conducted to derive market values for various ecosystem services. A PES program would allow taxpayers to know precisely what benefits accrue from payments to landowners. With perpetual conservation easements, the ecosystem services provided by particular easement properties are generally unknown.

Conservation easements are a relatively young legal tool, with the vast majority of easements having come into existence in the past 20 years. Conflicts between conservation easements and new proposed uses are increasing. Abuses and weaknesses have been revealed. Most responses to these developments propose changes to conservation easements to “fix” the problem. However, many suggested fixes prove to be complex as well as uncertain of success. Policymakers should recognize that conservation easements serve as but one tool in a vast toolbox of conservation tools. Other tools, like payments for ecosystem services, should be seriously considered to supplant conservation easements, at least in appropriate circumstances.