

INCORPORATING FLEXIBILITY INTO CONSERVATION EASEMENTS



Aaron Citron

Winner of the 2007 Lillian S. Fisher Prize
in Environmental Law and Public Policy

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Udall Center for Studies in Public Policy
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Aaron Citron, a recent graduate, cum laude, of the James E. Rogers College of Law at The University of Arizona, developed an interest and expertise in the use of partial property interests, especially conservation easements, as a new method of open space preservation and protection. Citron has lived in Tucson, Arizona, most of his life and graduated from Emory University with an undergraduate major in history.

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By Aaron Citron

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1

INTRODUCTION

The use of conservation easements (CEs) to privately protect land from development has grown significantly in the United States over the last decade and a half.¹ This mechanism is a perpetual and legally binding development and use restriction placed on a piece of property.² CEs are a promising alternative to what some see as the declining practice of unilaterally setting aside lands for preservation in an idealized pristine state.³ Many conservationists have turned to this novel perpetual restriction under CEs as a central thrust of the continuing movement to protect lands and the diversity of species they support, in places where people will continue to live. Today, CEs across the country are employed to preserve lands ranging from ecologically important woodlands, riparian areas, and grasslands to agricultural landscapes and open space near urbanizing areas.

In comparison to other forms of protection, CEs are easily created and can be tailored to fit the specifications of any parcel of land. While CEs hypothetically are also relatively easy to monitor and enforce, land trust organizations—the primary vehicle for CEs—have admittedly focused much more on the acquisition of easements than on the ongoing monitoring and regulation of CEs once they have been acquired.⁴ As Richard Brewer, author of *Conservancy: The Land Trust Movement in America*, observes, “Land trusts tend to see themselves in a war against urban sprawl. For some, the priority is saving land, in the narrowest sense. The message to the staff is to go out and do deals. There’ll be time for niceties later, when peace has been declared.”⁵ However, this lack of oversight has begun to threaten the viability of CEs.⁶

In the future, private land trusts as well as government trust holders will likely correct these deficiencies—especially if technological advances are used to make monitoring easier and more comprehensive.

Overall, as a conservation tool, CEs have been praised for creating a market-based solution to such problems as urban sprawl, habitat destruction, and water scarcity.⁷ On the other hand, CEs have certainly received their share of criticism. For instance, Gerald Korngold, professor of law at Case Western Reserve University, maintains that, “The choice of the best current use of a parcel of land is difficult enough; more difficult still is the decision today regarding future use, because future needs are more speculative. Rigid choices today may defeat the right of future generations to make critical decisions affecting their lives.”⁸ Some have questioned the wisdom of a system of restrictions on development and alienation of lands that will essentially lock land into its current state in perpetuity.⁹

Notably, University of Virginia law professor Julia Mahoney has focused on the perceived inflexibility of CEs.¹⁰ By restricting land use based upon current scientific knowledge and cultural values, we may, argues Mahoney, be foreclosing future solutions and forcing future generations to live with the value choices we make today.¹¹ Specifically, Mahoney says, “Conservation easements are not—and in all probability cannot be—designed to take account of the transformations in cultural attitudes and ecological understanding that are almost certain to occur.”¹² In addition, flexibility is needed in order to make CEs more resilient and appropriate in the long term. Future owners of easement-burdened properties will no doubt challenge the terms of CEs for personal financial gain. When this happens, proper amendment procedures will act as a framework for acceptable change and a bulwark against wholesale abandonment of CEs by the courts. Mahoney’s critique provides the springboard for this monograph. The discussion will show how it is possible to address the concerns of Mahoney without abandoning the underlying, perpetual conservation values of the CE form.

While early conservation easements, drafted in the 1980s and early 1990s, are no doubt blunt instruments compared to those being put in place today,¹³ courts have shown a willingness to enforce CEs reasonably and to interpret them so as to allow compatibility with new understandings and policies, so long as the underlying values are not disturbed.¹⁴ Such jurisprudence is, thus far, relatively limited. But challenges to these restrictions will no doubt grow significantly in the future as successive owners take control of lands encumbered by CEs drafted and adopted by others.

With these developments in mind, this monograph investigates whether concerns about the inflexibility of CEs are appropriate or overstated. Chapter 2 begins with a historical look at the bases and development of CEs. This is followed in Chapter 3 by a discussion of how courts have shown a willingness to interpret perpetual restrictions reasonably, so as to neither gut them of their underlying purpose nor to treat them as outdated impediments to scientific and cultural advances. The chapter also includes examples from state legislation allowing CEs. Chapter 4 begins by looking into how CEs are increasingly being drafted to allow for such modifications. It then explores language and methods that can be used to meet the overall goals of perpetual conservation while retaining flexibility. Chapter 5 turns to look at outside impediments to CE amendment and delves into potential future mechanisms for internal and external review that might work to allay these concerns and allow for freer amendment where necessary and appropriate. Chapter 6, the conclusion, summarizes the mechanisms available to incorporate the appropriate amount of flexibility into CEs so that they will be able to cope with future scientific and cultural changes without sacrificing their inherent conservation values.

2

CONSERVATION EASEMENTS IN HISTORICAL CONTEXT

Commons regulation

In the mid-1970s, the United States began to set up federal systems to regulate “common pool resources,” such as air and water. Noted political scientist Elinor Ostrom defines a common pool resource as “a natural or man-made resource from which it is difficult to exclude or limit users once the resource is provided, and one person’s consumption of resource units makes those units unavailable to others.”¹⁵

The fact that some resources are not renewable is magnified by a presumption that rational individuals will tend to overexploit the resources for their own short-term benefit, to the long-term detriment of others. This scenario, first expounded by Garrett Hardin in 1968 in his classic article “The Tragedy of the Commons,” has most often been analogized to a group of herders sharing a common plot of grazing land.¹⁶ Each herder will gain a marginal benefit from each additional sheep he grazes on that common land. The harms caused to the land by the extra sheep will, however, be passed on generally to all of the herders. This so-called free-rider problem has always been at the heart of commons management.

Hardin’s solution was a relatively simple one—the state would have to intervene to protect short-term, value-maximizing individuals from themselves. If the state did not get involved, rational individuals would presumably never be able to organize themselves to manage this resource to everyone’s mutual benefit.

Top-down enforcement and overauthorization

Since the 1970s, the state has gotten involved. During the Nixon administration, the U.S. Congress famously passed a series of environmental statutes that remain largely intact today. These statutes tend to rely on top-down enforcement through “command-and-control” strategies or “technology-forcing” approaches. The most well known of these state-imposed federal controls—the Clean Air Act,¹⁷ Clean Water Act,¹⁸ and Endangered Species Act¹⁹—have been successful in many ways, but may be deficient in others.²⁰

Federal programs begun during this era frequently intended to delegate authority over local resource issues downward to state governments and horizontally across many federal agencies. While this results in a broad array of government regulators, some would claim that the resources (air, water, land, wildlife) are now, in fact, overregulated, and that the underlying problems of common pool resource management are still far from being adequately addressed. Many agencies are perceived as holding authority over these myriad concerns, but often “no primary regulator exists or has reason to step forward.”²¹ Emory University professor of law William Buzbee contends that this perceived overregulation is in fact a problem of *overauthorization* that results in underregulation.²²

The existence of so many potential regulators of any given activity in fact acts to splinter the perceived demand for regulation since citizens might be unsure as to whom they should direct their requests and complaints. Additionally, this fragmentation may create for regulators a disincentive to actually regulate, as no one government regulator will gain credit for its efforts or, on the other hand, be held accountable for its failures. This disincentive will be discussed further below.

Development of the conservation easement form

Developed as an alternative conservation mechanism, CEs as we know them today are considered to be a type of “negative easement.” Easements were traditionally conceived as transferable

fractional interests in land akin to one of the “sticks” in a bundle. Negative easements, promises to refrain from exercising a right, were generally not legally accepted in English common law—the basis of the American legal system—prior to the American Revolution due to their conceptual difficulty.²³ A negative easement differs from a positive easement in that the servient estate relinquishes a right to use that which it had enjoyed but does not transfer that right of use to the dominant estate. Instead, the dominant estate gains a right to enforce the nonuse of that right against the servient estate. Since this right of enforcement had not existed prior to the grant of easement, early scholars had trouble justifying its creation in this way.

This restriction against negative easements was also practical public policy, as England did not have a property recording system in the 19th century. Thus, when property was transferred, the only way to confirm easements upon one’s land was by physical evidence upon the property—as in a road crossing the property to a neighboring estate. A negative easement leaves no such evidence. Instead, it leaves only an inconspicuous lack of use of a particular stream or hillside. The common law preference toward the free transferability and use of public property made negative easements understandably uncommon, and they were generally not legally recognized.²⁴

Until recently in the United States, common law restrictions forced land conservation most often to be accomplished by acquisition or management of complete or absolute interests in land. In 1981, the National Conference of Commissioners of Uniform State Laws drafted the Uniform Conservation Easement Act (UCEA) to create an exception to the common law prohibition on negative easements.²⁵ However, even prior to the UCEA, conservation advocates had begun to experiment with the use of negative conservation-style easements.²⁶ The UCEA essentially abrogates the common law restrictions on creation and transferability of negative easements *in gross*.²⁷ The act limits their use to charitable conservation organizations with the purpose of holding interests in land for conservation or historic preservation, and to public

or governmental bodies with the power to hold real property interests.²⁸ It also creates a third-party right of enforcement in that the holder can delegate its enforcement power and responsibilities to another qualified entity.²⁹ Federal tax laws have also recognized the benefits of preserving open lands by allowing deductions for grantors of CEs to charitable organizations.³⁰

Comparing CEs to traditional management

In many ways—and particularly in responding to changing science and environmental conditions—traditional management regimes prove just as inflexible in practice as Mahoney perceives CEs to be. On the one hand, government regulators ideally have the power to bend and amend their policies to follow changing science and to allocate their resources in line with changing needs. On the other hand, regulators may be wedded in a variety of ways to the status quo,³¹ seeming to have very little incentive to actually change policies to be in line with current knowledge.³² Similarly, legislative bodies are relatively slow to act and are allied along party lines. It seems infeasible to expect these bodies to constantly propose and amend new statutory schemes to keep up with constantly changing environmental conditions.

The very structure of American government leads to fragmentation of authority among not only federal, state, and local actors, but also between various branches of government, and even between agencies and departments within those branches. For example, the management and protection of our public lands falls under the jurisdiction of various regulators including the Bureau of Land Management, U.S. Forest Service, National Park Service, Environmental Protection Agency, U.S. Fish and Wildlife Service, and Natural Resources Conservation Service, just to name a few at the federal level. These organizations are mirrored by state, local, and frequently tribal organizations that, at least nominally, have the same goals and objectives.

However, the goals of governmental entities do not necessarily match those of the general public. As such, “when social ills match no particular political-legal regime or jurisdiction, but instead

encounter fragmented political-legal structures, predictable incentives arise for potential regulators to opt against investing in such regulatory opportunities.”³³ Each organization has an incentive to see its regulations enforced and its own agendas met so that it can be assured of political survival.³⁴

Under dynamics such as these, government regulators would have an incentive to propagate the status quo rather than set out specific standards for continuous active management. The situation that results from the regulator’s lack of incentive to act can be thought of as a “regulatory commons problem.”³⁵ The “commons” resource at issue is not the underlying natural resource, but instead the regulatory opportunity itself.³⁶ Since for so many natural resource management scenarios there exists no primary regulator, “[r]egulators are unlikely to be blamed for a problematic status quo, will be unable to control other regulators, and, if they choose to act, may create ineffective regulation due to others’ actions.”³⁷ A government regulator’s best barometer of political success may indeed be in the enforcement of existing policies, rather than the costly and time consuming creation of new ones. No one regulator will get the blame for failures in the system and no one regulator will get the praise for successes. Such a scenario effectively leads to underregulation and inflexibility.³⁸

Thus government regulatory regimes are inflexible in at least two distinct ways. First, there is internal political inertia toward agency self-preservation rather than action. Second, regulatory agencies with overlapping jurisdictions and without clear accountability create a disincentive for action or change, and this results in a regulatory commons dilemma. These inflexibilities are the result of fragmented bureaucracies without sufficient incentives to make sure that regulations actually keep up with the problems they are meant to address. In comparison, the potential inflexibilities of CEs could be solved by more thoughtful drafting and a better understanding of the CE form.

Admittedly, CEs contain needed elements of inflexibility by design. The purpose of CEs is, after all, the perpetual conservation

or protection of land. However, these instruments are also personal contracts, and contracts can be amended under proper circumstances. CE contracts are not entirely private as they are regulated from the outside by, among other mechanisms, the federal income tax code. CEs are also akin to charitable trusts and may be subject to equitable charitable trust principles.³⁹ As such, the public interest in CEs must be taken into account if and when CEs are amended.⁴⁰ However, as I will describe below, if standardized amendment procedures are put in place, CEs should be able to fulfill their purpose without becoming inflexible, outdated relics.

The next chapter will turn to individual state laws and the interpretations courts have given to the sometimes vague and contradictory language included in CEs.

3

STATE LEGISLATION AND JUDICIAL INTERPRETATION OF CONSERVATION EASEMENTS

Options for CE modification

To date, nearly every U.S. state, the District of Columbia, and the U.S. Virgin Islands have adopted laws that mirror or are very similar to the Uniform Conservation Easement Act.⁴¹ These state-enacted versions of the UCEA are instructive in understanding the manner in which courts have interpreted CEs and, potentially, how the courts will continue to interpret the CEs in the future. Most of these laws, such as those of New York, provide language that attempts to limit the modification of easements to “the minimum extent necessary” to accommodate the intended new use.⁴² California similarly includes in its statutes a broad provision to protect CEs from adverse interpretations in the future: “The provisions of this chapter shall be liberally construed in order to effectuate the policy and purpose of [the conservation easement act].”⁴³ While these canons limit amendment to some extent, their focus on the underlying purpose of the easement will be instructive in future legislation.

In the coming years, CEs will undoubtedly be challenged by developers, neighboring landholders, and the owners of the burdened estates themselves. Courts will be forced to decide whether to respect the specific language of the grants and reservations, and thus inevitably diminish the free alienability of land toward its most valuable use, or strike the easement as inconsistent with underlying policies advocating the free alienability of property.⁴⁴

However, the language in the New York and California codes gives a third option.⁴⁵ So long as changes remain consistent with the “policy and purpose” of broad land conservation, some minimal modifications may be acceptable to accommodate competing interests.⁴⁶ New York courts have interpreted CEs with just such a middle ground approach by following the perceived intent of the parties.⁴⁷ Changes to the burdened estate that have a *de minimis* impact on the CE will be allowed to accommodate reasonable use and neighborhood harmony. Courts faced with state codes without such interpretative guidance are more likely to either support the specific language of the restriction or, alternatively, to find a way to hold the grant unenforceable.⁴⁸

Courts have recently shown an increasing willingness to allow for unilateral modification and termination of CEs.⁴⁹ Courts have essentially stamped private amendments of CEs with their approval by refusing to find standing for third parties to intervene in CE amendment or enforcement actions.⁵⁰ Instead, the courts have accepted the assertions of local planning boards that an amendment was made in good faith⁵¹ and have refused to issue temporary restraining orders in the face of an imminent amendment to the CE without the donor’s consent.⁵²

The case *Fox Chapel v. Walters* provides an especially telling example of the Arizona District Court’s unwillingness to intervene in private amendment of CEs to protect private interests.⁵³ Fox Chapel, owner of the parcel of property at issue, donated a CE to Verde Valley Land Preservation Institute (VVLPI) in 2004. In 2005, VVLPI entered into negotiations with Donald and Marci Walters, neighboring property owners, to amend the CE so as to be consistent with an easement over the property that the Walters had owned since 1966. Fox Chapel asked the court to issue a temporary restraining order prior to allowing VVLPI to modify the CE without first getting input from Fox Chapel. Fox Chapel wanted to ensure that the conservation purposes for which they donated the CE were properly taken into account prior to any amendment. Since Fox Chapel had donated the CE, they felt that they had some right to be a part of any amendment discussions and

the responsibility to speak up against the unfettered amendment of the CE in contravention of its purpose.

The district court refused to issue the temporary restraining order because the “[p]laintiff failed to state specifically how wildlife has been disturbed, what type of harm has occurred, or how this disruption is irreparable” and thus did not “demonstrate the possibility of irreparable harm.”⁵⁴ The court essentially demanded that a more specific scientific study be completed to demonstrate the specific harms that would be expected if the CE were modified. Such a study would be nearly impossible to complete without first knowing the new terms of the amended CE, but the amendment had not yet been completed. Fox Chapel had requested a temporary restraining order to make sure they were involved in the amendment discussions. For the court to demand that specific information about potential harm be provided in a complaint for a temporary restraining order essentially creates an insurmountable burden to the granting of such an order.

The court essentially created a judicial hurdle that Fox Chapel has no chance of clearing. Such a precedent will give courts a way to exclude interested parties—even owners of the underlying property itself—from any involvement in amendments to the CEs that burden their own property or other lands that they have a particular interest in seeing protected. Thus, property owners who donate CEs would need to make sure they included language in the CE granting them a right to be at the negotiating table if they hope to retain some right to be consulted prior to amendments that may affect their property.

The Arizona decision does not bode well for third parties and property owners who hope to ensure CEs are enforced properly to uphold the intended conservation values. However, other district courts have shown different leanings.⁵⁵ In *Friends of the Shawangunks, Inc. v. Clark*, the New York District Court noted that since the particular CE at issue was acquired with federal funding, an amendment that would potentially make the resulting

easement ineligible for such funding requires approval by the Secretary of the Interior.⁵⁶ Thus, courts may place more weight on the protection of the conservation values of CEs when a third party provided funding for the acquisition of the easement on the understanding that the easement's terms would remain in line with the statutory basis for the funding.⁵⁷

In the absence of specific language regarding amendment procedures, courts tend to avoid being involved in CE amendment disputes. Without such guidance, courts will remain aloof and CEs will be vulnerable to unchecked modifications irrespective of the conservation values they were created to protect.

The applicability of traditional easement principles

General easement law also applies to conservation easements.⁵⁸ Owners of servient estates that have conveyed a conservation easement retain all rights in their estate not specifically granted. The grantor can even “grant additional easements in the same strip of land, provided such action does not impair the interests of the first easement holder.”⁵⁹ This understanding is in line with the concept of intent-based interpretation. Servient owners retain broad leeway to use their lands and even convey additional interests in burdened parcels so long as they do not interfere with the underlying conservation interests. A 2005 treatise, *The Law of Easements and Licenses in Land*, summarizes recent case law:

[A] [New York appellate court] construed easement language to permit a grant by the servient owner of access over the restricted property on grounds such *de minimis* use does not interfere with conservation interests. Similarly, a Connecticut appellate court ruled that the terms of a conservation easement permitted construction of a second single-family home on the servient estate ... [and a] Massachusetts appellate court has determined that the right of servient owners to “pass and repass” across a marshland subject to a conservation restriction encompassed the right to make reasonable improvements.⁶⁰

The crux of the issue is thus a consideration of whether or not a proposed use would unreasonably interfere with the rights of the CE holders. If the challenging party can prove (ecologically, hydrologically, legally, or otherwise) that, for example, the erection of a second home on a CE-burdened parcel is not an unreasonable interference with the CE, then they appear to have reasonable grounds for such an amendment. The central feature of CEs is generally the restriction of building and development on a particular parcel. For a court to allow an extra house to be built seems to fly in the face of such intent. However, it also signals the sort of flexible interpretation some have feared would be absent.

This sort of interpretation will likely alarm CE holders. If courts can unilaterally alter the terms of CEs, what is to stop them from chipping away at easements until the CEs have no effect at all? A servient owner is not usually required to obtain consent from prior easement holders to grant additional easements over the burdened property.⁶¹ Some CEs specifically require consultation on certain matters, but there does not appear to be a general legal requirement in this area.⁶² However, CE holders have an opportunity to proactively avoid an eventual disintegration of CEs by retaining close relationships with servient estate holders.

Broad interpretations of underlying intent

As described above, the presumed inflexibility of CEs is mitigated by statutory language in many states. Even in states without such provisions, reasonable judicial interpretations in line with the parties' intent and integrated land use policies seem more likely than either strict enforcement of outdated provisions or outright cancellation of the easements. Where perpetual easement language is incompatible with the perceived "highest and best use" of neighboring properties, it will be in everyone's best interest to interpret in line with the ever-evolving conceptions of conservation. Easement holders—generally governments and land trusts—ideally have an interest first and foremost in promoting the actual protection of the land and its resources.⁶³

As scientific knowledge increases, as it no doubt will, some of the provisions within CEs may become insufficient and potentially detrimental to land preservation values. Mahoney has raised this concern: “The ability of many conservation servitudes to adapt to scientific advances is in serious doubt because of the danger that their fundamental purposes, such as ensuring that a particular parcel of land remains in agricultural use, will turn out to be misguided.”⁶⁴ However, it seems unlikely that organizations whose express purpose is the protection of land would turn a blind eye to such changing scientific knowledge.

The blunt enforcement of many specific provisions contained in a CE in the face of clear evidence that such mechanisms are no longer effective would be worthless for a land trust or state holder. Courts have shown a willingness to interpret easements broadly in favor of their underlying intent. It is likely that easement holders will be equally willing to modify their easements when confronted with new scientific understandings.

The applicability of charitable trust principles

While CEs can hypothetically be modified in the same way as any other easement, CEs also act as a sort of public trust.⁶⁵ Thus, “[T]he donation of a perpetual conservation easement to a municipality or land trust ... creates a charitable trust relationship.”⁶⁶ Even though CEs generally do not expressly create a trust relationship, nor does the creation of a trust require the inclusion of any specific wording. Austin Wakeman Scott and William Franklin Fratcher, in *The Law of Trusts*, provide:

An express trust is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create it and subjecting the person in whom title is vested to equitable duties to deal with it for the benefit of others.⁶⁷

The commissioners' comment to section three of the UCEA confirms this. It provides that CEs may be modified or terminated "in the same manner as other easements" but that CE holders *may* be prohibited from agreeing to terminate or modify an easement in contravention of its purpose without first obtaining court approval in a *cy pres* proceeding.⁶⁸ This comment does not decree that all amendments be made only by way of a *cy pres* proceeding.⁶⁹ Permissive language is used to suggest, instead, that the public trust must be considered when terminating an easement or modifying it in contravention of its purpose.

The public interest must in some way be taken into account, but the use of a *cy pres* proceeding is just one suggestion to that end. The public interest can be protected in other ways, as well. In some circumstances a full judicial *cy pres* proceeding might be appropriate, especially for older CEs without a specific amendment procedure and where there is a serious question as to changed circumstances. However, non-judicial amendment will also be appropriate when the public interest is taken into account with a transparent amendment procedure allowing for disinterested third-party review.

The charitable trust doctrine has also been used to exclude the public, and thus defeat the attempts of third parties to enforce the terms of CEs. The Supreme Court of Wyoming recently invoked charitable trust doctrine to limit the standing of third parties who challenged the termination of a conservation easement.⁷⁰ Charitable trust doctrine limits the standing to enforce such a trust to qualified beneficiaries having a special interest.⁷¹ Such a doctrine makes sense in the context of traditional charitable trusts where any number of a large and shifting class of potential beneficiaries could otherwise bring suit. However, the concept of a "potential or qualified beneficiary" does not exist in the context of CEs.

The Uniform Trust Code defines a "qualified beneficiary" as "a beneficiary who is currently entitled to distribution of income or principle from the trust or has a vested remainder interest in

the residuary of the trust which is not subject to divestment.”⁷² Such a definition would exclude all interested third parties from enforcing the terms of a CE. While the underlying view of a CE as a charitable trust subject to the public interest is sound, to apply this facet of trust law to CEs would gut the third-party enforcement provisions of the UCEA⁷³ and would severely limit the accountability of CE holders.

It is not yet completely clear how and if courts will choose to intervene in questions surrounding CE amendment. However, so long as the underlying conservation values are taken into consideration, there do not appear to be any distinct legal impediments to such amendment. The next chapter will discuss proactive considerations of CE flexibility to insure their long-term viability, from questions of judicial interpretation and enforcement to drafting, an area more fully under the control of the parties to the CE contract.

4

PROACTIVE DRAFTING

To avoid later misinterpretations and challenges, such as those described earlier, flexible and specific amendment procedures should be incorporated into CEs when they are drafted. Many of the earliest CEs did not include any provisions regarding amendment.⁷⁴ While amendment provisions are today more commonly included, many are insufficiently specific to handle the many and varied issues that face both the holders of CEs and the owners of property burdened by CEs.⁷⁵

Well-drafted CEs contain mechanisms to handle various forms of amendment with transparency and, where appropriate, with the proper third-party input to ensure the public interest in the conservation purpose is protected. The Nature Conservancy (TNC), for example, includes in its CE template a provision allowing amendment if the amendment is approved by both the grantor and TNC so long as certain conditions are met—first and foremost that the amendment is consistent with the underlying purposes⁷⁶ of the easement.⁷⁷

One of the greatest benefits to the use of CEs is that they can be specifically adapted to each particular parcel and drafted to reflect that parcel's unique conservation values. A parcel containing a river in an arid region might have conservation values based upon its riparian corridor and dependant bird communities. A parcel in a densely forested zone might have conservation values based upon its old-growth forest and abundance of rare flowers. While the erection of a new building on a parcel may be difficult to

justify under the TNC template, even by mutual consent, smaller management and policy changes that will protect the conservation values of the property should be relatively simple to justify.

Hierarchy of values

Clearly, certain provisions of CEs will likely be more difficult than others to modify. While CEs can be fitted specifically to individual parcels containing different conservation values, some more fundamental values tend to appear in common at the heart of most CEs. Below these fundamental values lie slightly less important provisions common to the state, county, or eco-region where the parcel is located. One step below these lie provisions that would likely be more susceptible to future change should the right conditions arise and the right procedures be followed.

This conceptual hierarchy of conservation values is analogous to the various levels of law (see Table 1). At the top stand constitutional-style laws. Such laws are seen as fundamental and require full legislative amendment procedures to be changed. Next in line are statutory-style laws. These laws can be changed when necessary, but also require relatively transparent, drawn-out procedures to do so. Below statutes are regulations. Regulations are more specific and relatively fluid administrative interpretations of laws. Below regulations are guidelines that are constantly changing to reflect the on-the-ground realities of laws and policies as applied.

CE provisions are similar in many ways to this structure and will benefit from being drafted to reflect these similarities. The “constitutional” provisions are the most fundamental. Such provisions are likely to be the overarching conservation values to which courts have shown deference in the past.⁷⁸ Such values will likely be similar for CEs across the board. However, different qualified holder organizations have different core values that will be central to their interests in holding and enforcing CEs. Some organizations strive to “preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.”⁷⁹ In contrast, some land trusts are interested only in protecting lands to limit

Table 1: Guidance for drafting CE amendment provisions based upon a hierarchy of conservation values (similar to the amendment process for different levels of law)

Level	Levels of law	A similar hierarchy of CE conservation values
1	<p>Constitution-style laws—fundamental <i>Amendment:</i> Requires full legislative amendment in order to change.</p>	<p>Fundamental values <i>Amendment:</i> Draft provisions so that fundamental values are very difficult to amend. <i>Examples of fundamental values:</i> Preservation of biodiversity, open space, water quality</p>
2	<p>Statutory-style laws <i>Amendment:</i> Can be changed when necessary, but under transparent, drawn-out public procedure.</p>	<p>Provisions related to regional context/jurisdiction <i>Amendment:</i> Draft so that these provisions are also relatively difficult to amend, but can be changed with transparent, public procedure. <i>Examples of regional values:</i> Wildlife corridors, state conservation programs</p>
3	<p>Regulations and guidelines—more specific and responsive <i>Amendment:</i> Regulations relatively more fluid and amenable to change; guidelines constantly change to reflect new realities (legal, policy, scientific).</p>	<p>Parcel-specific provisions <i>Amendment:</i> Some modification may be necessary for successful active management in the future. Incorporate less formal amendment procedures into the parcel-specific CE provisions themselves. <i>Examples of parcel-specific values:</i> Preserving wetland and forest areas within parcel, particular parcel use restrictions</p>

development in favor of open lands, but with little or no focus on the plants and animals living thereon.⁸⁰ These fundamental values embodied in mission statements and definitions of CE “conservation values” should be written so as to be extremely difficult to amend, just as the U.S. Constitution is difficult to formally amend. “Statutory” style provisions are those common to a preserve, ecosystem, riparian zone or other region that are necessary for unified management of the area. The more parcel-specific provisions are analogous to regulations and guidelines. As such, modification of these lower tier provisions may well be necessary for successful active management of CEs in the future.

In order to give each “level of law” a distinct value, amendment procedures should be included in the CE itself. Just as constitutional amendments require significant review and ratification, amendment of their CE counterparts should require intensive review procedures. In much the same way, lower value provisions should require incrementally less formal procedures for amendment. Specific suggestions for such formal review procedures will be discussed in Chapter 5.

Templates as guides for amendment provisions

Many conservation organizations and governmental units now produce CE templates for general use. Most define conservation values broadly and then specifically apply them to the unique values of the property. While not all of these templates contain provisions to allow for amendment by mutual consent, many contain language that would mitigate against their inflexible imposition on lands in the face of contrary prevailing knowledge in the future.

The Wisconsin Department of Natural Resources CE template, for example, includes various mechanisms that will allow for intent-based construction of its provisions.⁸¹ Consistent with general easement law, the servient estate-holder “retains all rights associated with the ownership of the Property, including the right to use the Property and invite others to use the Property in any manner that is not expressly restricted or prohibited by the Easement or inconsistent with the purpose of the Easement.”⁸²

The Georgia Department of Natural Resources CE template requires the easement language to be liberally construed in favor of the grantee and the “policy and purpose of the Uniform Conservation Easement Act.”⁸³ Ambiguities should be resolved in favor of the purpose of the UCEA.⁸⁴

The Wisconsin CE template contains a broader amendment provision than does the TNC template. Amendments will be allowed if the CE holder agrees that such amendment will not (1) diminish the conservation values of the property; (2) be inconsistent with the purposes of the CE; (3) change the perpetual duration of the CE; (4) make the CE unenforceable under applicable state law; or (5) make the CE unenforceable under applicable federal law.⁸⁵ Unlike the TNC CE template, there exists no specific provision to exempt future development of the land in some way from the possibility of amendment. Since future scientific and cultural understandings may allow for, and potentially encourage, some form of development on burdened lands, the Wisconsin CE template would allow for even this sort of amendment if it is determined by the holder to be consistent with the purpose of protection of the conservation values of the land.

Allowing for intent-based interpretation

Many of the various model CE templates contain phrases that will essentially allow for broader, intent-based interpretations in the future. The Pennsylvania CE template contains a provision reserved for specifically defining how the particular property will benefit the general public as open land.⁸⁶ By specifying not just the ecological and environmental value of the specific parcel, but also the perceived public benefit of the protection of the parcel, future courts likely will feel more comfortable interpreting easements reasonably so long as the easements continue to provide the defined public benefit.

This public benefits provision seems to echo other provisions that might be read to encourage the future flexibility of the CE in Pennsylvania. Within the section titled “Resource Protection Objectives,” the Pennsylvania CE template contains language discussing the various ecological protection values of the property, such as water resources, forest and woodland resources, wildlife resources, scenic resources, and sustainable land uses.⁸⁷ Following this exhaustive list, the template contains as a stated objective, “Compatible Land Use and Development.”⁸⁸ This provision specifically establishes the intention to allow some compatible development of sections of the property burdened by the CE.

On the one hand, this evidences the intention to allow some reasonable changes to the property so long as they are compatible with the other objectives and, potentially, in line with the perceived public benefit as defined by statute. On the other hand, the wording here could lead to arguments that only the “certain areas” mentioned can be modified and the others must follow the CE restrictions to the letter.⁸⁹

Significantly, however, the CE contains a subsequent section on goals.⁹⁰ Pennsylvania has inserted a mechanism—akin to the levels of law analogy—to further delineate the various values of each burdened parcel into three separate protection categories. In so doing, the holder can retain control over “core” areas and values while allowing reasonable modification and development:

(B) GOALS

Highest Protection Area. This Conservation Easement seeks to protect natural resources within the Highest Protection Area so as to keep them in an undisturbed state except as required to promote and maintain a diverse community of predominantly Native Species.

Standard Protection Area. This Conservation Easement seeks to promote good stewardship of the Standard Protection Area so that its soil

and other natural resources will always be able to support Sustainable Agriculture or Sustainable Forestry.

Minimal Protection Area. This Conservation Easement seeks to promote compatible land use and development within the Minimal Protection Area so that it will be available for a wide variety of activities, uses and Additional Improvements subject to the minimal constraints necessary to achieve Conservation Objectives outside the Minimal Protection Area.⁹¹

This language mitigates against an interpretation that would allow modifications only to the “Minimal Protection Area.” Since the goals for all of the “Protection Areas” are worded in broad policy terms, including leeway for potential future changes in policy and science, all of the “Protection Areas” can potentially be modified and amended. Even in the “Highest Protection Area,” retaining these sections in “an undisturbed state” is preferable but in no way required where contrary use, management or development would be “required to promote and maintain a diverse community of predominantly Native Species.”⁹²

Such broad interpretations in line with the general policy of the CE are encouraged throughout the language of the template.⁹³ This sort of drafting is admirable, but its lack of specific modification procedures to differentiate between the various areas may make them relatively weak in application. Ideally, such language should in the future be paired with a standardized amendment process that includes different standards of review for the different protection levels.

Protecting the public interest

If CE drafters desire equitable trust principles to control the amendment procedure then they should incorporate such language into the easement document itself. The equitable doctrine of *cy pres* is invoked where the purposes of a trust have become “impossible or impracticable.”⁹⁴ Judicial scrutiny of certain provisions in an

easement may be preferable in some circumstances. Easement drafters may desire that the CE be amended relatively freely in the case of minor changes to the easement's terms. Such amendment can be accomplished simply by agreement between the grantee and grantor⁹⁵ or by agreement followed by third-party approval.⁹⁶

For amendments that may affect the underlying conservation purposes of the CE, third-party approval requirements could serve a variety of purposes. Third-party review could be used to ensure that a CE acquired for a particular purpose or with funds granted under a particular statute continues to adhere to the requirements of its underlying funding.⁹⁷ Programs such as the Farm and Ranch Lands Protection Program⁹⁸ and the Land and Water Conservation Fund Act⁹⁹ grant funds for the acquisition of CEs that meet the specifications of their particular programs. In such cases, review by the agency or department in charge of the program could be a prerequisite to any amendment. Also, objective third-party review could be required to add a layer of transparency to the CE amendment procedure. In such a situation, a university panel or neighborhood association could be given the third-party review responsibilities.

Certain amendments might only be appropriate if the easement itself has become inadequate to protect the land it was created to protect. Such a situation is most suited for the use of a judicial *cy pres* proceeding. A change in the property, such as by flood or fire, or a change in the general state of environmental science may make amendment of the easement appropriate to ensure continued protection of the property's values.¹⁰⁰ A *cy pres* proceeding would ideally still allow for amendment where appropriate. The question before the court would generally only be whether or not changed circumstances have made the easement inadequate and whether the proposed amendment would best follow the original intent of the drafters.¹⁰¹

Certain changes might never be appropriate. A well-drafted CE will lay these out with specificity. For example, the heart of many CEs is the protection of open space. As such, many CEs' highest

purpose is to restrict or completely prohibit the development of a parcel of property. Thus, amendments that would allow for subdivision or development should be specifically forbidden.¹⁰²

Inclusion of broad interpretative guidelines

Instead of specific amendment procedures, the Pennsylvania CE template deals with amendment rights in a broad policy that seems most likely to allow reasonable interpretation while also allowing the holder to have a final say in the determination of what constitutes “reasonableness” under the terms of the easement.¹⁰³ Specifically:

5.03 Other Rights of Holder. The grant to Holder under this Article also permits Holder, without any obligation to do so, to exercise the following rights:

Amendment. To enter into an Amendment with Owners if Holder determines that the Amendment is consistent with and in furtherance of the Conservation Objectives; will not result in any private benefit prohibited under the Code; and otherwise conforms to Holder’s policy with respect to Amendments.¹⁰⁴

CE templates frequently contain ill-defined interpretation guidelines. Some are extremely broad,¹⁰⁵ while others are more specific but will likely lack teeth in practice.¹⁰⁶ Such a broad statement of interpretative policy, coupled with the early evidence that courts will in fact be willing to interpret broadly and reasonably, cuts against many of the concerns regarding potential inflexibility of CEs in the future. However, this lack of specificity may also allow for extended judicial battles between the holders of the CE and the servient estate. Completely internal decisions as to the reasonableness of an amendment may also appear to some as inappropriate deal-making behind closed doors. A standard procedure would alleviate some of these concerns and allow for more transparency in the proceedings.

5

INCORPORATING FLEXIBILITY INTO CONSERVATION EASEMENTS

Addressing potential external impediments

A CE is essentially a contract between a regulating organization and a landholder. Such a system has the potential to act as a localized management regime more capable of coping with and acting in line with community norms than a state-wide or national management scheme.

CE contracts are subject to certain outside controls such as charitable tax deduction provisions¹⁰⁷ and statutes that provide funding for the acquisition of CEs.¹⁰⁸ In the form of tax deduction provisions, the tax code does not usually act as a vocal force against change. Rather, the code merely acts as a check on misuse. A charitable tax deduction is permitted for qualified conservation contributions of property.¹⁰⁹ As discussed previously, this charitable deduction is permitted so long as the property is maintained in perpetuity and remains faithful to its conservation purposes.¹¹⁰

While some maintain that modification of CEs will cause them to run afoul of the valuable tax exemption that motivates so many landowners to agree to them, there is simply no evidence to suggest that will be the case. On the contrary, so long as the conservation purpose¹¹¹ is protected in perpetuity, the deduction should be granted.¹¹² In fact, as has been mentioned earlier, modification may be permissible, or even necessary, in order for an old, ineffective easement to continue to protect its conservation purposes. Without such a modification, the stagnant easement

could itself run afoul of the tax provision for failing to protect its conservation purpose—or at least failing to protect that purpose in the most efficient or responsible way.

The language of the relevant tax regulations does not raise obvious concerns over the loss of a tax exemption based upon future amendment in line with the conservation purpose. However, the Internal Revenue Service (IRS) may send a different message to designated CE holder organizations.¹¹³ The central concern of the IRS appears to be the potential abuse of the charitable tax deduction. In addition, amendments may create confusing valuation issues upon change and seem to undermine the perpetual values for which the deductions are being granted. If a servient estate holder modifies and increases the resale value of his property, then he appears to have gained a windfall. If a subsequent owner modifies a CE, the perceived charitable value of the CE previously granted seems to have been reduced. Such issues raise concerns of potential misuse of the charitable contribution deduction.

Such a scenario certainly makes it more difficult for land trusts and government holders to enter into the business of amending CEs at all. However, short of requiring a new (and often expensive) appraisal of each amended easement prior to IRS acceptance, as described below, designated holders may be able to integrate internal and external consultation processes that could minimize the concerns of interested third parties.

A hybrid model: Integrated review and consultation

In the coming years, CEs will have to be able to cope with changes in science, environmental conditions, and new understandings of and attitudes toward the natural world. CEs may not be as legally inflexible as Mahoney intimates. However, underlying her concerns seems to be a general distrust of qualified holder organizations. A standardized consultation and review process (see Table 2) could put to rest both Mahoney's and the IRS's concerns.

Table 2: Elements of a hybrid consultation and review process

Elements
<ul style="list-style-type: none">• Proactive drafting• Internal scientific review• Third-party review by CE review board• Local review by neighborhood groups or public university

Proactive drafting

If land trusts and governments hope CEs will remain a viable conservation planning tool, then they will benefit from the creation of a standard review process. Such a process could mimic reporting and comment procedures already required for agency action and zoning changes. Proactive CE holder organizations could introduce such policies now. These policies would anticipate potential scientific or environmental changes which would necessitate CE modification. First and foremost, new CEs should be drafted to incorporate a hierarchy of specific amendment procedures, as elaborated in Chapter 4, based upon the severity of the amendment. Some of the most basic amendments that would not affect the overall conservation values of the easement should generally be allowed in much the same way as any other contract modification—by agreement of the property owner and the CE holder. More severe amendments should be subject to a public comment period and a disinterested third-party review.

Internal scientific review

An internal review would be the likely precursor to any CE amendment regardless of the presence of a standardized review process. The standardization here would instead force holders to be more thorough. A significantly less formal National Environmental Policy Act (NEPA)-style review procedure would graft very well onto the CE amendment procedure.¹¹⁴

NEPA requires that an environmental impact statement (EIS) be prepared for major federal actions that have the potential to significantly affect the quality of the environment.¹¹⁵ While a full EIS for every amendment would likely result in complete inflexibility, a simplified, scientific study meant to consider all the impacts of the amendment on the property would be appropriate. Presumably, most responsible CE holders would refuse to allow an amendment without first considering the specific scientific impacts of such a change. Thus, for most, these comprehensive internal findings would be formalized and should subsequently be made publicly available.

In line with the policy underlying NEPA, parties should have a duty to make such amendments in the least harmful way and would have to seriously consider all alternatives to the proposed amendment—including, potentially, not allowing the amendment at all.¹¹⁶ Not only would this provide more transparency to the process, it would likely have the added effect of further discouraging inappropriate modifications. Even this relatively minimal review-and-report process would require significant time and money to complete. This would act as a secondary economic disincentive to the overuse of CE amendment provisions, except in truly appropriate circumstances, to most cash-conscious qualified holder organizations. Thus CEs likely would retain their perpetual character and be amended only when truly necessary.

Third-party review

Once an internal review has been completed and made publicly available, there should be a procedure for mandatory third-party reviews. Assuming the holder of the CE agrees to allow the amendment, a CE amendment board could be assembled from local scientists and policymakers to consider the appropriateness of the plan. Such a board would alleviate concerns of internal deal-making between the CE holder and the holder of the burdened estate. The CE amendment board would consider proposals in much the same way localities consider proposed zoning amendments and exemptions. Local review procedures for zoning

changes would be particularly appropriate for this.¹¹⁷ Traditionally, there are three general ways to procure a zoning change: variances, exceptions, and rezonings or map amendments.¹¹⁸

There are two types of variances: “nonuse variances” and “use variances.” A “nonuse variance” standard applies when the new land use would be broadly consistent with the zone but would require only a minor relaxation of applicable rules rather than a wholesale exemption from these rules. To be granted such a variance, the landowner must show practical difficulties with the current land scheme as they apply. The “use variance” standard applies when the zoning as amended would allow a use that is completely inconsistent or prohibited. Such a variance requires a higher standard of review—the landowner must prove the current scheme poses an unnecessary hardship. When considering what constitutes an “unnecessary hardship,” courts look to whether the property under the current scheme will promise no reasonable financial return or whether this particular landowner’s plight is due to a uniquely unreasonable application of the zoning guidelines. If one of these two factors is met, a use variance will still only be granted if the amendment will not change the essential character of the property.

These two forms of variances could apply to CEs in line with the hierarchy of conservation values outlined in the preceding chapter. Amendments to the less critical conservation values (regulations and guidelines) would require only the lower nonuse variance standard. When smaller changes in the management or details of a CE need amendment to keep up with science or allow the reasonable use of the parcel, the landholder would have to make a showing of something akin to “practical difficulties.” Amendment of more central (statutory-style) provisions of the CE would have to stand up to the more stringent use variance—“unnecessary hardship”—standard.

The factors considered in determining what constitutes an “unnecessary hardship” would have to be modified somewhat from

those used in traditional zoning reviews. The first two factors—no reasonable financial return or unreasonable application of zoning guidelines—would lose their sway considerably. The third factor, whether the amendment will change the essential character of the conservation values (rather than the zoning values), would be paramount.¹¹⁹ This factor could be assessed, in line with the hierarchy of conservation values, based on whether the proposed amendment is in line with the fundamental or core conservation value. If the amendment passed this hurdle, a fact-based scientific inquiry would substitute for the first and second factors.

Local review

Upon review and prior to final approval by the CE amendment board, potentially affected parties should be given the opportunity for public comment. Neighborhood groups, government bodies, and non-governmental organizations could thus play an important role in the allowance of CE amendments. So long as these interested third parties have sufficient standards of review, a neighborhood consent requirement should be included as a condition of the acceptance of the amendment plan. Such requirements have been found to be valid¹²⁰ so long as they are not found to delegate too much unrestrained legislative authority to private citizens.¹²¹ As this would not amount to an outright veto power, neighbors can always try to negotiate for the purchase of the burdened property if they are unhappy with the proposed change (and can find the necessary financing, of course). As an added backstop, a secondary disinterested third party should also review the proposed change based on its scientific or policy merits. A local university would be particularly appropriate for this purpose.

A procedure such as the one proposed here would have the effect of adding transparency to the process of CE modification. If local citizens and the IRS were provided with more complete information, these novel land management tools would seem less bizarre, and their tax advantages would appear more fair when open to greater public scrutiny. The added cost this review

would impose on holder organizations would also act as a further disincentive to abuse by overuse of the amendment procedure.

In sum, I suggest a hybrid model for amendment of conservation easements with four elements to be incorporated into CE contracts and oversight: proactive drafting, an internal scientific review of the proposed amendment, a third-party review by a CE review board, and a local review by neighborhood groups or a public university.

6

CONCLUSION

Conservation easements have been both widely praised and criticized since their use was first formally allowed in the early 1980s.¹²² The use of CEs has allowed land trusts and local governments to protect lands they would otherwise not have the funds to purchase outright.¹²³ CEs can be tailored specifically to each parcel to allow for personal local controls over the important conservation values of a property while still allowing it to remain marketable. However, the more recent criticisms cannot be completely ignored.¹²⁴ CEs are meant to be perpetual and thus somewhat inflexible. These inflexibilities might thus make CEs unable to evolve in line with changing scientific, cultural, and economic realities were it not for the proactive measures available to CE holders described here.

While concerns about the inflexibility of CEs may be overblown, there exists, of course, the *potential* for some future inflexibility. However, all regulatory regimes are afflicted with this same problem. It takes significant time, money, and coordination for a government regulator to establish a regulation, be it for water quality or prescription-drug safety standards. While there may not be specific contract provisions maintaining the status quo, regulations, once established, tend to succumb to their own inertia. It may be easier for government bodies to continue to enforce their regulations rather than to constantly check and recheck their continuing viability. When the science behind a regulation is challenged, government regulators have much less incentive to begin the involved process of changing that regulation than to insist on continued compliance. The industries subject

Conclusion

to a regulation will also be averse to change as they have likely made significant investments in order to conform to the current regulatory scheme.¹²⁵

Thus, Mahoney has created a false dichotomy in distinguishing CEs from traditional state regulatory schemes on the basis of inflexibility. The success of traditional top-down regulations is largely determined by the willingness of government regulators to enforce statutes and policies or to amend them when appropriate or necessary. Courts will generally defer to the political branches of government where they act within a reasonable interpretation of a statutory duty.¹²⁶

The concerns about CEs may seem well founded, but there exist various mechanisms to mitigate against such a stagnant future. First, courts have shown their willingness to interpret CEs and other perpetual restrictions reasonably to allow for the realities of the day so long as they do not run afoul of their central conservation purpose. Second, forward-thinking drafting can go a long way toward avoiding potential roadblocks in interpretation and provide a clear method for amendment. The creation of a hierarchy of conservation values specifically delineated in the easement, along with specific amendment policies for each, will allow CE holders to accommodate reasonable amendments without surrendering interpretative controls to the courts. Finally, the creation of a standardized amendment and review procedure will also allow for this inevitable process to go on with more transparency. If such a procedure is integrated, it may help to alleviate any appearance of impropriety.

Disputes over CEs will most certainly arise more frequently in the coming years as new owners, far removed from the original easement contracting party, take control of the burdened parcels. So long as the holders of CEs are prepared to address potential changes and willing to be relatively flexible themselves, the CE management regime should be able to cope with change without sacrificing its fundamental values.

ENDNOTES

¹ See Land Trust Alliance, *National Land Trust Census*, <http://www.lta.org/aboutlta/census/shtml> (Accessed November 14, 2007). The number of acres protected by conservation easements held by nonprofit conservation organizations increased from 450,000 in 1990 to 37 million acres in 2005.

² See Restatement of Property-Servitudes 3d §1.6 (2000); The Nature Conservancy (TNC), *How We Work: Conservation Methods*, <http://www.nature.org/aboutus/howwework/conservationmethods/privatelands/conservationeasements/> (Accessed November 13, 2007).

³ Michael L. Rosenzweig, *Win-Win Ecology: How the Earth's Species Can Survive in the Midst of Human Enterprise* (Oxford Press 2003).

⁴ Richard Brewer, *Conservancy: The Land Trust Movement in America* (University Press of New England 2003). A study of 315 CEs by the Bay Area Open Space Council found that 49 percent of them were not being monitored—25 percent of those held by nonprofits were not monitored and 70 percent held by government organizations were not monitored.

⁵ *Id.* at 164.

⁶ Staff of Sen. Fin. Comm. Rpt. 109th Cong., *Finance Committee Report on The Nature Conservancy* (June 8, 2005). Following a series of *Washington Post* articles in May 2003, the Senate Finance Committee investigated TNC for possible violations of the law regarding charitable giving—especially in conjunction with the tax benefits from the donation of conservation easements. Though TNC was officially cleared of wrongdoing and subsequently tightened its internal review of potential conflicts of interest, the *Washington Post* articles and subsequent report have nonetheless caused some to question the integrity of some land trusts and CE donations.

⁷ See, e.g., Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 *Land & Water L. Rev.* 89, 106 (1997); John B. Wright, Reflections on Patterns and Prospects of Conservation Easement Use, *Protecting the Land: Conservation Easements Past, Present, and Future* (Julie Ann Gustanski and Roderick H Squires eds., 2000) at 498 (“The fundamental strength of conservation easements is their flexibility”); 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, 1078, 1085-91 (1996) (Expressing support for conservation easements and offering constructive suggestions to ensure the continuation of the “magic” of

privately negotiated perpetual conservation restrictions).

⁸ 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, 441-47, 457-67 (1984).

⁹ See, e.g., Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739, 758 (2002) (Discussing the danger of locking lands into perpetual restrictions based upon incomplete scientific knowledge and today's cultural values that may easily change over time).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*, at 744-746.

¹³ See Janet Diehl and Thomas S. Barrett eds., *The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs*, 205-206 (1988) (Remarking in 1988 that “[u]ntil quite recently, most conservation easements have been silent regarding amendment. It is unrealistic to think, however, that the need to amend will never arise. Because easements are perpetual, there are bound to be changed circumstances over time that require amendment—at least in a substantial number of cases—and many consider it prudent to set the ground rules ahead of time”).

¹⁴ See *Redwood Construction Corp. v. Doornbosh*, 248 A.D.2d 698, 699 (N.Y.A.D. 1998) (Allowing conveyance of an access easement crossing land burdened by CE because CE “prohibited only those changes in use of the property as ‘would be detrimental to any significant open space interest, significant natural habitat interest or other significant conservation interest sought to be protected by this Conservation Easement.’” Access easement found to be de minimis infringement). See also, *AJC Associates L.P. v. Town of Perinton*, 791 N.Y.S.2d 867 (N.Y. Supp. 2004) (unreported) (Where two easements over same property would contradict each other, interpret to allow reasonable change to the CE to accommodate compatibility).

¹⁵ Elinor Ostrom, *Coping with Tragedies of the Commons*, Annu. Rev. Polit. Sci. 493, 497 (1999).

¹⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

¹⁷ 42 U.S.C. §7401 et seq. (2006).

¹⁸ 33 U.S.C. §1251 et seq. (1972).

¹⁹ 16 U.S.C. §1531 et seq. (1988).

²⁰ See, e.g., Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 308 (1999) (The Clean Air Act has been subject to “telling criticism” for its failure to balance costs and benefits); William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537 (2004) (Discussing that while the CWA has generally been successful, there remain in it many regulatory flaws); Shannon Petersen, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 *Envtl. L.* 463 (1999) (Discussing the Endangered Species Act’s failures in protecting smaller, less well-known species).

²¹ William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 Iowa L. Rev. 1, 5 (2003).

²² *Id.*

²³ Edward E. Chase, *Property Law: Cases, Materials, and Questions*, 775 (2002) (“At common law, the category of negative easements was limited to the following four: easements for light, air, flow from a stream, and support for buildings”). English common law, the law in England and the American colonies prior to the American revolution, forms the basis of the American legal system.

²⁴ *Id.*

²⁵ National Conference of Commissioners of Uniform State Laws, *Uniform Conservation Easement Act* (UCEA) (1981).

²⁶ Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin’s Great River Road: A Progress Report on Perpetuity*, 66 J. Am. Plan. Ass’n 177, 178 (Spring 2000). The National Park Service purchased conservation easements to protect scenic views along various highways prior to enactment of UCEA.

²⁷ *Supra* note 25 UCEA at Commissioners’ Prefatory Note (An *in gross* easement is one “that can be enjoyed without regard to the beneficiary’s ownership or occupancy of any other interest in land,” Restatement (Third) of Servitudes §2.6 cmt. c, at 62, 1989). In other words, traditional easements must benefit another parcel of land—such as an easement for a driveway that will benefit the neighboring parcel and anyone who uses the driveway to reach the benefitted property. In contrast, an *in gross* easement is one that does not benefit any particular parcel of land, but instead only benefits a third party personally—such as “John Smith, and only John Smith, has the right to drive across my property.”

²⁸ *Supra* note 25 UCEA at §1(2) cmt.

²⁹ *Supra* note 25 UCEA at §1(3) cmt.

³⁰ 26 U.S.C. §170(f)(3)(B)(iii) (2007).

³¹ *Id.* at 32 (“Status quo bias and risk aversion tendencies create additional incentives for regulatory inaction, especially in a regulatory commons setting. Any baseline (or status quo) legal framework will create entitlements and shape investments of both regulators and constituents”). See also, Elizabeth S. Rolph, *Government Allocation of Property Rights: Who Gets What?*, 3 J. Pol’y Analysis & Mgmt. 45, 47-49 (1983) (A “common theme” of regulatory design was “the maintenance of the status quo,” rather than regulatory design achieving immediate or major redistributions of wealth).

³² *Id.*

³³ *Supra* note 21, Buzbee at 6.

³⁴ See Tim Vanderpool, Species Spat, *Tucson Weekly*, February 8-14, 2007, at 11 (Outlining differences of opinion between the Arizona Game and Fish Department (AGFD) and federal wildlife officials). As an example of regulatory infighting, federal wildlife authorities and AGFD are squabbling over management of Mexican Gray Wolf populations in Arizona. AGFD claims it is unable to actively manage endangered species populations due to federal ESA restrictions. Arizona believes AGFD needs to be recognized as an equal regulatory partner to effectively manage. Though both agencies have the same basic conservation goals in effect, compromise is difficult in the face of political wrangling.

³⁵ *Supra* note 21, Buzbee.

³⁶ *Supra* note 21, Buzbee at 22 (“A regulatory opportunity is itself the resource to be harvested or capitalized on through regulatory action, much as fish or a pasture is the resource in the usual commons resource tale. Regulatory commons problems pervade any complex multi-layered legal setting. Such dynamics could lead to excessive and potentially conflicting regulation by numerous policymakers in diverse institutions, but more often will create incentives for political inattention”).

³⁷ *Supra* note 21, Buzbee at 1.

³⁸ See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621 (1998). This sort of underregulation is very similar to an anticommons. In such a situation, “multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has effective privilege of use.” Multiple regulatory agencies have effective regulatory jurisdiction and the possibility of regulation by other organizations effectively, if not legally, excludes other organizations from regulating for many of the reasons explained by Mr. Buzbee.

³⁹ Nancy A. McLaughlin, *Conservation Easements: Perpetuity and*

Beyond, 34 Ecology LQ 673 (2007).

⁴⁰ *Id.*

⁴¹ The National Conference of Commissioners on Uniform State Laws, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucea.asp (Accessed November 8, 2007); Restatement (Third) of Property Servitudes §1.6 (2000) (“The Uniform Conservation Easement Act was promulgated in 1981. In 1999, only three states lacked such a statute”).

⁴² McKinney’s Environmental Conservation Law of New York §49-0305 (1997).

⁴³ West’s Ann. Cal. Civ. Code §816 (2007).

⁴⁴ See, e.g., *Hays v. St. Paul Methodist Episcopal Church*, 196 Ill. 633, 636, 63 N.E. 1040, 1042 (1902); *Latham v. Taylor*, 10 N.C. App. 268, 270, 178 S.E.2d 122, 124 (1970), *cert. denied*, 278 N.C. 104, 179 S.E.2d 452 (1971); *Voyager Village Property Owners Ass’n v. Johnson*, 97 Wis. 2d 747, 749, 295 N.W.2d 14, 15 (Ct. App. 1980).

⁴⁵ *Supra* notes 42 and 43.

⁴⁶ *Id.*

⁴⁷ *Supra* note 14.

⁴⁸ *Goldmuntz v. Town of Chilmark*, 651 N.E.2d 864. (Mass. App. 1995) (Interpreting a CE strictly on its face to refuse a request to build a swimming pool. However, as this appears to be a particularly egregious violation of the CE, courts might still interpret restrictions reasonably even without specific statutory language if such situations are presented to them).

⁴⁹ *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) (Coal bed methane found under land covered by a CE. Trustees of trust that held the CE conveyed the property and the CE to Defendants, thus extinguishing the CE by joinder. Supreme court refused to find standing in Plaintiff to challenge this termination of CE); *Reed v. Village of Philmont Planning Board*, 34 A.D.3d 1034 (N.Y.S.2d 2006) (“Hard look” review by planning board of amendment of CE to allow for location of stormwater detention ponds on property deemed sufficient); *Fox Chapel v. Walters*, Slip Copy, 2007 WL 2265684 (D. Ariz. 2007) (District Court refuses to issue temporary restraining order since property owner has failed to demonstrate that the amendment of CE it donated constitutes irreparable harm).

⁵⁰ *Supra* note 49, 157 P.3d 914 (Wyo. 2007).

⁵¹ *Supra* note 49, 34 A.D.3d 1034 (N.Y.S.2d 2006).

⁵² *Supra* note 49, 2007 WL 2265684 (D. Ariz. 2007).

⁵³ *Id.*

⁵⁴ *Id.* at 2.

⁵⁵ *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446 (C.A.N.Y. 1985).

⁵⁶ *Id.* at 451.

⁵⁷ *Id.*

⁵⁸ See *Ephrata Area School District v. County of Lancaster*, 886 A.2d 1169, 1177 (Pa. Commonw. Ct. 2005) (Discussing the right of servient estate holders to grant additional servitudes over burdened property so long as they do not unreasonably interfere with the use and enjoyment of the prior easement. The court notes “[t]hese general rules also apply where the servient tenement is burdened by a conservation easement”).

⁵⁹ *Id.* (Citing *Assocs. of Phillipsburg v. Hurwitz*, 437 A.2d 447 (Pa. Super 1981)). See also W. Ely Jr. and Jon W. Bruce, *The Law of Easements and Licenses in Land*, §12:2 (2005) (“The grantor of a conservation easement retains ownership of the servient land and may use the property for any purpose not inconsistent with the servitude”); See also *Twomey v. Commissioner of Food and Agriculture*, 759 N.E.2d 691, 699 (Mass. 2001) (Servient estate holder retains all rights not specifically granted in the easement).

⁶⁰ *Id.*, *The Law of Easements and Licenses in Land*.

⁶¹ *Supra* note 58 at 1177-1178.

⁶² The Nature Conservancy, Arizona Conservation Easement Template, on file with Western Resource Office, 2424 Spruce St., Suite 100, Boulder, CO 80302. §6 (“Grantor shall not undertake or permit any activity requiring prior approval by the Conservancy without first having notified and received approval from the Conservancy as provided herein”).

⁶³ See *supra* note 9, Mahoney. Some of Mahoney’s criticism seems to stem from a distrust of the benevolence of these CE holder organizations. She seems to fear placing perpetual land management authority in these organizations without some guarantee or oversight to ensure land trusts and government holders actually manage CEs in line with their conservation values.

⁶⁴ *Supra* note 9 at 758.

⁶⁵ *Supra* note 39 at 3.

⁶⁶ *Id.*

⁶⁷ Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts*, §462.1 at 310 (4th ed. 1989).

⁶⁸ *Supra* note 25 UCEA at §3 cmt..

⁶⁹ The doctrine of *cy pres* is meant to limit a donor’s control of property

donated for a charitable purpose. 14 C.J.S. Charities §45 (2008). In order to change the use to which charitable property is put requires court approval to determine if the charitable purpose has become “impossible or impractical.” If such a finding is made then the court will supervise the amendment and compensate the holder for any rights relinquished.

⁷⁰ *Supra* note 49.

⁷¹ Restatement (Third) of Trusts §28 (2007). See also *Scott on Trusts*, §364 (4th ed. 1998) (“A charitable trust is enforceable at the suit of the Attorney General, and ordinarily is not enforceable at the suit of an individual beneficiary, although in the case of some charitable trusts there may be beneficiaries having such special interest in the performance of the trust as to entitle them to maintain a suit to enforce it”); *Scott on Trusts*, §391.

⁷² Uniform Trust Code, National Conference of Commissioners of Uniform State Laws, §103 (2003).

⁷³ *Supra* note 25 UCEA §3(a)(3).

⁷⁴ See *supra* note 13, *The Conservation Easement Handbook*.

⁷⁵ See Elizabeth Byers and Karin Marchetti Ponte, *The Conservation Easement Handbook*, 377 (Land Trust Alliance, 2d ed. 2005).

⁷⁶ *Supra* note 62, The Nature Conservancy at §1 Conservation Values and Purpose. Grantor and the Conservancy acknowledge that the Property contains excellent examples of ... [see guidelines below], hereinafter referred to as the “Conservation Values.” The purpose of this Easement is to preserve and protect in perpetuity, to enhance upon mutual agreement, and in the event of their degradation or destruction, to provide for the restoration of the Conservation Values of the Property. Other benefits of this Easement include prevention of fragmentation of native habitat caused by man-made features including but not limited to roads, buildings, and conversion to agriculture. In achieving its purpose and providing such other benefits, it is the intent of the Easement to permit the continuation of such [residential, ranching, agricultural, and recreational uses – chosen as appropriate for the property] of the Property as are consistent with the Conservation Values protected herein.

⁷⁷ *Supra* note 62, The Nature Conservancy at §16 Amendment. If circumstances arise under which an amendment to or modification of the Easement would be appropriate, Grantor and the Conservancy may jointly amend the Easement; provided

that no amendment shall be allowed that affects the qualification of the Easement under the IRS Code or Sections 33-271 to 33-276, Arizona Revised Statutes. Any such amendment shall be consistent with the purposes of the Easement, shall not affect its perpetual duration, shall not permit additional development or improvements to be undertaken on the Property other than development or improvements currently permitted by the Easement, and shall not impair any of the Conservation Values of the Property. Any such amendment shall be recorded in the official records of the county in which the Property is located.

⁷⁸ See *supra* note 14, 248 A.D.2d at 699-700 (N.Y.A.D. 1998); and *Southbury Land Trust, Inc. v. Andricovich*, 757 A.2d, 1263, 1264-1267 (Conn. App. 2000).

⁷⁹ The Nature Conservancy, *About Us*, <http://www.nature.org/aboutus/?src=t5> (Accessed March 5, 2007).

⁸⁰ Arizona Open Land Trust, *Our Mission*, <http://www.aolt.org/aboutus/ourmission.shtml> (Accessed March 5, 2007) (“The Arizona Open Land Trust protects Southern Arizona’s vanishing western landscapes and wildlife habitat by acquiring and managing sensitive lands”). Also, interview with Diana Freshwater, Executive Director, Arizona Open Land Trust (AOLT) in Tucson, Arizona (February 9, 2007). Ms. Freshwater stated that AOLT is dedicated to curbing development and does not base its easements on the protection of species—only on the protection of open lands.

⁸¹ Wisconsin Department of Natural Resources, Grants for Conservation Easements (September 2005) (Accessed November 11, 2007 at <http://www.dnr.state.wi.us/org/caer/cfa/Grants/easement.html>).

⁸² *Id.* at §F(3).

⁸³ Georgia Department of Natural Resources, Wildlife Resources Division, State Template for Conservation Easement, at §K(2) (September 2005) (Accessed November 11, 2007 at <http://georgiawildlife.dnr.state.ga.us/content/displaycontent.asp?txtDocument=178>).

⁸⁴ *Id.*

⁸⁵ See *supra* note 81, Wisconsin CE Template, at §7.

⁸⁶ Pennsylvania Land Trust Association, Pennsylvania Model Documents, Conservation Easement and Commentary on changes to newest edition of easement, at 2 (Accessed November 11, 2007 at http://conserveland.org/model_documents/).

⁸⁷ *Id.*, Pennsylvania CE Template at §1.03(a).

⁸⁸ See *supra* note 86, Pennsylvania CE Template at §1.03(a)(vi) (Compatible Land Use and Development. Certain areas have been sited within the Property to accommodate existing and future development taking into account the entirety of the natural potential of the Property as well as its scenic resources).

⁸⁹ *Id.*

⁹⁰ See *supra* note 86, Pennsylvania CE Template at §1.03(b).

⁹¹ *Id.*

⁹² See *supra* note 86, Pennsylvania CE Template at §1.03(b)(i).

⁹³ For example, see Pennsylvania CE Template, *supra* note 86, at §4.03(b)(vii) (“Other resource management activities consistent with maintenance or attainment of Conservation Objective and conducted in accordance with the Resources Management Plan approved for that activity after Review”); §5.02 Rights and Duties of Holder (d) Interpretation (“To interpret the terms of the Conservation Easement, apply the terms of this Conservation Easement to factual conditions on or about the Property, respond to requests for information from Persons having an interest in this Conservation Easement or the Property (such requests for certification of compliance), and apply the terms of this Conservation Easement to changes occurring or proposed within the Property”).

⁹⁴ 14 C.J.S. Charities §50 (2008).

⁹⁵ Coconino County (Ariz.) Recorder, Fox Chapel Deed of Agricultural Conservation Easement, Document #3297185, Article II(D)(5)(iii). Recorded December 8, 2004.

⁹⁶ *Id.* at Article VI(F).

⁹⁷ See Farm and Ranch Lands Protection Program, 16 U.S.C. § 3838h (2002).

⁹⁸ *Id.*

⁹⁹ 16 U.S.C. § 4601-4 et seq. (1990); see also *Friends of the Shawangunks, Inc.*, *supra* note 55 at 451 (Noting *in dicta* that secretarial approval would be required for amendment of CE since such amendment would call into question the basis for the original federal funding of the CE’s acquisition).

¹⁰⁰ *Supra* note 95, Fox Chapel CE Article VI(B)(4).

¹⁰¹ *Supra* note 94.

¹⁰² *Supra* note 95 at Article II.

¹⁰³ *Supra* note 86, Pennsylvania CE Template at §5.04(d) (Standard of Reasonableness. Holder’s approval will not be unreasonably withheld;

however, it is not unreasonable for Holder to disapprove a proposal that may adversely affect natural resources described in the Conservation Objectives or that is *otherwise inconsistent with maintenance or attainment of Conservation Objectives*" [italics added]).

¹⁰⁴ *Supra* note 86, Pennsylvania CE Template at §5.03(b).

¹⁰⁵ *Supra* note 83, Georgia CE Template at §K(2) (Noting that the CE should be liberally construed "in favor of the Grantee to affect the purpose of this Conservation Easement and the policy and purpose of the Uniform Conservation Easement Act").

¹⁰⁶ *Supra* note 86, Pennsylvania CE Template at §1.03(b).

¹⁰⁷ 26 U.S.C. §170 (h) et seq. and 26 U.S.C. §170(f)(3)(B)(iii) (2007).

¹⁰⁸ See *supra* notes 97-99.

¹⁰⁹ See *supra* note 107.

¹¹⁰ Treas. Reg. §1.170A-14 (2007).

¹¹¹ A contribution is for a conservation purpose if it: (1) preserves land for the general public's outdoor recreation or education; (2) protects a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem; (3) preserves open space either for the scenic enjoyment of the general public or pursuant to Federal, State, or local governmental conservation policy and yields a significant public benefit; or (4) preserves a historically important land area or a certified historic structure. 26 U.S.C. 170(h) (3), (4) (2007). See also *Glass v. Commissioner of Internal Revenue*, 471 F.3d 698 (USTC 2006) (Qualified conservation easement contribution deduction allowed); cf. *Turner v. Commissioner of Internal Revenue*, 126 T.C. No. 16 (T.C. 2006) (Qualified conservation easement contribution denied as contribution was found to not have been made "exclusively for conservation purposes").

¹¹² Treas., Reg., §1.170A-14(a) (2007) ("To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity"). See also 26 U.S.C. §170(h)(5)(A) (2007).

¹¹³ Interview with Diana Imig, Protection Information Manager, The Nature Conservancy in Tucson, Arizona (January 26, 2007). The IRS has "unofficially" informed them that if The Nature Conservancy (TNC) amends too many easements, they may refuse to recognize their validity for tax purposes in the future. Cf. Interview with Diana Freshwater, Executive Director, Arizona Open Land Trust in Tucson, Arizona (February 9, 2007). Ms. Freshwater feels that TNC is a special case due to the added federal scrutiny of their use of CEs since the 2005 Senate Finance Committee report. She feels that so long as all parties reasonably agree to the change, modification or amendment might not

be too difficult for most organizations.

¹¹⁴ National Environmental Policy Act 42 U.S.C. §4332 (2007).

¹¹⁵ *Id.* at §4332(c).

¹¹⁶ 40 C.F.R. §1502.14 (2004).

¹¹⁷ See Tucson, Arizona Land Use Code §23A-50 Special Zoning Review—Full Notice Procedure (2004), http://www.tucsonaz.gov/dsd/Codes_Ordinances/codes_ordinances/html (Accessed February 2007).

¹¹⁸ Robert C. Ellickson and Vicki L. Been, *Land Use Controls: Cases and Materials*, 283 (3d ed., 2005).

¹¹⁹ For an analogous look at consistency with an overall land use plan see *Haines v. City of Phoenix*, 727 P.2d 339 (Ariz. Ct. App. 1986). Also see *Snyder v. Board of County Commissioners*, 595 So. 2d 65 (Fla. Dist. Ct. App. 1991), quashed, 627 So. 2d 469 (Fla. 1993) (Burden is on the developer to show consistency with the plan).

¹²⁰ *City of Chicago v. Stratton*, 44 N.E. 853 (Ill. 1896).

¹²¹ *Cary v. City of Rapid City*, 559 N.W.2d 891 (S.D. 1997).

¹²² See *supra* notes 7 and 8.

¹²³ Tony Davis, *Price Tag for Open Space put at \$2.6B*, Arizona Daily Star, August 3, 2006 (Discussing the fact that to buy all the most biologically valuable land in Pima County under the Sonoran Desert Conservation Plan would cost taxpayers nearly \$2.6 billion dollars).

¹²⁴ See *supra* note 9, Mahoney.

¹²⁵ See *Whitman v. American Trucking Assoc.*, 531 US 457 (2001) (Discussing whether the EPA can consider the high costs to industry in setting the primary ambient air quality standards. Specifically, “the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air—for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries”).

¹²⁶ *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

ABBREVIATIONS

AGFD	Arizona Game and Fish Department
AOLT	Arizona Open Land Trust
CE	conservation easement
EIS	environmental impact statement
EPA	Environmental Protection Agency
IRS	Internal Revenue Service
NEPA	National Environmental Policy Act
TNC	The Nature Conservancy
UCEA	Uniform Conservation Easement Act
VVLPI	Verde Valley Land Preservation Institute

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