

Exacted Conservation Easements: The Hard Case of Endangered Species Protection

Many federal and state environmental laws require permits for development projects. Permit applicants must often show that they will mitigate the harm caused by their projects. The Endangered Species Act (ESA) is one of those statutes. For developers to carry out projects that may harm threatened and endangered species, they must obtain Incidental Take Permits. As part of that permitting process, applicants prepare Habitat Conservation Plans (HCPs). One of the key elements of any HCP is mitigation of the potential harms of the development project. Often mitigation measures take the form of land preservation by either purchasing and conserving endangered species habitat or creating or purchasing conservation easements for such habitat. The use of conservation easements in conjunction with the ESA raises a host of concerns for environmentalists, developers, and regulatory agencies. This Article describes the use of conservation easements in the HCP process and explains the complexities that arise with the enforcement of those conservation easements. When landowners comply with the conditions of HCPs and conservation easements, all works well. However, when an owner of land burdened by a conservation easement does not comply with the conservation easement, enforcement becomes an issue. Typically, the holder of the conservation easement enforces the agreement. When a conservation easement holder is not diligent, however, it is unclear who can enforce the terms of the agreement. This becomes a concern of the public in conjunction with the ESA. HCP conservation easements are held by many different groups with different levels of capability and interest in enforcement. Because these conservation easements are held in perpetuity, it is important that the fate of endangered species rest in capable hands. To ensure the reliability of this land preservation tool, the federal agencies that

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implement and enforce the ESA should retain a right to enforce any conservation easement made in conjunction with an HCP. Further, the public should be able to ensure enforcement of these private land agreements by bringing actions against agencies based on the Administrative Procedure Act (APA).

Over the past thirty years, conservation easements have emerged as a favorite land-preserving tool of conservationists.¹ The scholarship examining this tool has generally focused on donated and purchased conservation easements.² A largely overlooked category, however, is “exacted conservation easements.”³ Property owners seeking to change their land must often obtain federal, state, and local permits. Increasingly, these permits require mitigation measures when land changes result in environmental impacts like increased pollution or habitat destruction. At times, these mitigation measures take the form of conservation easements. Different than the traditionally studied

¹ Land use planner William Whyte popularized conservation easements in 1959. Although voluntary private land protection schemes were not new, Whyte was the first to label them as “conservation easements” and to articulate clearly an appropriate circumstance for such a tool. Whyte’s conservation easements are different from the ones largely used today. He specifically advocated conservation easements as a tool for government agencies to apply. William Whyte, *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BULL. 1 (1959). The conservation easement has seen its greatest rise in popularity since the emergence of land trusts. Land trusts have been growing over the past thirty years at an incredible rate. See JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* xi (1988); Land Trust Alliance, 2003 National Land Trust Census, available at www.lta.org (last visited Jan. 12, 2005).

² See, e.g., Ian Bowles et al., *Economic Incentives and Legal Tools for Private Sector Conservation*, 8 DUKE ENVTL. L. & POL’Y F. 209 (1998); 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 (1996); Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989); John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319 (1997); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984); Daniel C. Stockford, Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823 (1990); Karen M. White, Note, *“Extra” Tax Benefits for Conservation Easements: A Response to Urban Sprawl*, 18 VA. ENVTL. L.J. 103 (1999).

³ Because the category of conservation easements I am examining has gone largely unstudied, it is also unnamed. I use the term “exacted” because these easements function in ways similar to other exactions. They are concessions given in exchange for a right to pursue a development project. Importantly, exacted easements are not new, but exacted “conservation” easements are. We could also refer to these easements as coerced, regulatory, mitigation, or involuntary. I choose the term exacted because it fits more readily into the land use planning framework.

conservation easements, these exacted conservation easements are not exactly voluntary.⁴ Exacted easements are secondary mitigation requirements for landowners seeking to fulfill goals other than land protection.

Although similar to other conservation easements in structure, exacted conservation easements are a different creature when it comes to landowner motivation and tax benefits. The common picture of conservation easements is a donated or sold easement where a landowner exchanges property rights in return for long-term security for her land and various potential tax benefits.⁵ Exacted conservation easements are not accompanied by wide-ranging tax benefits and the landowners are not driven by conservation as their primary project goal. Because of this difference, concerns about enforcing these types of easements may be elevated. Enforcement concerns take a paramount position with conservation easements created to meet the goals of federal environmental statutes. In particular, conservation easements are increasingly a part of HCPs. These endangered species exacted conservation easements represent an area of special enforcement concern. The ESA is a federal law with broad ranging goals and stringent regulations designed to preserve species and prevent habitat destruction.⁶ To ensure species protection, it is important that these conservation easements are both monitored and enforced. The outlook is somewhat bleak however. Little is known about these conservation easements. There are no state or federally

⁴ Whether exacted conservation easements are voluntary is a contentious issue. We may think of them as *involuntary* because a permit holder is required to create them in exchange for her permit. Alternatively, we may think of them as *voluntary* because a landowner or project proponent engages in the permitting process willingly. They are choosing to develop or change their land under their own free will. The Supreme Court appeared to reject this second argument in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987) (“[T]he announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary ‘exchange.’” (citations omitted)). This dispute may seem merely academic or semantic until we look closer at specific state statutes. For example, in California, the conservation easement statute clearly requires that the arrangements be “voluntarily conveyed.” CAL. CIV. CODE § 815.3(b) (West 2004). Therefore, if exacted conservation easements are not voluntary, they may not be enforceable under California’s conservation easement statute. Although this would not automatically invalidate an agreement, it would bring into question the long-term viability of exacted conservation easements in California. This is a fascinating and important issue to address in light of the multitude of exacted conservation easements being created in California. Unfortunately, however, there is not room to address it here (nor would it necessarily be appropriate to do so).

⁵ See *infra* discussion at part I.D.1.

⁶ 16 U.S.C. § 1531(b) (2004).

compiled databases and there is no guarantee of consistency in structure or enforcement of the easements. Therefore, these exacted conservation easements represent a difficult enforcement situation and bring into question the long-term viability of conservation easements as a tool to protect habitat. Finding ways to successfully enforce this “hard case” example of easements will be informative for enforcement of other types of conservation easements. If we can figure out how to create functioning conservation easements in this constrained context, other conservation easements should be relatively straightforward.

Although some scholars have written on conservation easements as a tool for biodiversity protection,⁷ there has been little mention of conservation easements specifically targeted to meet the habitat goals outlined in the ESA.⁸ This is especially surprising considering the significant role conservation easements play in HCPs, which are part of the ESA’s permitting system. This Article examines conservation easements in the context of HCPs, specifically addressing problems of enforcement and concerns about long-term habitat protection that arise. Section I of this Article examines the development of conservation easements as a land preservation strategy. In general, conservation easements fall into three categories: donated, sold, and exacted. Section I describes the common structure of conservation easements, generally examining the history of this land conservation tool and briefly explaining how it evolved from its common law roots.

Section II of this Article details the development of the ESA and explains its current structure. Section III then takes a close look at HCPs and Incidental Take Permits. When a landowner seeks to develop land where either listed species or their habitat is present, he must apply for and obtain a permit from the Department of the Interior (DOI). As part of the permitting process, applicants must prepare an HCP. It has become commonplace for government agencies to require the creation of conservation easements as part of

⁷ See, e.g., Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9 (1996); Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Land*, 41 NAT. RESOURCES J. 373 (2001); Ronald R. Scott, *Private Land Use Controls and Biodiversity Preservation in Kentucky*, 11 J. NAT. RESOURCES & ENVTL. L. 281 (1995-1996); Nancy M. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453 (2002).

⁸ But see Kimberley K. Winter, Comment, *The Endangered Species Act Under Attack: Could Conservation Easements Help Save the ESA?* 13 N. ILL. U. L. REV. 371 (1993).

these plans. After detailing the HCP process, section III(C) explains concerns that arise with the reviewability and enforceability of HCPs generally. Section IV looks more closely at the role of conservation easements within HCPs and the problem of their enforcement. It is not clear who has the right and ability to enforce the terms of conservation easements that are included in HCPs. Section IV(B) examines some of the current enforcement strategies and section IV(C) offers suggestions for addressing the major enforcement problems.

I

CONSERVATION EASEMENTS

Conservation easements are property rights in land that are held by someone other than the landowner and have a conservation purpose.⁹ Conservation easements are voluntary restrictions on private land.¹⁰ When an owner places a conservation easement on her land, whether by donating it, selling it, or creating it to meet legal requirements, she

⁹ DIEHL & BARRETT, *supra* note 1, at 5. Throughout this Article, I use the term “conservation easement.” I chose conservation easement because it is the term most commonly used in statutes and in the academic literature. However, it is not universally accepted as the most appropriate term. As explained below, conservation easements are not easements in the traditional sense. A more appropriate name may be “conservation servitude” because these agreements represent a type of property servitude more akin to equitable servitudes or real property covenants. Scholars have pointed out this inconsistency before. *See, e.g.*, Korngold, *supra* note 2. But the term conservation easement seems to have stuck despite these concerns. Academics are not the only ones who find the term conservation easement inappropriate; states also use other terms. In Massachusetts, for example, they are called “conservation restrictions.” MASS. GEN. LAWS ch. 184, § 31 (2003). I use the term conservation easement broadly to encompass a larger category of land restrictions that include agricultural preservation easements, scenic easements, open space easements, forever-wild easements, conservation restrictions, restrictive covenants, and any other land restrictions that follow the pattern of divided property rights described in the text of this Article. Despite my misgivings about using the term “easement,” I use “conservation easement” here to refer generally to private land restrictions with a conservation purpose regardless of official legislative terms. Conservation purposes generally include, but are not necessarily limited to, the following: “protecting historical, architectural, archaeological or cultural aspects of real property.” RESTATEMENT (THIRD) OF PROPERTY § 1.6 (2000).

¹⁰ *See* Hollingshead, *supra* note 2, at 322. Although scholarship discussing the voluntary nature of conservation easements usually addresses donated (and sometimes sold) conservation easements, *see, e.g.*, Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401, 403 (1993), exacted conservation easements also may have a voluntary nature. *See supra* note 3.

is generally agreeing to refrain from certain activities.¹¹ Although conservation easements can take many forms, the most common restrict development. Using the traditional “bundle-of-sticks” metaphor for property, we can describe the landowner as losing one of the sticks in her bundle. A conservation easement is in essence taking a stick out of the bundle and giving it to someone else. State statutes determine who may accept the right and set rules about the method of transfer. A conservation easement is not a straightforward transfer of a right, however, because the holder of a conservation easement cannot exercise the right it holds. For example, if a landowner donates an easement in the form of restricting the right to develop her property, the holder of the easement does not gain the development right. The holder of the conservation easement can prohibit all development or any development that interferes with a particular activity or conservation goal. Conservation easements, therefore, are really rights of enforcement. The holder of the conservation easement has the right to bring an action against the landowner if the terms of the easement are violated.

Generally, the easement holder is either a government entity or a non-profit conservation organization. Many conservation easements restrict land “in perpetuity.” However, because statutes and regulations about conservation easements vary by state, there may be differences in the length and style of conservation easements, including limitations on who is allowed to hold the right.

Conservation easements are different than the traditional notion of easements. *Black’s Law Dictionary* defines easements as:

an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.... Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land.¹²

¹¹ Although conservation easements are generally thought of as negative restrictions preventing landowners from doing certain actions, conservation easements also may have affirmative obligations. Alexander R. Arpad, Comment, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91, 112-21 (2002) (explaining that the affirmative aspect of conservation easements is often ignored). States often explicitly recognize both negative restrictions and affirmative duties in their state conservation easement statutes. See, e.g., ARIZ. REV. STAT. § 33-21(1) (2004); KY. REV. STAT. ANN. § 382.800 (Michie 2004); OR. REV. STAT. § 271.715(1) (2004); S.C. CODE ANN. § 27-8-20(1) (Law Co-op. 2004); WIS. STAT. ANN. § 700.40(1)(a) (West 2004).

¹² BLACK’S LAW DICTIONARY 414-15 (7th ed. 2000).

The most common forms of easements are rights of way, rights of entry, rights to the support of land and buildings, rights of light and air, rights to water, rights to do an act that would otherwise be considered a nuisance, and rights to place or keep something on an adjacent piece of land.¹³ The term conservation easement is so new it is not yet found in law dictionaries.¹⁴ The legal concept of a conservation easement is actually a statutory construction that contradicts principles of common law despite being closely linked to the traditional notion of easements and servitudes.

A. *Development of the Concept*

Increasing population and development pressures have led to environmental degradation and loss of open space.¹⁵ In the search for flexible solutions to these problems, ways to restrict the use of private property have developed.¹⁶ At common law, there were several different tools for restricting the use of private property including easements, real covenants, and equitable servitudes. Planners and conservationists drew on all three of these tools to protect habitat values, but found them all lacking in some way. Conservation easements were born out of a desire to protect conservation values for the long term without requiring fee-simple purchase of property.¹⁷

1. *Types of Land Restrictions Historically Allowed*

Today's conservation easements are not constructions traditionally upheld by courts.¹⁸ Courts were resistant to allow agreements that separated ownership in land. This section describes the historical restrictions on land agreements like conservation easements and

¹³ *Id.*

¹⁴ This does not mean, however, that the concept is new. As will be explained below, there have been many forms of easements and servitudes in land. Bringing these ideas together under one workable concept is new however.

¹⁵ This problem has been oft-studied and remarked upon. For a specific discussion in the context of the land conservation movement see RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 13 (2003).

¹⁶ Many books and articles discuss the emergence of new land preservation tools and creative property arrangements in response to increased environmental degradation. See, e.g., *id.*; LAND SAVING ACTION (Russell L. Breneman & Sarah M. Bates eds., 1984); PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION (Montana Land Reliance & Land Trust Exchange eds., 1982).

¹⁷ BREWER, *supra* note 15, at 135; see also Hollingshead, *supra* note 2, at 322.

¹⁸ Dana & Ramsey, *supra* note 2, at 3.

discusses why common law courts were resistant to some of the features that we now see operating in conservation easements.

a. Only Affirmative Easements Were Permissible

Traditionally, courts generally only upheld affirmative easements.¹⁹ Affirmative easements explain what an individual *may* do. They describe a right existing in someone other than the landowner. Negative easements, alternatively, describe a prohibition. Negative easements are restrictions on a property owner's behavior on her own land—they prohibit a property owner from doing something on her land. Conservation easements are often a form of negative easement because they represent prohibitions on certain activities (usually development). At common law, the only accepted negative easements were those that prevented landowners from blocking the free flow of air and light.²⁰ Negative easements are harder to enforce because of the requirements of monitoring and policing.²¹ Negative easements also go against traditional American notions of private property. A person's land is thought to be the place where he is king. Jeffersonian ideals of individual farmers working the land in peace and freedom dominate the concept of property in the United States. Therefore, limits on private behavior are discouraged. The common law exception to the rule against negative easements, allowing for the free flow of air and light, is more akin to traditional nuisance law. People may do whatever they like on their own property, as long as it does not harm others—such as by blocking their air and light.

Courts viewed negative easements critically whether they were appurtenant or in gross. Obligations that are connected to the land instead of to a specific person are called "appurtenant." At common law, appurtenant negative easements regarding air and light, as

¹⁹ *Id.* at 12-13.

²⁰ Cheever, *supra* note 2, at 1081.

²¹ To exercise an affirmative easement, the easement holder need only perform the allowed activity. For example, an easement allowing access across a landowner's property is exercised by crossing that land. The easement is violated when the easement holder finds some new impediment to her access (e.g., a locked gate). A negative easement, however, prevents a landowner from doing something instead of requiring them to allow something. If, for example, a negative easement purports to restrict hunting on a certain part of land, someone must monitor the land to ensure that the hunting never occurs. This requires vigilance on the part of the easement holder.

described above, were accepted, while easements not tied to land were disfavored.²²

When an easement is appurtenant, we label the land subject to the easement the “servient estate.”²³ The land benefited by the easement is the dominant estate.²⁴ Using the example of a negative easement preventing obstruction of light, the owner of the servient estate may not block the light of the dominant estate. The benefit here “runs with the land.” The owner of the servient estate may not block the light regardless of who owns the dominant estate. The restriction remains in place even if the dominant estate changes hands. Thus, whoever owns the dominant estate enjoys the benefit of the appurtenant negative easement.²⁵

The only appurtenant negative easements allowed at common law benefited neighboring landowners.²⁶ When an easement is held in gross, it is held by a particular person. Here, the benefit is not tied to ownership of neighboring land. Concerns regarding easements in gross are the topic of the next section.

Courts were disinclined to allow current landowners to make rules affecting subsequent landowners.²⁷ This could give one landowner a lot of power over future generations by forever restricting the land. Such restrictions could make it harder to transfer or sell land and prevent land from being put to its “highest and best use.”²⁸ Conservation easement burdens “run with the land” because the restriction remains in place even when the land changes hands. The restrictions are incorporated into the deed and new owners must adhere to the restrictions negotiated by prior owners of the land.

b. Both the Easement Burden and the Easement Benefit had to Run with the Land

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When looking at the traditional property tools of easements and real property covenants, we see that courts did not favor agreements between parties when a landowner’s burden or obligation was tied to

²² Dana & Ramsey, *supra* note 2, at 14. Negative easements in gross were disfavored. *See, e.g.,* *Dunn Bros., Inc. v. Lesnewsky*, 164 Conn. 331 (1973).

²³ A. JAMES CASNER ET AL., *CASES AND TEXT ON PROPERTY* 939 (4th ed. 2000).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Dana & Ramsey, *supra* note 2, at 14.

²⁷ *Id.*

²⁸ *Id.* at 3.

her land, but the benefit was not.²⁹ Easements “in gross” describe rights not associated with the person who owns the land; they create a personal right related to the land in another individual.³⁰ Although easements create a prohibition that runs with the land, the property right gained by the easement holder is a right in gross, meaning that it is not associated with the ownership of land. When underlying land is transferred, rights in gross are not affected.³¹ Courts may have disfavored this structure because of the increased enforcement burdens it creates. When an easement is connected to a piece of property (i.e., the easement holder is always the next-door neighbor), it is easier to track who has the right associated with the easement and who can bring enforcement actions. There are no requirements that tie conservation easements to neighboring land. Holders of conservation easements may be located anywhere and may move around without disrupting their conservation easement property right. Thus, conservation easements can be characterized as negative easements in gross, which are not a character of the common law at all.

While negative easements represent restrictions on a property owner’s behavior, covenants are more like promises regarding the land.³² Therefore, conservation easements are sometimes viewed as similar to real property covenants.³³ However, under common law, covenants in gross cannot bind a successor in interest and the parties must intend both the burden and the benefit to run with the land.³⁴ Essentially, under the common law, a burden would not run with the land if the benefit was in gross.³⁵ Although the burden runs with the land for conservation easements, the benefit does not. Additionally, options for remedies might dissuade us from characterizing conservation easements as covenants. A violation of a real covenant was traditionally enforced with an award of damages, which is inappropriate for conservation goals.³⁶

²⁹ CASNER ET AL., *supra* note 24, at 941.

³⁰ *Id.* at 940.

³¹ *Id.*

³² *Id.* at 939.

³³ *See, e.g.*, Korngold, *supra* note 2, at 436 (supporting this characterization).

³⁴ Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1269-71 (1982).

³⁵ *Id.*

³⁶ Morrisette, *supra* note 7, at 381-82.

Some scholars characterize conservation easements as more in line with the common law notion of equitable servitudes.³⁷ An equitable servitude is a promise that runs with the land much like a covenant.³⁸ However, there are no privity requirements, meaning that enforcement is not confined to those who are party to the agreement.³⁹ Additionally, equitable servitudes at common law were typically enforced by injunction,⁴⁰ which is the most appropriate enforcement mechanism to meet the goals of conservation easements. There is one key difference between conservation easements and equitable servitudes though—traditionally equitable servitudes could not be held in gross.⁴¹ The prohibition on holding equitable servitudes in gross makes them an inappropriate tool for widespread conservation. Conservation organizations and government entities would not be able to negotiate enforceable agreements under this rubric.

2. *Conservation Easements were not Allowed under Traditional Common Law Concepts of Property*

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As can be seen from the above section, conservation easements differ from traditional property constructs in several key aspects. The main policy reasons behind disfavoring conservation easements under the common law arise from concerns about agreements in perpetuity. Perpetual agreements give a lot of decision-making power to a present landowner. There is a long-standing objection to restrictions on land that limit transfer of land and restrictions on land that prohibit property owners from controlling their own land long after the death of those party to the original agreement.⁴² This concern about a “dead hand” controlling present day actions from the grave gave rise to traditional property conventions like the rule against perpetuities⁴³ and the rule against restraints on alienation.⁴⁴ Professor Lewis Simes argued that it is more socially desirable to have property controlled by

³⁷ See, e.g., Hollingshead, *supra* note 2, at 331-32.

³⁸ French, *supra* note 34, at 1276-81.

³⁹ *Id.* at 1276-77.

⁴⁰ Morrisette, *supra* note 7, at 382-83.

⁴¹ *Id.* at 383; Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 271 (2002).

⁴² Cheever, *supra* note 2, at 1098-1100.

⁴³ The goal of the rule against perpetuities is to prevent landowners indefinitely controlling who inherits the land. CASNER, *supra* note 23, at 342.

⁴⁴ See *id.* at 306; Dana & Ramsey, *supra* note 2, at 22.

the living, who are more apt to make economically optimal land-use decisions.⁴⁵ This is rooted in the concern that conservation easements will lock land into inefficient uses and prevent “natural” development.⁴⁶

Additionally, common law courts had concerns about the long-term stability of easements that lasted through changes in ownership of the underlying land.⁴⁷ Although land does not move around, the businesses or entities holding the development right or other benefit might. This could increase the transaction costs involved in land transfer. It would be more difficult to ascertain what restrictions were on lands.⁴⁸ Thus, there are many doubts about the reliability of conservation easements, especially concerning what might occur as land changes hands.⁴⁹

Other concerns, such as worries about creating non-competitive business arrangements, led courts and scholars to hesitate in their endorsement of perpetually restricting property use agreements like conservation easements. Courts seem to envision specific examples where restrictions on the land would create restrictions on competition.⁵⁰ For example, arrangements to transfer property could be bound by agreements designed to benefit sellers’ businesses.⁵¹

⁴⁵ LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 59-60 (The Thomas M. Cooley Lectures, 6th Series, 1955).

⁴⁶ *Id.*

⁴⁷ See French, *supra* note 34, at 1282.

⁴⁸ Although conservation easements are supposed to be incorporated into deed restrictions, they may still be difficult to track down or to understand. This author has often heard anecdotal evidence about landowners ignorant of conservation easements encumbering their property. This includes stories where landowners learned of existing conservation easements only when trying to create new conservation easements restricting already encumbered land. Additionally, state laws regarding marketable title may lead to inconsistent recordation. See Dana & Ramsey, *supra* note 2, at 20.

⁴⁹ See generally Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989).

⁵⁰ CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH THE LAND” 84 (1929); see also *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 246 (Mass. 1979) (invalidating a covenant restricting commercial competition because the benefit and burden did not “touch and concern” the affected parcels).

⁵¹ These concerns are akin to antitrust worries. Laws have developed that address these concerns directly. If we are worried about business competition, statutes should focus on business competition, not prohibitions on covenants and servitudes.

B. Conservation Easements Today

1. State Statutes and the Uniform Conservation Easement Act

Because of common law obstacles, states have passed laws to legitimate the creation of successful conservation easement programs. Every state but one now has laws on conservation easements.⁵² There are currently forty-nine states with conservation easement statutes⁵³—affecting over three million acres of land nationwide.⁵⁴ The oldest identifiable conservation easement statutes were adopted in 1956 in Massachusetts⁵⁵ and in 1959 in California.⁵⁶ These early laws provided little guidance on how conservation easements should operate; therefore, few landowners took advantage of them.⁵⁷

⁵² Sixteen states have adopted the UCEA directly while five others use it as a model for their own state laws. SALLY K. FAIRFAX & DARLA GUENZLER, CONSERVATION TRUSTS 152 (2001); Mary Ann King & Sally K. Fairfax, *History of the Uniform Conservation Easement Act* (unpublished manuscript on file with author).

⁵³ See Michael R. Eitel, Comment, *Wyoming's Trepidation Toward Conservation Easement Legislation: A Look at Two Issues Troubling the Wyoming State Legislature*, 4 WYO. L. REV. 57, 66 n.68 (2004); North Dakota, H.C.R. 3023 (enacted 2001) available at <http://www.state.nd.us/lr/assembly/57-2001/bill-text/BRFB0200.pdf>.

⁵⁴ Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 21 (2004). McLaughlin's article shows the amount of land protected by conservation easements that are held by land trusts; the total acreage protected by government entities is unknown, this number is likely much higher.

⁵⁵ 1956 Mass. Acts ch. 631.

⁵⁶ 1959 Cal. Stat. 1658, p. 4035, § 1 (codified at CAL. GOV'T CODE §§ 6950-6954 (2004)). Although these are the oldest conservation easement statutes, scholars show conservation easements as dating back much farther. The first American conservation easement appears to have been written in the late 1880s to protect the parks and parkways of Boston designed by Frederick Law Olmstead. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 9 (Julie Ann Gustanski & Roderick H. Squires eds., 2000); Jean Hocker, *Foreword* to PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE xvii (Julie Ann Gustanski & Roderick H. Squires eds., 2000). These older conservation easements were born without statute and therefore courts could have chosen to overturn them if challenged based on common law structures discussed in the previous section. Additionally, although there is a rich history of conservation easements, they were still considered an obscure tool. Indeed, the first publication about conservation easements was not written until 1959. WHYTE, *supra* note 1; see also Jean Hocker, *Foreword* to PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE xvii (Julie Ann Gustanski & Roderick H. Squires eds., 2000). Even today's scholars, practitioners, and landowners tend to think of conservation easements as a "new" tool. See Hollingshead, *supra* note 2, at 325-34 (describing the history of conservation easements).

⁵⁷ Morrisette, *supra* note 7, at 385.

Initially, the California and Massachusetts statutes only authorized government agencies to hold the easements,⁵⁸ but in 1969, Massachusetts became the first state to allow non-profits to hold conservation easements.⁵⁹

Many states with conservation easement statutes model their regulation on the Uniform Conservation Easement Act (UCEA).⁶⁰ In 1981, the National Conference of Commissioners on Uniform State Laws approved the current UCEA.⁶¹ The UCEA defines a 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.⁶²

The UCEA allows easements to be made in perpetuity,⁶³ which enables donated easements to qualify for federal tax benefits.⁶⁴ Additionally, the UCEA places limitations on who may hold the property interest. It limits the definition of holder to:

(i) a governmental body empowered to hold an interest in real property under the laws of this State or the United States; or

(ii) a charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property....⁶⁵

Nearly every state has some type of conservation easement statute. In fact, only Wyoming does not have a specific conservation

⁵⁸ Cheever, *supra* note 2, at 1080.

⁵⁹ Morrisette, *supra* note 7, at 385.

⁶⁰ NCCUSL, Uniform Law Commissioners, UCEA fact sheet, at www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ucea.asp (last accessed Jan. 12, 2005).

⁶¹ Unif. Conservation Easement Act, 12 U.L.A. 170 (1981), available at www.law.upenn.edu/bll/ulc/fnact99/1980s/ucea81.pdf.

⁶² *Id.* § 1(1).

⁶³ Unless state law provides otherwise, the UCEA framework assumes conservation easements are created in perpetuity. *Id.* § 2(c).

⁶⁴ See *infra* section I.D.1.

⁶⁵ Unif. Conservation Easement Act § 2(c).

easement law on its books.⁶⁶ The state laws on conservation easements generally share the trait of trading development and certain use rights for some level of tax break, but there are also many variations within the laws. For example, some state conservation easement statutes relate only to scenic and public access easements; these statutes often fall short of protecting biodiversity.⁶⁷ Some statutes say that you *cannot* prohibit certain activities. For example, in Delaware, hunting, fishing, and other recreational activity must always be allowed.⁶⁸ Kentucky actually has rules about particular mining operations, including a provision that prohibits conservation easements from interfering with coal mining.⁶⁹ Some states have specific time limits on conservation easements, while other states require them to be in perpetuity. For example, Kansas, which has potentially the shortest time allowance, limits conservation easements to the lifetime of the grantor.⁷⁰ Many states have mechanisms for release from conservation easement obligations, while other states do not. In general, most states require conservation easements to be released or modified in certain circumstances, as other easements can be.⁷¹ For example, in Iowa, a conservation easement may be released when it ceases to be beneficial to the public, or the holder of the easement can choose to release it.⁷² In Kansas, the grantor of the conservation easement can revoke it.⁷³ In New Jersey, a conservation

⁶⁶ See *supra* note 53. Wyoming still has conservation easements that rely on common law notions of real covenants, easements, and equitable servitudes. See generally Eitel, *supra* note 53; Tapick, *supra* note 42, at 265-66. Additionally, Wyoming residents can still take advantage of federal tax breaks if they adhere to the I.R.C. guidelines. See *infra* part I.D.1. The federal tax guidelines do not require conservation easements to comply with state law.

⁶⁷ See David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* 19 HARV. ENVTL. L. REV. 303, 346-47 (1995) (stating that public access easements and scenic easements may not be in the public interest).

⁶⁸ DEL. CODE ANN. tit. 7, § 6901(c) (2001).

⁶⁹ KY. REV. STAT. ANN. § 382.850(1) (Michie 2004). This directly conflicts with recent changes to the federal income tax laws, which do not allow conservation easements in conjunction with mining operations meaning that Kentucky landowners should not be able to benefit from the federal tax deductions. I.R.S. Reg. § 1.170A-14(g).

⁷⁰ KAN. STAT. ANN. § 58-3811(d) (2003).

⁷¹ Cheever, *supra* note 2, at 1083.

⁷² IOWA CODE ANN. § 457A.2(1) (West 1997).

⁷³ KAN. STAT. ANN. § 58-3811(d) (2001).

easement can be released after a public hearing.⁷⁴ Some states have more stringent restrictions than others on who may hold a conservation easement. While some states allow any type of non-profit, others require that the non-profit have I.R.C. § 501(c)(3) tax status, and still others go further by declaring that the non-profit must have conservation of natural resources or historic preservation as one of its primary purposes.⁷⁵

2. Societal Benefits of Conservation Easements Override Common Law Concerns

Although there are many well-founded and valid concerns about conservation easements, concerns about conservation and a desire to preserve land and open space appear to be stronger. Stability concerns about conservation easements have not disappeared. Whenever we have perpetual agreements with limited rights of enforcement, there will be concerns about what will happen as the years go by. However, restrictions on who can hold a conservation easement have lessened some of these concerns. Today, the federal tax code and most state statutes require that conservation easements be held by either a government entity or a non-profit organization with a conservation purpose. This is because the government is accountable to the people, and non-profits are accountable to their members; theoretically these are stable entities who will ensure that the terms of the conservation easements are being related to new landowners and being adhered to by all.

3. Conservation Easements do not Solve all the Common Law Problems

Conservation easements are not a magic tool that solve all common law concerns.⁷⁶ The reasons courts disfavored conservation easements have not entirely disappeared. There are still concerns about the perpetual aspect of these agreements. Additionally, some scholars point out that conservation easements are a strange mix of public and private land together; therefore, there may be some

⁷⁴ N.J. REV. STAT. § 13:8B-5 (1980). A more complete list of statute release provisions can be found in Cheever, *supra* note 2, at 1083 n.46.

⁷⁵ See, e.g., MONT. CODE ANN. § 76-6-104(5)(c) (2002); CAL. CIV. CODE § 815.3(a) (West 1982); Unif. Conservation Easement Act § 1(2), 12 U.L.A. 170 (1981); see also Morrisette, *supra* note 7, at 388 for a discussion of other specific state restrictions.

⁷⁶ But see generally Cheever, *supra* note 2, at 1077-78 (describing the use of conservation easements by land trusts as "magic").

unarticulated public rights like access and recreation.⁷⁷ Further, as this Article articulates in section IV, there are continuing worries about the enforcement of these agreements. States did not pass statutes codifying rules about easements because they had discovered a new solution to age-old problems, but because societal attitudes had evolved to the point where the new concerns overrode the old worries.

C. *Forms of Conservation Easements*

1. *Donations*

Many landowners donate conservation easements on their land. There may be many reasons for the donation, the chief of which are usually a desire to preserve the character of their land and a desire to receive tax breaks as described below. Much of the research related to conservation easements has focused on these donated conservation easements, looking at the motivations of the donors and the intricacies of the tax breaks.⁷⁸

2. *Sales*

Conservation easements, like other property rights, can be bought and sold. Because there is no clearinghouse for easements, it is not discernable what percentage of easements are sold by landowners. The chief motivation for selling easements is likely to be the money made from their sale, but landowners may also be motivated by retaining the character of their land and their way of life or gaining some tax benefits.

3. *Exactions*

Many conservation easements are born under very different circumstances than the previous two categories. Donated and sold conservation easements are actions voluntarily initiated by landowners. Sometimes, instead of being part of private decisions about the future of one family's farm, conservation easements are part

⁷⁷ See, e.g., Jeff Pidot, *Reinventing Conservation Easements – A Work in Progress* (prepared for a conference on regulatory takings at UCLA in 2004) (paper on file with author and also available through the Lincoln Policy Institute); see also BAY AREA OPEN SPACE DISTRICT, *ENSURING THE PROMISE OF CONSERVATION EASEMENTS* (1999), available at <http://www.openspacecouncil.org/Documents/Easements/EnsuringThePromise.pdf>; FAIRFAX & GUENZLER, *supra* note 52, at 236 n.5.

⁷⁸ See generally Tapick, *supra* note 41; McLaughlin, *supra* note 7; Dana & Ramsey, *supra* note 2; White, *supra* note 2.

of large development projects with complex permitting programs. When developers and individual landowners want to make changes to the land, there are often local, state, and federal permit requirements.⁷⁹ Many of these permit programs require larger projects to incorporate some type of conservation for mitigation.⁸⁰ Conservation easements are one of the most common methods of meeting these requirements.⁸¹ These conservation easements are of a different sort than donated and sold conservation easements. Developers may be required to place some type of conservation easement on their own land or to purchase a conservation easement on someone else's land. Although they engage in the transactions willingly, the easements should not be viewed in the same light. Both the incentives and benefits of these types of conservation easements are very different than those for donated and sold easements.

D. Conservation Easements are Becoming a Key Element of Land Conservation

Despite their awkwardness, conservation easements continue to gain popularity with landowners, government agencies, and conservation organizations. Indeed, conservation easements are the most widely used tool for conservation in the private sector.⁸² Their popularity draws in large part from the tax incentives that accompany conservation easements as well as their flexibility.

1. Tax Breaks

One of the chief benefits of donating or selling a conservation easement is the potential of significant tax benefits. Federal law provides tax breaks to landowners who donate easements based on the value of the easement as a charitable donation.⁸³ There are also estate

⁷⁹ See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 194-96 (2004).

⁸⁰ See, e.g., General Policies For Evaluating Permit Applications, Clean Water Act § 404 Permit Regulations, 33 C.F.R. § 320.4(r) (2005); Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A)(ii) (2004).

⁸¹ Interview with Clark Morrison, Partner, Morrison & Foerster (Oct. 8, 2003); interview with David Nawi, Of Counsel, Shute, Mihaly & Weinberger (Nov. 17, 2003).

⁸² Gustanski, *supra* note 56, at 9.

⁸³ I.R.C. § 170 (2000). To calculate the value of the donation, you take the value of the land before the easement and compare it to the value of the land when encumbered by the easement. The difference is the value of the donation. For more about the valuation process and its potential problems, see McLaughlin, *supra* note 55 (explaining the difficulty in determining the appropriate value of the donation and the incentives of landowners to overestimate).

tax benefits both because the fair market value of the land encumbered is reduced and because a 1997 change to the Internal Revenue Code allowed for a reduction of estate taxes for certain qualified easements.⁸⁴

State tax benefits vary, but there are often reductions in property tax. The tax benefits encourage landowners to set aside their land and serve as a counterweight to development pressures. For landowners to reap all the possible advantages of conservation easements, they must conform to both state and federal law.⁸⁵

In 1964, changes to the Internal Revenue Code formally defined conservation easements at the federal level and allowed income tax deductions for conservation easements donated to charitable organizations including government agencies.⁸⁶ The Internal Revenue Service allows for a federal income tax deduction for qualified charitable contributions up to a maximum of thirty percent of the taxpayer's adjusted gross income.⁸⁷ However, the value of the easement donation can be spread over five years.⁸⁸

Conservation easements also reduce the fair market value of the underlying land. This can reduce valuation for purposes of local property taxes. Some of the most attractive tax breaks associated with easements, however, are related to estate taxes. High estate taxes make conservation easements attractive to landowners when they begin to make plans for passing on their land to heirs. Stephen Small, a Boston attorney specializing in conservation easements, identifies estate taxes as the driving force behind the rise in conservation easements.⁸⁹ With the current level of estate taxes and the continuing increase in property values, many families find themselves forced to

⁸⁴ American Farm & Ranch Protection Act, I.R.C. § 2031(c) (2000). For a discussion of this provision and which conservation easements qualify for the deduction, see Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 60-65 (Julie Ann Gustanski & Roderick H. Squires, eds., 2000).

⁸⁵ Cheever, *supra* note 2, at 1084.

⁸⁶ Feb. 26, 1964, Pub. L. 88-272; *see also* FAIRFAX & GUENZLER *supra* note 52, at 10, 152.

⁸⁷ 26 U.S.C. § 170 (2003). The amount of a contribution exceeding thirty percent of the adjusted gross income in a given year can be carried over and deducted for the next five years.

⁸⁸ *Id.*; McLaughlin, *supra* note 55 (explaining various easement related tax incentives in detail).

⁸⁹ Lynn Asinof, *Conservation Easements Lighten Taxes*, WALL ST. J., Aug. 9, 1991, at C1.

sell their inherited property merely to cover the estate taxes.⁹⁰ Easements reduce the value of the land and the corresponding estate tax. Furthermore, recent changes to the tax code allow additional estate tax deductions for landowners who place easements on property near metropolitan areas, national parks, wilderness areas, and urban national forests.⁹¹

Exacted conservation easements arising from mitigation requirements do not yield the same tax benefits. Because they are permit requirements, not donations, there can be no charitable deduction for these “coerced easements.”⁹² Although these easements might look the same as others on the ground, the lack of donative intent prevents them from qualifying for charitable tax benefits.⁹³ However, the existence of conservation easements still reduces the fair market value of the land; thus, the landowners qualify for any property and estate tax breaks that accompany lower property values.⁹⁴ This tax break only benefits a permit holder who creates a conservation easement on her own land as opposed to purchasing a conservation easement on land owned by another party.

2. Conservation Motivations

There are many different personal incentives for creating conservation easements. Private landowners often create

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The difference between these voluntary and involuntary easements may not seem very significant, but the differing attitudes of the easement purchasers, sellers, and holders may affect later enforcement. A conservation easement on family land to protect the family farm that remains in one family over the course of generations may be more likely to be complied with. Landowner incentive may be a significant factor in the success of conservation easements. Research on the characteristics of conservation easements that make them more or less likely to meet their conservation goals is currently underway at University of California – Berkeley in the Department of Environmental Science, Policy & Management.

⁹³ Most tax courts disallow deductions where there is a lack of donative intent. *See, e.g., Pettit v. Commissioner*, 61 T.C. 634 (1974); *Saba v. Commissioner*, 40 T.C.M. (CCH) 466 (1980).

⁹⁴ As will be discussed later, in some instances, there is no change in property values when a conservation easement is placed on endangered species habitat. Even without the conservation easement, the landowner may be prevented from developing if doing so would result in harm to the species. Therefore, if the value of the land is properly assessed before being encumbered by the conservation easement, the appraisal should account for the development restrictions, making the before and after encumbrance values nearly equal. Thus, the current donation valuation measure for conservation easement on endangered species habitat would not yield a tax break.

conservation easements to protect personal values. Property owners who do not want to see their land turned into a strip mall or want to make sure that the family farm remains a farm look to easements to protect their interests in the land. Some landowners may have pure conservation motives—a wish to protect a certain species or habitat for example. Many people who donate easements cite the ability to leave a lasting mark on the land as their strongest incentive.⁹⁵ This type of altruistic incentive may also influence people who sell easements on their land. Alternately, landowners who are required to create conservation easements to meet permit conditions are usually trying to develop land. Altruistic incentives do not often come into play for these developers because they are actively trying to change or expand the current uses of the land.

3. Avoidance of Federal Involvement

Conservation easements may be a promising solution to the dilemma of balancing private property development interests and conservation. When landowners willingly enter into conservation easement transactions with private land conservation organizations, the exchange appears to avoid the unpleasantness of government land regulation. Such conservation easements are agreements entered into willingly and, at times, even enthusiastically. Landowners can donate or sell their easement to a local land trust and keep the transaction both local and out of government hands.⁹⁶ The absence of federal government involvement is one of the chief benefits of donated and sold conservation easements noted by scholars.⁹⁷ That advantage is lost when the easement is the direct result of a federal permit requirement.

4. A Cheaper and More Efficient Way to Conserve Land

Conservation organizations value conservation easements as a land protection tool because they are a less expensive way to protect a larger acreage. The holders of conservation easement development rights may not exercise those rights. They can no more develop the

⁹⁵ Asinof, *supra* note 89, at C1.

⁹⁶ Conservation easements often have federal ties because of funding, but these are not necessarily felt directly by the landowner.

⁹⁷ See, e.g., James Boyd et al., *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 211 (2000).

land than the original landowner can. They have gained instead something less tangible — their actions contribute to values like habitat conservation, open space, etc. We all benefit from these things. Thus, the holder of the easement is given a burden — they must manage, monitor, and uphold the conservation easement while everyone reaps the benefits. This is why conservation easements are generally held by either government agencies or non-profit organizations.

Conservation easements are attractive to government agencies and conservation organizations because they provide a more efficient way to conserve land. Conservation organizations, for example, need only purchase the rights required to protect the environmental benefits not the entire fee-simple title to the land. Because conservation easements are less costly, easements may be used to shield more total land area from development than fee-simple purchases.

Conservation easements are also an attractive tool because they add relatively few new administrative burdens. This is especially true when the easements are held by private organizations. Essentially, the federal government can pass its conservation duty onto non-governmental organizations who then monitor and enforce federally mandated agreements.

E. Enforcement Concerns About Conservation Easements

The most pressing concern with both voluntary and coercive conservation easements is enforcement.⁹⁸ Conservation easements take many forms and are held by many different entities. Many conservation easements are held by local land trusts. Land trusts come in a variety of shapes and sizes, but they are generally non-profit organizations with conservation as a central goal. Many of these groups protect land by purchasing property rights and accepting donations of property rights — both full fee title and conservation easements. These groups are often newly formed with few staff.⁹⁹ It is not clear whether these groups have enough capacity to both

⁹⁸ Of course, there are many other concerns relating to easements such as the problems of valuation and the implications of passing federal responsibilities to private organizations. These concerns are not the topic of this Article, however. Because conservation easements achieve nothing if they are not viable and enforceable, I consider enforceability a key ingredient to workable conservation easement programs.

⁹⁹ This is not always true, of course. The Nature Conservancy and the Trust for Public Land are two of the largest easement holders in the nation. They are both well-established groups with significant funding, history, and staff.

monitor and enforce complex easements well into the future. This becomes of greater concern as the underlying land passes to new landowners. Second and third generation landowners may be less familiar with the easements and less motivated to respect the restrictions. These concerns are explored in more detail in section IV below.

Conservation easements may also be held by government entities. These can be local, state, or federal agencies. Many of the earliest conservation easements were held by federal agencies. The National Park Service acquired scenic easements along the Blue Ridge Parkway in the 1930s.¹⁰⁰ Additionally, the U.S. Fish and Wildlife Service acquired conservation easements throughout the country in the 1930s and 1940s to protect habitat for species covered under the Migratory Bird Treaty Act.¹⁰¹ In fact, the earliest conservation easement statutes *only* permitted government agencies to hold them.¹⁰² Although we generally think of government as a relatively stable force, enforcement concerns remain even with these well-established entities. As political agendas, funding mechanisms, and staffs change, governmental organizations may vary in their ability to monitor and enforce conservation easements effectively. Indeed, a recent study by the Bay Area Open Space District shows that conservation easements held by government agencies may be in a more precarious position than those held by private organizations.¹⁰³

This section has presented a general picture of conservation easements, briefly outlining the emergence of conservation easements from the common law and explaining general concerns with the tool. Although this section has described conservation easements generally, this Article is chiefly concerned with exacted conservation easements. The remainder of the Article explores the specific concerns raised by that category of conservation easements. Specifically, I examine the example of conservation easements exacted to meet the goals of the ESA. These exacted easements arise in a constrained area where significant public policy goals of endangered species protection conflict with land development goals. This constrained situation

¹⁰⁰ Hocker, *supra* note 56, at xvii.

¹⁰¹ See, e.g., *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974).

¹⁰² See, e.g., 1956 Mass. Acts ch. 631; 1959 Cal. Stat. ch. 1658, p. 4035, § 1 (codified at CAL. GOV'T CODE §§ 6950-6954 (1959)).

¹⁰³ See BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS 28 (1999), available at <http://www.openspacecouncil.org/Documents/Easements/ensuringThe Promise.pdf> (last visited Mar. 8, 2005).

presents a difficult category of conservation easements meriting close examination.

II ENDANGERED SPECIES ACT

Species are going extinct at an alarming rate. Although the exact numbers are uncertain, anthropogenic causes have accelerated the rate to levels that parallel the loss in diversity that accompanies mass extinctions.¹⁰⁴ The current extinction rate is the highest in sixty-five million years.¹⁰⁵ Humans, who are significantly influencing global ecosystems, are triggering this downward spiral.¹⁰⁶ The number one cause of species extinction is habitat destruction.¹⁰⁷ Private lands are an important element of any biodiversity or species protection regime. Approximately fifty percent of the species listed under the ESA are found only on private lands and many more have substantial parts of their remaining range on private property.¹⁰⁸

It is not surprising that private lands have high habitat value. Very few ecosystems in the United States exist solely on public lands.¹⁰⁹ One quarter of all ecosystem types are inadequately represented on public lands and seven percent of ecosystems are not found on public land at any level.¹¹⁰ One-half of all threatened and endangered species are exclusively on private lands, with over twenty percent of the remainder spending at least half of their time on private lands.¹¹¹ Additionally, private lands are more vulnerable to fragmentation and landowners often face intense pressure to develop.

To protect these areas, local and federal governments have generally turned to strict "command-and-control" style regulation.¹¹²

¹⁰⁴ Clark & Downes, *supra* note 7, at 9.

¹⁰⁵ Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, 12 J. ENVTL. L. & LITIG. 151, 153 (1997).

¹⁰⁶ *Id.* at 154-55; AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 30 (1993).

¹⁰⁷ JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* 226 (Robert C. Clerk et al. eds., 2002).

¹⁰⁸ Clark & Downes, *supra* note 7, at 10.

¹⁰⁹ Morrisette, *supra* note 7, at 374.

¹¹⁰ *Id.* at 374. Wetlands, for example, are almost entirely privately owned.

¹¹¹ *Id.*

¹¹² LEONARD ORTOLANO, *ENVIRONMENTAL REGULATION AND IMPACT ASSESSMENT* 163-65 (1997). Command and control is a phrase used to indicate that strict standards and

This means prohibitions on building, limitations on activities, and governmental control of private action. These techniques have had mixed results both ecologically and politically. Most significantly, states and the federal government have enacted endangered species acts. While the specifics of the acts vary, the goals remain the same: protect endangered species and their habitat. The federal ESA involves strong restrictions on governmental activities accompanied by restrictions on private landowners.

A strong belief in private property rights, accompanied by a distrust of bureaucracy and governmental regulation by much of the country, has inspired government agencies, activists, and scholars to explore new mechanisms for environmental protection. In recent years, property rights advocates have been claiming that regulations have gone too far.¹¹³ In response to this concern, communities, developers, and government agencies are adopting market-based approaches to habitat conservation.¹¹⁴ The search for ways to protect endangered species habitat and preserve private property rights has led to the use of a variety of new institutions and tools, including conservation easements.

Protection of the environment has created tension between conservation and development. Indeed, some see land conservation as sacrificing the interests of private landowners to achieve a public benefit.¹¹⁵ The private property rights movement poses a significant threat to the protection of biodiversity. Some scholars have characterized the movement as “the most serious obstacle to efforts to protect biodiversity and the environment generally.”¹¹⁶

In 1973, Congress passed the ESA.¹¹⁷ Probably the most strongly biocentric law of the United States, the ESA establishes a program to protect threatened and endangered species and the ecosystems upon

requirements are used to meet environmental goals. Stringent commands, monitoring, and sanctions for non-compliance mark regulations of this type. This technique can be contrasted with economic or efficiency-based regulation.

¹¹³ Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 8-9 (1997). Property rights advocates have generally allied themselves with the wise-use movement, but the groups have only had limited success in achieving their goals thus far. *Id.*

¹¹⁴ Clark & Downes, *supra* note 7, at 50.

¹¹⁵ Boyd et al., *supra* note 98, at 211.

¹¹⁶ Clark & Downes, *supra* note 7, at 73.

¹¹⁷ 16 U.S.C. §§ 1531-1543 (1973).

which they depend.¹¹⁸ Congress enacted the ESA in response to findings that economic growth and development had both endangered the existence of many species and driven others to extinction.¹¹⁹ The ESA's purpose is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species."¹²⁰ Rooted in the Commerce Clause of the Constitution, the ESA recognizes the aesthetic, ecological, recreational, and scientific value of preserving species and biodiversity generally.¹²¹ To meet these goals, the ESA imposes strict requirements on both public and private actions. In general, the ESA makes it illegal to import, export, trade, take, possess, or transport such species.¹²²

Congress' intent to set species protection as paramount has been upheld and recognized by the courts.¹²³ People from every part of the political spectrum have heavily criticized the ESA. The two most significant complaints are the potential for the ESA to infringe on private property rights and the narrowness of the ESA's species-specific framework. Internationally, where land has been managed for specific species, it has often been to the detriment of natural ecosystems.¹²⁴

A. Section 4: Listing and Critical Habitat Designation

The ESA is based on listing species as threatened or endangered. Federal protection for a species is triggered once the DOI lists the species in the Federal Register as either threatened or endangered.¹²⁵ The Secretary of the Interior (the Secretary) makes a decision to list a species as either threatened or endangered based on the biological

¹¹⁸ *Id.* § 1531(b); Lara M. Bernstein, Comment, *Ecosystem Communities: Zoning Principles to Promote Conservation and the Economy*, 35 SANTA CLARA L. REV. 1309, 1312 (1995).

¹¹⁹ 16 U.S.C. § 1531(a)(1)-(2).

¹²⁰ *Id.* § 1531(b).

¹²¹ *Id.* § 1531(a)(3).

¹²² *Id.* § 1538.

¹²³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176-92 (1978) (stopping a large federal dam project in order to protect the snail darter because Congress' intent was read as requiring halts to projects that would hurt endangered species "whatever the cost").

¹²⁴ Farrier, *supra* note 67, at 307.

¹²⁵ Bernstein, *supra* note 118, at 1312.

health of the species.¹²⁶ In making this decision, the Secretary must use available scientific and commercial data. Because listing decisions must be based solely on scientific factors, the Secretary cannot consider the private property impacts of listing decisions.¹²⁷ Although the listing of a species does not itself lead to restrictions on private property, requirements that accompany listing can have serious impacts. Simultaneous with the listing of a species as threatened or endangered, section 4 of the ESA requires that the Secretary designate critical habitat for the species to the “maximum extent prudent and determinable.”¹²⁸

B. Section 7: Protection of Species

Section 7 is one of the more significant provisions of the ESA. It requires federal agencies to ensure that all actions they undertake conform with the ESA.¹²⁹ Specifically, agencies must ensure that their actions will not put any listed species in jeopardy. Agency actions are broadly defined to encompass the issuing of federal permits in conjunction with statutes like the Clean Air Act, the Clean Water Act, and the ESA itself. Section 7 also recognizes the harm to species caused by habitat destruction, and the accompanying regulations prohibit any modification of habitat that could directly or indirectly “diminish[] the value of critical habitat for both the survival and recovery of a listed species.”¹³⁰

C. Section 9: Prohibition of Takings

Some ESA requirements extend beyond federal agencies to impact private parties. Under section 9, any activity that harms, or could harm, a listed species or its habitat¹³¹ is prohibited unless it receives specific governmental approval. The ESA prohibits any person within the jurisdiction of the United States from “taking” any listed

¹²⁶ 16 U.S.C. § 1532(20) (2004).

¹²⁷ *See id.* § 1533(b)(1).

¹²⁸ *Id.* § 1533(a)(3)(A).

¹²⁹ *See id.* § 1536(a)(2).

¹³⁰ 50 C.F.R. § 402.02 (1994).

¹³¹ Note that this section prohibits taking of “habitat” not “critical habitat.” Critical habitat and actual habitat are two different things. Critical habitat is only that habitat specifically designated as such by the Secretary. Habitat for purposes of section 9 refers to any actual habitat of a listed species. Thus, if a species is present on the land, modification of that land is restricted even if the land is not officially designated critical habitat.

wildlife or fish species.¹³² The ESA broadly defines “take” to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.”¹³³ Harm has been further defined in agency regulations as including “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”¹³⁴ This standard can impact private individuals who want to modify or develop their land.

D. Section 10: Incidental Take Permits

In 1982, Congress responded to growing protests from developers by amending the ESA to provide partial relief from the section 9 ban on habitat modification. The amendments created “incidental take permits.”¹³⁵ These permits allow landowners to develop their land even when the land serves as endangered species habitat as long as the taking of individual species is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”¹³⁶ To obtain these permits, landowners wishing to develop or modify their land must prepare an HCP.¹³⁷ These habitat plans set forth the details of the development and provide for mitigation of any harmful effects. HCPs and their accompanying incidental take permits give developers flexibility and a greater degree of economic certainty.¹³⁸ HCPs generally require landowners to mitigate the harm created by their proposed project.¹³⁹ The mitigation projects often take the form of conservation easements.

¹³² 16 U.S.C. § 1538(a)(1)(B). This section does not cover insects and plants.

¹³³ 16 U.S.C. § 1532(19).

¹³⁴ 50 C.F.R. § 17.3 (1994). The Supreme Court upheld this definition of harm, despite a vigorous dissent, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 707 (1995).

¹³⁵ See 16 U.S.C. § 1539(a).

¹³⁶ See *id.* § 1539(a)(1)(B).

¹³⁷ *Id.* § 1539(a)(2)(A).

¹³⁸ Bernstein, *supra* note 118, at 1317.

¹³⁹ 16 U.S.C. § 1539(a)(2)(A)(ii).

III HABITAT CONSERVATION PLANS

Habitat loss is the single greatest cause of species extinction.¹⁴⁰ The ESA seeks to promote habitat conservation through the regulation of both federal and private activities. Section 9 of the ESA has the most direct impact on private landowners, because it prohibits “taking” of listed species by any person whether the species are on public or private lands.¹⁴¹ Section 3 defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁴² Much has turned on the definition of the word “harm”¹⁴³ and many landowners worry that any action they take could in some way result in “harm” to a species. The ESA has actually created a perverse incentive, where property owners intentionally destroy habitat before species can obtain listed status.¹⁴⁴

Before the 1982 amendments to the ESA created a provision for incidental takes, the only allowable takes were those associated with scientific research. Congress created the incidental take permitting system to give developers flexibility. In particular, Congress was acknowledging a need to balance economic pressures and species preservation. The conservation plans and section 10 permits were designed to help foster “creative partnerships” between the public and private sectors and state, municipal, and federal agencies.¹⁴⁵

As mentioned above, the amendments authorized the Secretary of Commerce and the Secretary of the Interior (“the Secretaries”) to issue incidental take permits.¹⁴⁶ The Secretaries charged the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Services (NMFS)¹⁴⁷ with the duty of carrying out the permitting process. The requirements for these permits are laid out in

¹⁴⁰ Clark & Downes, *supra* note 7, at 49.

¹⁴¹ 16 U.S.C. § 1538(a)(1)(C).

¹⁴² *Id.* § 1532(19) (emphasis added).

¹⁴³ Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) (upholding harm as a significant habitat modification); Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781 (9th Cir. 1995) (holding imminent threat of harm is actionable as a “taking” under the Act); Palila v. Haw. Dep’t of Land and Natural Res., 852 F.2d 1106 (9th Cir. 1990) (habitat destruction is a harm).

¹⁴⁴ Karkkainen, *supra* note 113, at 59 n.312.

¹⁴⁵ H.R. REP. NO. 97-835, at pp (date).

¹⁴⁶ 16 U.S.C. § 1539(a)(1)(B) (1988).

¹⁴⁷ Now called NOAA fisheries.

section 10(a) of the ESA.¹⁴⁸ The NMFS and the FWS (the Services) may issue permits that allow an applicant to engage in an otherwise prohibited “taking” of an endangered species under certain circumstances.

Section 10 of the ESA is triggered when it is determined that an activity on non-federal land¹⁴⁹ is likely to result in the “take” of a listed species. The landowner or project proponent must then apply for a section 10(a)(1)(B) Incidental Take Permit. The next step of the analysis is to determine whether the project can be undertaken without resulting in harm to listed species. If the Services find that harm to listed species cannot be avoided, they recommend that applicants obtain a section 10 permit.¹⁵⁰ It is ultimately up to the applicant to decide whether to apply for a permit, the Services merely issue recommendations. If an applicant does not obtain a permit and a take does indeed occur, however, the individuals responsible for the take of a listed species will be subject to the enforcement provisions of the ESA, which have potential penalties including fines, injunctions, and jail time.

To obtain permits, property owners must submit an HCP, a comprehensive conservation plan. Both the Services and the public review the proposed HCP before a permit is issued. For an applicant to qualify for an Incidental Take Permit, the Services must ensure that the take will truly be incidental to an otherwise lawful activity. Additionally, the HCP must mitigate the impacts of the take “to the maximum extent practicable.”¹⁵¹ The applicant must show that she has funding for the plan, and the take must not appreciably reduce the

¹⁴⁸ *Id.* § 1539(a).

¹⁴⁹ Federal activity or activity on non-federal land requiring a federal permit usually triggers section 7, not section 9, procedures. UNITED STATES FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLAN HANDBOOK 1-4 (Nov. 1996) [hereinafter HCP HANDBOOK]. All federal projects are subject to section 7 consultations. In some cases, however, federal agencies besides FWS or NMFS may be integrally involved in HCP efforts. In these cases, the HCP process is usually done in conjunction with section 7 actions. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any related federal actions into one biological opinion. The biological opinion developed for the HCP incorporates the necessary biological analysis on the federal action as well as the actions in the HCP to help eliminate duplication. Thus, a single biological opinion issued by the Services addresses both the federal action and the non-federal action; it includes an incidental take statement which authorizes any incidental take by the federal agency and an incidental take permit, which authorizes any incidental take by the section 10 permittee.

¹⁵⁰ *Id.* at 1-4.

¹⁵¹ 16 U.S.C. § 1539(a)(2)(A)(ii).

likelihood of the survival of the species as a whole. Because HCPs generally offer greater certainty for protection of species habitat than taking no action, they are unlikely to appreciably reduce the likelihood of species survival in the wild.¹⁵²

Because HCPs are binding plans for an area, they usually include more than just specific discussions of one species. Congress intended that the plans also include consideration of candidate species and fragile ecosystems. This broader scope is more beneficial to both the protected ecosystems and to the developers. By considering species not yet listed, a developer creates protection for his projects in case a species becomes listed in the future.¹⁵³ Thus, HCPs can be valuable tools for preservation by creating conservation plans covering whole ecosystems and multiple species, while providing landowners and developers with a greater degree of certainty as to future obligations.

Congress modeled section 10 and the HCP program after creative endeavors occurring on San Bruno Mountain in San Mateo County, California during the early 1980s.¹⁵⁴ The San Bruno Mountain HCP was negotiated before section 10 was in place. It could not go into effect because there was no allowance for incidental takes in the ESA. Congress added section 10 specifically to enable the San Bruno agreement to proceed. Further, Congress explained that the San Bruno agreement should serve as a model for future HCPs.¹⁵⁵

The issuance of an Incidental Take Permit triggers section 7 of the ESA. Section 7(a)(2) requires all federal agencies, in consultation with the Services, to ensure that any action “authorized, funded, or carried out” by any such agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat.¹⁵⁶ This process, known as section 7 consultation, includes detailed requirements for scientific inquiry. Although the requirements of sections 7 and 10 are relatively similar, the triggering of section 7 adds a few new elements. Specifically, the Services must examine indirect effects, effects on federally listed plants, and effects on designated critical habitat.

¹⁵² HCP HANDBOOK, *supra* note 149, at 1-6 to 1-7.

¹⁵³ *Id.* at 1-2.

¹⁵⁴ *Id.*

¹⁵⁵ H.R. Conf. Rep. No. 97-835, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807.

¹⁵⁶ 16 U.S.C. § 1536(a)(2).

HCPs and Incidental Take Permits were not used extensively until the Clinton administration. Partly because both the FWS and NMFS were slow to write and issue implementing regulations for the provision,¹⁵⁷ only three HCPs were adopted between 1982 and 1989.¹⁵⁸ In the 1990s, Secretary of the Interior Bruce Babbitt decided to use the tool to its full potential.¹⁵⁹ Within four years, over one hundred permits were issued.¹⁶⁰ Today, more than thirty million acres are covered by over four hundred HCPs.¹⁶¹

Support for HCPs is mixed. Some environmentalists worry that HCPs are being developed without clear scientific guidance and that they lock the public into a contract with a private property owner that might not actually be beneficial to the species in question.¹⁶² In particular, some scholars worry that HCPs are inadequately funded and monitored.¹⁶³ Other environmentalists are not quite as skeptical; they see the potential of HCPs to increase habitat protection¹⁶⁴ and to

¹⁵⁷ The FWS published its final regulations for implementing the section 10 permit program in the Federal Register on September 30, 1985. 50 Fed. Reg. 39681, 39691 (Sept. 30, 1985). NMFS published final regulations for the program on May 18, 1990. 55 Fed. Reg. 20603 (May 18, 1990). Even after the Services issued their regulations, there was a lot of uncertainty about how to proceed. This led to the publication of the HCP Handbook in 1996.

¹⁵⁸ NAGLE & RUHL, *supra* note 107, at 286. The first HCP was litigated in the well-known *Jantzen* case. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985).

¹⁵⁹ Karkkainen, *supra* note 113, at 59; Press Release, Department of Interior, Habitat Conservation Planning Is Streamlined Under New Guidelines Announced By Two Agencies (Dec. 3, 1996), available at <http://daewin.eeb.uconn.edu/documents/fws-960916.html> (last visited Jan. 19, 2005).

¹⁶⁰ U.S. Fish & Wildlife Service, *Habitat Conservation Plans and Agreements Database*, at <http://ecos.fws.gov/conserv-plans/public.jsp> (last visited Jan. 19, 2005) (showing listings for all HCPs, Safe Harbor Plans, and Candidate Conservation Agreements).

¹⁶¹ As of March 8, 2005, 479 Habitat Conservation Plans have been approved, covering over 38 million acres and protecting more than 526 species. U.S. Fish & Wildlife Service, *Endangered Species Habitat Conservation Planning*, at <http://endangered.fws.gov/hcp/index.html> (last updated Mar. 8, 2005).

¹⁶² Michael Lipske, *Giving Rare Creatures a Fighting Chance*, NAT'L WILDLIFE (Feb./March 1998).

¹⁶³ See, e.g., Thomas Douglas Feldman, *Local Solutions to Land Use Conflict Under the ESA: Habitat Conservation Planning in Riverside County* (1995) (unpublished Ph.D. dissertation, University of California at Riverside) (on file at the University of California at Riverside University Library).

¹⁶⁴ The National Wildlife Federation argues that the plans work well as long as safeguards are in place. Press Release, National Wildlife Federation, U.S. District Court Ruling In California Will Improve Wildlife Safeguards Nationwide (Aug. 16, 2000), available at <http://www.swainsonshank.org/Natomas%20Victory.html> (last visited Mar. 8,

make the ESA less vulnerable to attack by conservatives and private property rights advocates. HCPs are very attractive to policy-makers because they help alleviate some of the criticisms of the ESA. The increased flexibility allows private landowners to make changes to their land. Private landowners are generally in favor of HCPs because HCPs allow them to develop land that otherwise seemed unavailable due to the presence of endangered species. However, HCPs still represent an obstacle for developers. Although the goal of HCPs is to increase flexibility, the HCP requirement imposes a cumbersome process on developers. The lengthy permitting process imposes direct costs on developers and causes building delays, which further increase costs.¹⁶⁵ Some scholars and landowners view the prohibitions of section 9 and the permitting process of section 10 as examples of the increasing interference of federal government with local decisions.¹⁶⁶ Because local land use control is a function traditionally left to state and local governments, the HCP requirements, which impose a federal planning process on private land with endangered species, can be viewed as an infringement on local sovereignty.

A lack of adequate scientific understanding of species and their habitat makes HCPs uncertain documents. They are essentially long-term contracts binding on both parties—but it is difficult to know when HCPs are really doing the “right thing” for listed species. It is not clear what type of mitigation really works best. There are few studies showing whether HCPs have actually been successful in terms of species recovery and rehabilitation. As one scholar noted, “[g]ranting permits based on inaccurate or incomplete information about an ecosystem could result in species decimation, which would thwart the goals of the ESA.”¹⁶⁷ Habitat modification could harm an unknown or unlisted species—unforeseen and unforeseeable impacts could disrupt an entire ecosystem.

2005). The National Audubon Society has criticized the current state of HCPs, but believes that there is potential for improvements in habitat protection with changes in the current implementation procedures. The National Audubon Society, *Report of the National Audubon Society Task Force on Habitat Conservation Plans* (1995), available at http://www.audubon.org/campaign/esa/task_force.html (last visited Mar. 8, 2005).

¹⁶⁵ Bernstein, *supra* note 118, at 1343-44.

¹⁶⁶ See, e.g., Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 2 (1991).

¹⁶⁷ Bernstein, *supra* note 118, at 1344.

In 1998, the agencies that enforce the ESA adopted a “No Surprises” rule.¹⁶⁸ This rule provides security for landowners. Once an HCP is agreed to, landowners will not be penalized if a species “unexpectedly worsens due to unforeseen circumstances.”¹⁶⁹ This “No Surprises” provision is even more upsetting to environmentalists than the original Incidental Take Permit provision. With uncertainty in the conservation biology of endangered species and unknown potential ecosystem effects, HCPs can never take into account all potentialities. Additionally, scientists agree that adaptive management and ecosystem level programs provide the best protection for species and their habitat. A locked-in agreement between the federal government and a property owner prevents future changes to the management of particular parcels as knowledge about a species or ecosystem increases.¹⁷⁰

A. *Types of HCPs*

An HCP must assess the impact of the proposed activity on listed species, analyze alternatives to the proposed activity, set out the steps that will be taken to minimize the impact, and describe the funding that will be available to implement such steps.¹⁷¹ The Secretaries may approve the HCP and issue an Incidental Take Permit if the Secretaries find that the taking will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”¹⁷² The federal agencies charged with administering the ESA interpret this requirement to mean that a species may be incidentally taken unless the taking threatens to diminish the species’ survival and recovery chances. Thus, a project can harm individuals of a species as long as it does not imperil the survival of the species as a whole. Some environmentalists and scholars argue that Incidental Take Permits allow landowners to harm species in ways that could

¹⁶⁸ Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859 (Feb 23, 1998).

¹⁶⁹ *Id.* at 8867.

¹⁷⁰ The spotted owl serves as a good example of the problems of scientific uncertainty. The owl was largely unstudied before Eric Forsman began his graduate work in the forests of the Pacific Northwest in the 1980s. Each time a study on the raptors was released, the estimated critical habitat requirements changed. *See generally* STEPHEN L. YAFFEE, *THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY* (1994).

¹⁷¹ 16 U.S.C. § 1539(a)(2)(A).

¹⁷² *Id.* § 1539(a)(2)(B)(iv).

jeopardize the existence of the species.¹⁷³ With an increasing number of HCPs being approved, scholars and conservationists now worry about the potential cumulative impacts of all these plans.¹⁷⁴

In a typical HCP, a landowner has immediate plans to do something on her land that would harm a listed species. In exchange for permission to carry out this harm-causing activity, the landowner must prepare a plan to mitigate the harm of the proposed activity. In these situations, the listed species is already present on the property.

HCPs generally take one of two forms: project specific or regional. Project specific HCPs generally cover less land area and are put together by a developer. The developer hires consultants to write the HCP, which must meet the approval of the FWS. The developer is personally responsible for finding conservation easements in this case.

The developer can either purchase conservation easements from a landowner whose land has suitable habitat characteristics or place a conservation easement on his own land. In these cases, although the developer is involved in the process of creating the conservation easement, he quickly divorces himself from the encumbrance. When the developer donates a conservation easement on his own land, it is common for him to sell the underlying fee interest.¹⁷⁵ The conservation easement becomes part of the cost of doing business. Once the conservation easement is purchased and turned over to an appropriate entity, the developer is no longer involved in the conservation easement process. Although developers are generally required by their permit terms to provide some upfront money to fund monitoring and enforcement, developers do not play an active role in either the monitoring or enforcement. The developer does not usually hold the conservation easement or the underlying fee title. The agreement is between the easement holder and the fee title landowner. Developers thus successfully remove themselves from the situation after they have provided the money for the conservation easement creation or donation and a cash payment for enforcement and monitoring.¹⁷⁶

¹⁷³ See, e.g., Brown, *supra* note 105, at 200.

¹⁷⁴ See, e.g., *id.* at 201.

¹⁷⁵ Interviews with several Bay Area HCP lawyers including Clark Morrison of Morrison & Foerster and David Nawi of Shute, Mihaly & Weinberger.

¹⁷⁶ Nancy McLaughlin refers to these costs as transaction costs. The developer pays the cost of writing the deeds, hiring the lawyers, and providing the land trust with funding for administration. McLaughlin, *supra* note 83, at 24.

With regional HCPs, the developer is even further removed from the conservation easement process. When HCPs are regional, it is usually a city or county that puts together the HCP. The regional administrator, for example a county, is then responsible for finding and purchasing conservation easements. The regional administrator can hold on to the easements, but generally passes them on to local land trusts or state agencies. In California, for example, many conservation easements on wetlands are held by the California Department of Fish and Game.¹⁷⁷ In such cases, developers merely provide the funding for the conservation easements. The cost of purchasing, monitoring, and enforcing easements comes in the form of a fee paid by the developer when applying for a permit to undertake a project. Once again, the developer is generally disconnected from the easement.

B. Reviewability of HCPs

ESA and HCP regulations provide for limited public review of HCPs. The Services currently require a thirty-day public comment period for all formal HCP applications, but generally expand the comment period to sixty days for large-scale HCPs.¹⁷⁸ Generally, the Services publish notices about the availability of HCPs in local newspapers and hold informational meetings.¹⁷⁹ Because the development of an HCP is the responsibility of an applicant and not a government agency, there is no requirement that the public be involved in the creation of an HCP. However, the Services do encourage applicants for larger or more controversial projects to provide opportunities for public involvement.¹⁸⁰ Indeed, most HCPs are the result of negotiation and cooperation between many participants including community members, non-profit organizations, project proponents, and representatives from all levels of government.¹⁸¹

¹⁷⁷ California Department of Fish & Game Website, <http://www.dfg.ca.gov> (last visited Feb. 15, 2004).

¹⁷⁸ U.S. FISH & WILDLIFE SERVICE / NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, ADDENDUM TO THE HCP HANDBOOK, Executive Summary (May 2000).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ For example, the San Bruno HCP was constructed based on the input of representatives from housing developments, landowners, "prospective developers, [San Mateo] County, the cities of Brisbane, Daly City, and South San Francisco, the California

HCPs are subject to public review under the requirements of the ESA and under the National Environmental Policy Act (NEPA). The issuance of a section 10 permit is a federal action subject to NEPA requirements. Although many section 10 requirements overlap with NEPA requirements, NEPA goes further than the ESA, requiring consideration of environmental impacts beyond species and habitat impacts. A NEPA analysis must also include, for example, examinations of impacts on air and water quality. Depending on the scope of an HCP, NEPA compliance requires a categorical exemption, an Environmental Assessment, or an Environmental Impact Statement.

Groups and individuals that can show standing can bring legal challenges to the granting of Incidental Take Permits. In fact, a group named Friends of Endangered Species challenged the very first Incidental Take Permit ever issued.¹⁸² Challenges to permits are in essence challenges to agency decisions. Thus, the cases are rooted in the administrative law drawing largely on the APA. The APA and judicial precedents have established a strong level of deference to agency action and decision-making.¹⁸³ Challenges to the issuance of Incidental Take Permits necessarily include a review of the HCPs, and usually include a review of the biological data collected and presented within the context of section 7 of the ESA. Although such challenges can result in a revocation of a permit or a change in permit terms, these are not suits based upon enforcement of a permit.

HCPs cannot be challenged by ballot referendums. In San Bruno, local citizens tried to challenge an amendment to an HCP via referendum. Although they garnered enough signatures to qualify the issue for the ballot, a court held that an HCP amendment is an administrative act and therefore not subject to referendum.¹⁸⁴

C. Enforcement of HCPs

The Services are responsible for enforcement of HCPs. If the terms of an HCP are not being complied with, the Services should

Department of Fish and Game, the FWS," and a citizens' environmental group called the Committee to Save San Bruno Mountain. Arnold, *supra* note 166, at 20. This assortment of participants, although large, is typical for HCPs.

¹⁸² Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

¹⁸³ See generally 5 U.S.C. § 706 (2003), Chevron, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

¹⁸⁴ W.W. Dean & Assoc. v. City of San Francisco, 190 Cal. App. 3d 1368 (1987).

bring enforcement actions against the permit holder. Failure to comply with an HCP is essentially a violation of a federal permit. Federal agencies are the only entities that can bring actions against permit holders.¹⁸⁵

IV

CONSERVATION EASEMENTS IN HCPS

Conservation easements created to meet HCP requirements are a form of exacted conservation easements. This means, among other things, that the developers who are providing the funding for purchasing, monitoring, and enforcing conservation easements are not eligible for the tax breaks that accompany conservation easements undertaken for other reasons. The developers are required to assist in the creation of conservation easements; therefore, the conservation easements are not created in the same spirit as conservation easements that qualify as charitable donations.

A. Coerced Conservation Easements

1. No Tax Breaks for Charitable Contributions

Conservation easements created in conjunction with permits do not qualify as charitable donations. Other elements of the conservation easements are generally the same. A landowner is placing a restriction on land that detracts from the marketability and commercial value of the land. However, in the case of exacted conservation easements, the landowner is not really assigning away a right he had. Because of the presence of either listed species or habitat, the land could not have been developed anyway. Viewed in this way, however, the landowner is not really giving away any rights, and perhaps the restriction should not be termed a conservation easement—it is merely a codification of a restriction already present because of ESA requirements. However, it is significant that the restrictions embodied in conservation easements are usually in perpetuity. This means that regardless of changes in species make-up, habitat ranges, climate changes, or even greater understanding of the conservation biology of the species, the land can never be

¹⁸⁵ Although some environmental statutes contain citizen suit provisions allowing private individuals and groups to act as private attorneys general and bring enforcement actions, the ESA does not contain a provision specifically allowing for citizen enforcement of Incidental Take Permits.

developed.¹⁸⁶ If a conservation easement is created to protect a species that later goes extinct, the extinction does not automatically change the restriction on the land. Taking into account these long-term restrictions, the landowner has indeed lost a significant opportunity. The denial of tax incentives may not be clearly justified. Examination of the motivations of conservation easement donors does not necessarily reveal incentives that are any purer than those of developers required to purchase a conservation easement based on permit terms.

Perhaps tax incentives should be available to landowners and developers in conjunction with conservation easements that are born out of HCPs. Scholars have found federal tax policy a useful incentive for accommodating species preservation. It makes sense to draw upon tax incentives to encourage species and habitat protection because the tax system is already in place, the tax code reaches everyone, and legislators commonly use the tax code to stimulate or shape investment and development decisions.¹⁸⁷

2. *Property Tax and Estate Tax Breaks Should Still be Available*

Even if a charitable tax deduction is not available, there could still be property tax breaks available to landowners who are required to create conservation easements in conjunction with permits. If a conservation easement reduces the value of land, the land should be taxed at a lower rate. However, if the conservation easement is on land that provides habitat for endangered species, the land would not be developable even without the conservation easement. Therefore, even before the creation of the easement, the land would have had a reduced fair market value and thus, reduced property and estate tax liability. When developers place conservation easements on their own land, they generally get rid of the underlying fee title soon thereafter. Thus, the new owner of the fee simple land would be the

¹⁸⁶ Although these exacted conservation easements are technically in perpetuity and generally last a “long time,” there are ways for conservation easements to end whether by merger, laches, or changed circumstances. Courts are generally reluctant to terminate easements, but it does happen. A discussion of easement termination is outside the scope of this Article, but there are some helpful texts available. *See, e.g.,* Korngold, *supra* note 2, at 482-94; Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989).

¹⁸⁷ Brown, *supra* note 105, at 247.

one that gets the lower property taxes and accompanying benefits in exchange for purchasing encumbered land.

Increasing the tax credit for such lands could increase the benefit of owning and protecting rare habitat. Whenever conservation easements are violated, the property tax benefits should disappear, thereby encouraging landowners to be honest.¹⁸⁸

There may still be some available tax advantages associated with the burdens of the current estate tax. This is only an advantage to a project proponent who is also a landowner. When the fee simple title to land burdened by an easement is held by an outside party, that party gets the benefit of lower property values. This benefit could be magnified, however. There are currently additional estate tax benefits when an easement applies to certain categories of land.¹⁸⁹ Because preservation of endangered species habitat is a public good, the additional tax benefits should also apply to this land.

B. Major Concerns

1. Dead Hand

One of the most common concerns about conservation easements relates to the fear of “dead hand control” over land. Conservation easements give an extraordinary amount of power to the present day landowner who negotiates the original deal restricting future owners and managers. Thus, conservation easements may be overshadowed by a fear of one generation creating long-term obligations and imposing their views far into the future. This so called “dead hand control” has led to laws against perpetuities and other efforts to diminish the amount of control one owner’s wishes can have far into the future. Some scholars find this dead hand argument “ironic” when the alternative to conservation easements is often development and habitat restriction, which has a much greater capacity to impose dead hand control over land.¹⁹⁰ Worries about dead hand control take on a different tone when discussed in relation to exacted conservation easements. Here, the hand controlling the land is not clearly the

¹⁸⁸ See Brown’s discussion of state and local property tax credits, *id.* at 247-49. Of course, this assumes that someone is monitoring the HCPs and adjusting the property values accordingly, an action that is unlikely to occur.

¹⁸⁹ See *supra* text accompanying note 7.

¹⁹⁰ Farrier, *supra* note 67, at 344 (“Such an argument is ironic in the current environmental context, where non-sustainable development is responsible for reducing the choices available to future generations.”).

private landowner; the government also plays an important role. Although present day actions restrict future flexibility with regard to the land, the involvement of land use and environmental law statutes imbues the decision with public policy goals.

2. *Change of Circumstance*

Connected to concerns of the dead hand are potential problems associated with changed circumstances. Conservation easements placed on land today may not always make sense in the future. For example, neighboring land may be developed - making scenic and environmental quality easements less beneficial. In the case of conservation easements to protect habitat, species may go extinct—making protection of their habitat less critical. Alternatively, species may recover to such an extent that preserving a few acres may no longer be important. The best conservation easements try to take into account future events and incorporate potentialities. Some conservation easement agreements do have provisions for release of the easement and clauses about changes of circumstances. However, for HCP mitigation proposals, the easements should be in perpetuity; therefore, no change of circumstance clauses should allow landowners to break their easement contracts.

3. *Enforcement and Monitoring is Uncertain*

Some scholars worry that land trusts will spend their energies securing conservation easements without thinking thoroughly about enforcement.¹⁹¹ Many holders of conservation easements are small groups who do not have the resources or expertise to implement projects adequate to protect biodiversity. Although the government often provides funding for purchasing conservation easements, there are usually not funds set aside for enforcement duties.¹⁹²

Land trusts may not have the necessary staff and infrastructure to manage conservation easements. According to the Land Trust Alliance, 40 percent of all regional land trusts are staffed entirely by volunteers.¹⁹³ A recent survey in the San Francisco Bay area examined 315 conservation easements and found forty-three

¹⁹¹ See, e.g., *id.*

¹⁹² *Id.* at 348-49.

¹⁹³ Land Trust Alliance, *About Land Trusts*, at <http://www.lta.org> (last visited Jan. 19, 2005).

violations.¹⁹⁴ There were more violations on conservation easements managed by land trusts compared to conservation easements owned by public entities, but this is most likely because private groups were more diligent in their enforcement and thus, more likely to find violations.¹⁹⁵

Many of the large land trusts become so entrenched in their business and working with the landowners that they overlook transgressions.¹⁹⁶ The Nature Conservancy focuses on maintaining good relationships with landholders to prevent easement transgressions.¹⁹⁷ Monitoring land encumbered by easements is not always an easy task. To secure compliance with a conservation easement agreement, a land trust must monitor the encumbered land, which can take time for both the easement holder and the landowner. For example, The Nature Conservancy enforces their conservation easements at the ACE Basin in Florida by walking through the property with the landowner each year; the Conservancy asserts to having no problems with enforcement even when the property has changed hands.¹⁹⁸ However, changing ownership seems likely to lead to increased easement violations and enforcement concerns. A recent Land Trust Alliance study indicates that all 435 serious conservation easement violations in 1999 were committed by post-transaction owners.¹⁹⁹ To provide funding for enforcement, many land trusts have begun to charge easement defense fees to entities, such as governments, that are donating easements to them.²⁰⁰

Conservation easements are legal mechanisms that can be enforced in the courts, but formal proceedings are seen as a last resort.²⁰¹

¹⁹⁴ Morrisette, *supra* note 7, at 391; *see also* Cheever, *supra* note 2, at 1100; BAY AREA OPEN SPACE COUNCIL, ENSURING THE PROMISE OF CONSERVATION EASEMENTS (1999).

¹⁹⁵ Morrisette, *supra* note 7, at 391. Around 75 percent of land trusts monitored their easements regularly while only 30 percent of public entities did.

¹⁹⁶ This is one of the justifications for the new Huey Johnson (founder of Trust for Public Lands) organization, Defense of Place. Defense of Place is the first of what promises to be several new organizations serving as a watchdog of conservation easement holders working through legal and non-legal channels to try to ensure easement agreements are upheld. Defense of Place, *About Defense of Place*, at <http://defenseofplace.rrri.org/about/index.html> (last visited Jan. 12, 2005); *see also* Farrier, *supra* note 67, at 349-50.

¹⁹⁷ Farrier, *supra* note 67, at 350.

¹⁹⁸ Morrisette, *supra* note 7, at 413.

¹⁹⁹ Land Trust Alliance, *Easement Violations 1999*, at <http://www.lta.org>.

²⁰⁰ DIEHL & BARRETT, *supra* note 1, at 104.

²⁰¹ *Id.* at 92.

Without vigilant easement holders, who are willing to pursue enforcement in the courts, the mechanism loses its power. Essentially, the public is a co-owner of many easements and should be able to insist that obligations are upheld.²⁰² Unfortunately, only some states allow third-party enforcement actions.²⁰³ Often, the attorney general of a state and the holder of the easements are the only ones who can bring court challenges.²⁰⁴ These options are discussed further in the next section of this Article.

The more complex the conservation easement agreement, the more difficult it may be to monitor and enforce the terms of the contract.²⁰⁵ Sometimes it is just plain difficult to determine that the terms of an easement are not being complied with. For example, some natural changes in land may resemble changes resulting from poor management or changes in farming techniques.²⁰⁶

4. Accountability

Because conservation easements are often held, monitored, and enforced by private organizations there is no direct political accountability. Enforcement of the ESA is the responsibility of the federal government. Thus, the public should be able to hold the political branches accountable for the enforcement of the ESA and attaining the goals of the ESA. This does not happen easily when the ESA is enforced through conservation easements held by private organizations. Some scholars assert that the organizations are indeed accountable to the public.²⁰⁷ As non-profit public charitable organizations, they are subject to review by state attorneys general.

5. Long Term Protection is Actually Uncertain

Most easement violations happen when the underlying property changes hands.²⁰⁸ Subsequent property owners do not always have the same motivation to protect species, and they might not fully understand the requirements of the conservation easement

²⁰² McLaughlin, *supra* note 7, at 470-71.

²⁰³ Generally, these are the states that have substantially adopted the UCEA. Morrisette, *supra* note 7, at 389.

²⁰⁴ *Id.*

²⁰⁵ See Boyd et al., *supra* note 98, at 215.

²⁰⁶ *Id.*

²⁰⁷ FAIRFAX & GUENZLER, *supra* note 52, at 153.

²⁰⁸ See *supra* note 199 and accompanying text.

agreements. Additionally, subsequent landowners sometimes bring challenges against conservation easements in court.²⁰⁹ So far, there have been few conservation easement cases, but the courts have shown a strong tendency to enforce the terms of these easements.²¹⁰ Conservation easements are “a form of ‘shared’ ownership of land.”²¹¹ This means that the long-term viability of these agreements depends on how the conservation easement agreements can anticipate and incorporate potential future conflicts and changes amongst owners. Such conservation easements can be difficult to draft.

C. Special Enforceability Concerns With Conservation Easements in HCPs

The biggest concern with conservation easements within HCPs is enforcement.²¹² It is not clear who has the right to enforce the terms of a conservation easement bargained for under the ESA. Generally, a conservation easement is like a contract between the owner of the land encumbered by an easement and the holder of the easement. In

Comment [JL3]: We seem to jump from FN 212 to 214. I think we lost a number somewhere.

²⁰⁹ For an in depth discussion of these types of challenges, including both the statutory and common law principles on which they rest, *see* Cheever, *supra* note 2, at 1093-1101.

²¹⁰ Morrisette, *supra* note 7, at 390.

²¹¹ Boyd et al., *supra* note 98, at 219.

²¹² Throughout this section and the remainder of the Article, I work under the assumption that the conservation easements exacted to meet the terms of a federal permit are valid under the operating state conservation easement statutes. This is not an obvious or trivial assumption for a few reasons. First, conservation easement statutes do not usually explicitly address the special category of exacted conservation easements. The contemplated conservation easements appear to be donated ones (and sometimes sold easements). The legislative history behind the UCEA reveals no discussion of conservation easements created by exaction. (I thank Mary Ann King and her legislative history research of the UCEA for this information.) Second, state conservation easement statutes may have provisions that specifically conflict with the goals of the ESA (e.g., one must allow access, or hunting, or even mining). A similar conflict arose in *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974), where the FWS negotiated easements that conflicted with state common law. North Dakota, the site of the challenged easements, did not have a conservation easements statute when that case was tried. There, the Eighth Circuit held that state property law would not disrupt the federally-negotiated and federally-held easements. In essence, federal law superseded the conflicting state law. It is not clear if courts would be equally deferential to conservation easements arising under a federal statute but held by a state or private entity. Third, conservation easements that are invalid under state conservation easements statutes follow state common law regarding servitudes introducing an additional set of enforcement concerns. These complexities are interesting and should be explored further, but for purposes of pursuing the narrow question at hand, I assume here that the exacted conservation easements operating in conjunction with the ESA are valid under state conservation easement statutes and save the further questions for another day.

the cases of HCP exacted conservation easements, these two entities could be individuals or groups that had nothing to do with the HCP process. HCPs are part of the ESA. They aim to protect threatened and endangered species because Congress has identified that aim as an important goal for America. The desire to protect species is strong enough to stop large federal projects that have been underway for years and in which millions of dollars have been invested. Additionally, despite protests by private landowners, Congress has declined to revoke the ESA. Essentially, these background facts point to the conclusion that Congress meant what it said when it passed the ESA. The protection of threatened and endangered species is paramount. The American public has an interest in preserving endangered species for both biocentric and anthropocentric reasons. By extension, the public also has an interest in HCPs. Federal money is used in the creation of HCPs, and this money should be going to projects where species are being protected *and* where the federal government has some type of monitoring and enforcement power. Without clear enforcement mechanisms, it is unclear what happens when landowners do not adhere to the terms of the conservation easements encumbering their lands.

The desire to make sure that conservation easements are being enforced is clear, but how to enforce them is not. There are three key questions: (1) who has the right to bring an enforcement action?; (2) who should the action be brought against?; and (3) what form should the enforcement action take? The basic conservation easement framework and language tell us that the holders of easements have the authority to enforce them. As described above, these easement holders are generally land trusts and government agencies. Many of the land trusts are small local groups potentially lacking capacity, accountability, and experience in managing conservation easements and monitoring endangered species habitat. What if the land trust chooses not to enforce because of a desire to avoid ill-will in a community? A decision not to enforce could be a strategic decision to focus the organization's energies elsewhere. What if it simply does not have the capacity to monitor the land to realize when enforcement actions are necessary? Essentially the question becomes: what do we do when an easement holder is not doing its job? The outlook is not much better when government agencies serve as conservation easement holders. Government agencies are also often faced with budget constraints that may infringe upon their ability to diligently monitor the easements they hold. In the absence of enforcement by

the easement holder, it is not clear who has the right to bring an action against an easement holder or a negligent landowner. This lack of clarity is especially troubling in light of the use of conservation easements in conjunction with federal environmental laws. Because HCP easements are protecting endangered species habitat, and thus our common heritage, it is vital that either public or federal routes of enforcement remain open.

1. Who Can Bring a Conservation Easement Enforcement Action?

As well as defining the rights transferred to the easement holder, the text of conservation easements generally “establish the means of enforcement for division and transfer of rights.”²¹³ These enforcement rights are usually vested solely in the easement holder, with some exceptions that will be discussed below. When the text of the conservation easement does not identify enforcement possibilities beyond the easement holder, it is unclear who else has the right to bring an enforcement action. This section describes the different possible groups who could bring actions to enforce exacted conservation easements.

a. Conservation Easement Holders

For a conservation easement to be effective, the government agency or non-profit organization holding the exacted conservation easement must be committed to monitoring the use of the land and protecting the conservation purpose of the easement in perpetuity. A conservation easement is a contractual relationship between a landowner and an easement holder. Easement holders have the responsibility of both monitoring and enforcing the agreement. Their ability to enforce the easement is clearly detailed in the conservation easement provisions and often clearly delineated by state law. It is clear that easement holders are able to enforce the conditions of the easement because that is the essence of the property right that they have gained as holders of conservation easements.

b. Attorneys General

The real issue is what happens when the holder of an easement falls down on the job for one reason or another and does not enforce the terms of the conservation easement. Because the job of enforcing

²¹³ Boyd et al., *supra* note 98, at 220.

these agreements often rests with a private organization, it is important that the right of enforcement be given to an organization with a demonstrably strong environmental interest. Even so, problems may occur.

The directors of conservation organizations are generally held to a standard of care similar to that for directors of private corporations. Thus, directors “must perform their duties in good faith, with the care that an ordinarily prudent person would exercise” were they in a similar situation.²¹⁴ Directors are expected to act in the best interests of their corporation. In most states, the attorney general has powers over charitable institutions that give her the right to enforce an easement when an easement holder is not meeting its obligations.²¹⁵ In Washington D.C., only the United States Attorney is vested with the power and discretion to bring suit against a director of a conservation agency.²¹⁶ Because this power is discretionary, however, the United States Attorney and state attorneys general cannot be compelled to bring an action. Thus, if a private organization or individual discovers a violation, that person can bring the violation to the attention of the United States Attorney or the state attorney general, but there is no basis for independent enforcement.

c. Department of the Interior

It seems fundamental that the Departments of Commerce and the Interior must have the right to enforce an HCP and any permit terms. As the issuers of Incidental Take Permits, they have both the right and obligation to make sure that permit terms are being complied with. The language in HCPs regarding conservation easements tends to be vague. Sometimes HCPs just make passing references to conservation easements. For example, the Metropolitan Bakersfield Habitat Conservation Plan merely lists conservation easements as a planning tool that may be available.²¹⁷ HCPs generally state that there will be conservation easements that meet the approval of the Service.

²¹⁴ *Id.* at 230.

²¹⁵ DIEHL & BARRETT, *supra* note 1, at 115.

²¹⁶ Boyd et al., *supra* note 98, at 230-31; D.C. CODE ANN. §§ 29-425 (1997-1998).

²¹⁷ METROPOLITAN BAKERSFIELD HABITAT CONSERVATION PLAN STEERING COMMITTEE, METROPOLITAN BAKERSFIELD HABITAT CONSERVATION PLAN 83 (April 1994) (on file with author).

There is usually nothing in an HCP mentioning enforcement of conservation easements in particular, but there are often broad statements in HCPs or their implementation agreements declaring that nothing in the HCP will create a third-party beneficiary or any interest in the public.²¹⁸ FWS and DOI lawyers, however, are now beginning to require easements to contain provisions allowing for DOI enforcement of the agreements.²¹⁹ These changes represent an acknowledgement of potential future enforcement issues. This change was needed because without any clarifying language, the rights of the public may be left in the hands of local land trusts. Although there have not yet been any examples of enforcement problems brought to court, both conservation easements and HCPs are relatively young and it would not be surprising to see these problems develop in the future.

d. Members of the Public

In some states, local citizens can sue to enforce a conservation easement. In California, for example, the California Open Space Easements Act of 1969 allows property owners and local residents to enforce open space easements if the city or county holding the easement fails to enforce or honor the restrictions.²²⁰ In Florida, water management districts often hold conservation easements associated with wetlands.²²¹ State law explicitly binds the water districts to their duties under easement agreements. If a district fails to sufficiently monitor or enforce a conservation easement, a third party with demonstrated environmental interests in the property

²¹⁸ See, e.g., UNITED STATES FISH & WILDLIFE SERVICE, ET AL. IMPLEMENTATION/MANAGEMENT AGREEMENT REGARDING THE METROPOLITAN BAKERSFIELD HABITAT CONSERVATION PLAN 24 (April 1994) ("Urban Development Permittees are intended Beneficiaries None of the rights or benefits created by this Agreement shall inure to or benefit any person other than the identified parties herein . . . except as may be provided pursuant to the ESA . . ."); KERN WATER BANK AUTHORITY, KERN WATER BANK HABITAT CONSERVATION PLAN/NATURAL COMMUNITY CONSERVATION PLAN 71 (May 1997) (on file with author) ("This Agreement is solely for the benefit of the [Kern Water Bank Authority], the Department [of the Interior] and the [United States Fish & Wildlife] Service. The Parties intend that only the Parties to this Agreement and their approved Assignees shall benefit from the Agreement. This Agreement shall not create in the public, any member of the public, any other person or entity . . . any rights as a third-party beneficiary to this Agreement.").

²¹⁹ Interview with Heidi Crowell, Staff Attorney for the U.S. Fish & Wildlife Service, Red Bluff Office (Nov. 10, 2003) (notes on file with author).

²²⁰ CAL. GOV'T CODE § 51058 (West 2005).

²²¹ FLA. STAT. ch. 259.101(8) (1998).

subject to the easement can obtain an administrative hearing to challenge the district's inaction.²²² These statutes are not uniform across the country, and even the Florida and California statutes do not necessarily cover conservation easements that are part of Incidental Take Permits.

2. *Who Should Conservation Easement Enforcement Actions Be Brought Against?*

Because so many parties are involved in creating HCPs and their corresponding conservation easements, it is not clear whom to ultimately hold responsible when things go awry. A permit holder is usually responsible for permit compliance, but here the real violator is usually the owner of the land encumbered by the conservation easement, which may or may not be the permit holder. This section examines the different parties against whom enforcement actions could be brought.

a. *The Current Landowner*

Landowners and occupants have the most direct control over a property's condition. Conservation easements give the responsibility for enforcement and monitoring to groups who have more incentive to enforce, but less direct control, and therefore, an impaired ability to access information. Undisputedly, the person or entity occupying the land should have both the best information about activities on the land and be in the best place to influence land management. Conservation easements should acknowledge this relationship and place responsibility for degradation squarely on the landowner. Thus, we should give more leeway to the easement holders; if they miss or overlook an infringement that should not be license for the landowner to violate the agreement.

Because landowners are the ones who are generally violating easement conditions, it makes the most sense for enforcement actions to be brought against them directly. The person violating the agreement by making changes to the land that could result in habitat modification or destruction should answer directly for his actions. Landowners are informed about the easement restrictions when entering into the agreements or when purchasing land encumbered by such restrictions.

²²² See Boyd et al., *supra* note 98, at 232.

b. Easement Holder

Because Incidental Take Permit programs involve the potential destruction of endangered species and their habitat, the public has a strong interest in enforcement, but to whom should people turn for redress when an easement is not being upheld? An easement holder can bring an action against the landowner, but can anyone bring an action against the easement holder for not holding up her end of the bargain? Third parties should be able to bring an action against a land trust or government agency that is not doing the monitoring and enforcement job required by a conservation easement. Suit against the easement holder would be somewhat indirect though. The easement holder would still have to commence a later action against the landowner. Suits against easement holders would then take the form of suing someone for not suing someone else. By the time the actions would be settled, either in or out of court, irreparable harm could be done to endangered species and their habitat.

c. Government Agencies

The Departments of Commerce and the Interior are charged with administering the ESA. The DOI has taken the lead in this area and delegated day-to-day operation to the Services. As the administrator of the ESA, it is the DOI's responsibility to ensure that the ESA is being complied with, including Incidental Take Permit holders' compliance with HCPs. Permits are conditioned on compliance with HCPs. HCPs contain conservation easements. Therefore, a violation of a conservation easement is non-compliance with the HCP, and a violation of the permit. If the DOI is not working to ensure permit compliance, a suit could be brought against the DOI for failing to do its job to enforce the ESA. Actions against the DOI would be similarly attenuated as those against easement holders. The DOI would still need to take subsequent action against either the permit holder, the easement holder, or the landowner. As discussed below, it is not clear what the DOI's potential routes of enforcement are.

d. Incidental Take Permit Holder

When conservation easements are used as permit conditions, there is an added level of complexity. It is unclear who is responsible for the enforcement of conservation easements that are permit conditions. Enforcement of permit terms may include enforcement of conservation easement terms. Perhaps the permit holder should be responsible for ensuring compliance with conservation easement

terms? If the HCP is not being complied with, perhaps it should be regarded as a per se violation of a permit. When the permit holder is also the conservation easement violator, the case is rather straightforward—but this is not generally the case. As described above, permit holders often purchase conservation easements on other land. In cases where they do place conservation easements on their own land, they often later sell the fee simple title to the land. In the end, the permit holder may have no direct connection to the conservation easement or the land encumbered by it.

If developers comply with the terms of the ESA, there is a strong argument that they should be shielded from liability. The permits generally require developers to provide funding for the conservation easements. If they uphold their end of the bargain, why should they later be punished for someone else's irresponsibility?²²³

Finally, actions against the permit holder may not yield the desired result. Non-compliance with a permit usually means permit revocation, penalties, or criminal sanctions. Such actions may do little to obtain compliance with associated conservation easements or to protect endangered species habitat.

3. What Form Should Enforcement Actions Take?

There are two main prongs of enforcement inquiry for conservation easements that are incorporated into HCPs. Because these conservation easements are part of a federal scheme to enforce the ESA, there should be clear federal routes of enforcement based upon the ESA and the APA. If pursuing enforcement via federal routes is undesirable, traditional state laws concerning conservation easements could enable enforcement actions by someone other than the easement holder.

a. Federal Enforcement Routes

Federal enforcement of conservation easement violations may be desirable because it could provide a national, uniform method of enforcement. Drawing upon the ESA and the APA would create precedent and guidance for agencies and courts throughout the country. In contrast, state enforcement mechanisms would not provide uniformity. State laws on conservation easements vary

²²³ If the developer however retains fee title to the land burdened by the exacted conservation easement, they are clearly responsible for any infractions and should face permit revocation and penalties for violations.

widely. It is not clear what enforcement routes state conservation easement statutes allow or how the various state statutes would interact with federal schemes aimed at protecting endangered species and their habitat. Because conservation easements are part of HCPs, there could be enforcement actions based upon the ESA. Additionally, because government agencies are the enforcers and administrators of the ESA, enforcement actions could be brought against them under the APA when the agencies do not adequately perform their duties by allowing conservation easements to go unenforced.

i. ESA Actions

a. Brought by the DOI

As designated administrators of the ESA, the Services should be able to require enforcement of the ESA. Although that seems like a non-controversial contention, it is not clear exactly how enforcement actions would be brought, or against whom they would be brought. The Services negotiate the permits and could likely bring actions for violations of a permit based on the notion that a violation of a conservation easement is a *per se* violation of the ESA. There are some problems here though. First, if the argument is that the permit has been violated, then the action would be against the permit holder. As discussed above, this may not necessarily be appropriate. The permit holder may have been diligent in negotiating and complying with permit terms to the best of her ability. Should the permit holder be the one held responsible when a landowner violates the terms of one of the conservation easements she funded? Second, conservation easements are not always clearly recorded. Although the land may be encumbered by an exacted conservation easement, there might not be a record connecting the conservation easement to the HCP it was created in conjunction with.

If the DOI could show that the easement violation was resulting in a “take” to an endangered species, it would have a clear basis for ESA enforcement. This would require monitoring of the easement followed by proof that there was actual harm to an individual species.

b. Brought by Citizens

Because the conservation easements being discussed are permit conditions, affected parties should be able to bring citizen suits requiring compliance with the conservation easement terms. Once

again, the difference between conservation easement actions and other permit enforcement actions is that the action would not necessarily be against the permit holder. There are three possible defendants here. The action could be brought against the exacted conservation easement holder for not upholding his end of the bargain, against the landowner for violating the easement terms, or against the DOI for failing to ensure compliance with the ESA. Claims against the landowner for violating the easements and the easement holder for turning a blind eye to the violation could be brought by individuals or groups acting as private attorneys general under the ESA's citizen suit provision. Actions against the DOI could be brought under the ESA's citizen suit provision or the APA.

Under the ESA, any person may sue any other person, including a governmental entity, alleged to be in violation of any ESA provision or implementing regulation.²²⁴ Citizen suits may not be brought unless the plaintiff provided appropriate prior notice.²²⁵ Claims are further barred if the Secretary of the Interior has commenced and is diligently prosecuting an action against the violator.²²⁶ To bring an ESA citizen suit, a plaintiff must show standing to bring the action.²²⁷ Although the statutory provisions appear to grant broad standing to all persons, plaintiffs must still satisfy constitutional standing requirements born out of Article III's case or controversy requirement.

Establishing standing with regards to environmental laws, and the ESA in particular, is not so easy these days. There are three main elements needed for Article III standing: (1) an injury in fact, which is both concrete and particularized, and either actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision.²²⁸ These requirements could prove difficult to meet for individuals or organizations that desire to enforce a conservation easement. In *Lujan v. Defenders of Wildlife*, the Supreme Court declined to honor Congress' expansive view of standing, nearly invalidating the citizen suit provision of the ESA. The Court also rejected several novel approaches to standing advanced by the

²²⁴ 16 U.S.C. § 1540(g)(1)(A) (2004).

²²⁵ *Id.* § 1540(g)(2).

²²⁶ *Id.*

²²⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

²²⁸ *Id.* at 559-60.

plaintiffs.²²⁹ It is not clear how far standing can be asserted in the wake of this case. The “injury in fact” prong will limit who can bring such a suit. Neighboring landowners may be able to bring suits based on scenic values, noise, or other side effects of easement violations. Groups could try to bring a suit based on the theory that injury to biodiversity is an injury to the public, but courts have held that the injury must go beyond injury felt by the public at large.²³⁰

Even if the causal connection between the injury and the conduct complained of is relatively clear, redressability may be difficult to show. If the easement has been fully violated and the parcel developed, a plaintiff would need to show that there is still a way to restore the habitat and that the animal has not been irreparably injured. If the species has gone extinct, it will be impossible to show redressability.

The Ninth Circuit has held that citizens may sue to enjoin an imminent threat of harm. In *Rosboro Lumber*, the court ruled that a citizen suit was actionable because the plaintiff demonstrated that the proposed logging was reasonably certain to injure endangered owls.²³¹ If an intended violation is discovered before irreparable harm occurs, an action will have a greater likelihood of progressing.

Citizen suits may also be filed to compel the Secretary of the Interior to take specified emergency actions²³² or to perform non-discretionary statutory duties.²³³ However, the Court has limited the types of claims that can be brought under the ESA citizen suit provision. In *Bennett*, the Court indicated that the duties covered by the citizen suit provision relate exclusively to compliance with section 4, concerning species listing and critical habitat designation, and do not include agency obligations under section 7.²³⁴ With this limitation, it is unclear whether citizen suits can be brought based on

²²⁹ *Id.* at 565-66 (rejecting standing arguments based on an ecosystem nexus, an animal nexus, and a vocational nexus).

²³⁰ *Id.* at 560 n.1.

²³¹ *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995). The court indicated in dictum, however, that a mere threat of harm is not grounds for imposition of civil or criminal penalties. *Id.* at 786 n.3.

²³² 16 U.S.C. § 1540(g)(1)(B).

²³³ *Id.* § 1540(g)(1)(C).

²³⁴ *Bennett v. Spear*, 520 U.S. 154, 172 (1997). Nor is an alleged violation of section 7 the appropriate basis for a citizen suit under section 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A). *Id.* at 174. Litigants nevertheless may challenge the government's failure to comply with section 7 duties under the APA. *Id.* at 179.

sections 9 or 10. Although no court has addressed whether a citizen suit can be brought based on section 10, the Fifth Circuit extended the jurisdiction of such suits, ruling that a citizen suit was available to redress an alleged violation of the affirmative conservation duty imposed on federal agencies by section 7(a)(1).²³⁵

ii. APA

Even when groups and individuals are unable to avail themselves of the citizen suit provision of the ESA, they may still pursue a cause of action under the APA.²³⁶ A person or entity suffering a legal wrong because of a federal administrative agency's action, or who is adversely affected or aggrieved by an agency's action within the meaning of a relevant statute, is entitled to judicial review under the APA.²³⁷

If an exacted conservation easement is held by a state level government agency, state statutes could provide for specific enforcement or review mechanisms as described above. When the government entity is federal, plaintiffs may also bring suits under the APA. The APA grants standing to a person "aggrieved by [an] agency action within the meaning of a relevant statute."²³⁸ A person's interest under the APA, the Supreme Court stated, may reflect "aesthetic, conservational, and recreational," as well as economic values.²³⁹ The Supreme Court, in *Lujan v. National Wildlife Federation*, stated in dictum that it had no doubt that "recreational use and aesthetic enjoyment" are among the interests

²³⁵ See 16 U.S.C. § 1536(a)(1); see also *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998). For a discussion of the affirmative conservation duty see GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15C:18 (2004). Cf. *Am. Canoe Ass'n v. EPA*, 30 F. Supp. 2d 908, 927 (E.D. Va. 1998) (holding jurisdiction was appropriate under the ESA's citizen suit provision, not the APA, for claims that EPA failed to comply with section 7 consultation requirements when it reviewed the state's implementation of a water quality standards program under the Clean Water Act).

²³⁶ *Glickman*, 156 F.3d at 618; see also *Env'tl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1079 (9th Cir. 2001).

²³⁷ 5 U.S.C. § 702 (2003).

²³⁸ *Id.*

²³⁹ *Ass'n of Data Processing Serv. Org., Inc. v. Camp (ADAPSO)*, 397 U.S. 150, 154 (1970).

that the "land withdrawal review program" of the Bureau of Land Management was specifically designed to protect.²⁴⁰

When plaintiffs bring claims based on the APA, they must satisfy the zone of interests test laid out in *ADAPSO*.²⁴¹ Plaintiffs must show that their grievances "arguably fall within the zone of interests protected or regulated by the statutory provision[s] or constitutional guarantee[s] invoked in the suit."²⁴² The plaintiff must make it clear that the she is within the zone of interests to be protected by the particular provision involved, not the statute as a whole.²⁴³ The test is a prudential standing requirement of general application, the Court explained, that applies unless expressly negated by Congress.²⁴⁴ The Court also stated that by providing that "any person may commence a civil suit," the citizen suit provision of the ESA negates the "zone of interests" test by allowing "any person" to commence such a suit as opposed to only those persons with a protected interest.²⁴⁵ In cases where the plaintiff is not the subject of the contested regulatory action, the zone of interests test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The zone of interests test is not meant to be especially demanding; in particular, there does not need to be any indication of congressional purpose to benefit the would-be plaintiff.²⁴⁶

b. State Enforcement Routes

If federal routes of enforcement do not prove fruitful, there are multiple opportunities to attempt to enforce exacted conservation

²⁴⁰ 497 U.S. 871, 886 (1990) (As to the "zone of interests" test, the Court stated that recreational use and aesthetic enjoyment were among the interests to be protected under the statute in question. As to whether there was an injury to these interests, the Court noted that the affidavits indicated only that the members used unspecified portions of an immense tract of territory of some 5.5 million acres and did not necessarily indicate that they used the 4,500 acres on which the Bureau intended to allow mining activities.).

²⁴¹ *ADAPSO*, 397 U.S. 150, 153-54 (1970).

²⁴² *Bennett v. Spear* 520 U.S. 154, 162 (1997); *see also ADAPSO*, 397 U.S. 150 (1970) (first use of zone of interests test by the Supreme Court).

²⁴³ ROGER FINDLEY & DANIEL FARBER, *ENVIRONMENTAL LAW NUTSHELL* 3 (2000); Donald T. Kramer, "Zone Of Interests" Tests in Determining Standing in Litigation Involving Federal Statutes—Supreme Court Cases, 153 A.L.R. FED. 375 (1999).

²⁴⁴ *Bennett*, 520 U.S. at 163.

²⁴⁵ *Id.* at 164.

²⁴⁶ *Id.* at 175-76.

easements based on state laws.²⁴⁷ This method may be especially pertinent where parties are unable to meet the stringent standing requirements of federal courts and the ESA. States often have broader standing allowances.

i. Based on State Conservation Easement Statutes

States create their own conservation easement framework by statute.²⁴⁸ Although these statutes vary, many of them are based on the UCEA described in Section I. A state may choose to describe enforcement provisions specifically in its conservation easement act, including allowing for third party enforcement.

Section 1 of the UCEA details a third party right of enforcement, which it defines as “a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder” of the conservation easement in question.²⁴⁹

Section 3 of the UCEA recognizes four types of eligible enforcers: “(1) an owner of an interest in the real property burdened by the easement; (2) a holder of the easement; (3) a person having a third-party right of enforcement [of the conservation easement]; or (4) a person authorized by other law.”²⁵⁰ The first three categories describe parties delineated specifically in the easement agreement. The fourth category, however, is a bit wider and vaguer. Generally, an example of “a person authorized by other law” is a state attorney general.²⁵¹

States that have adopted the UCEA are the most likely to identify rights of third-party enforcement.²⁵² States not adopting the UCEA tend not to even include mention of third-party beneficiaries — neither describing them nor prohibiting them.²⁵³

²⁴⁷ This section describes pursuit of enforcement under state law based on the assumption that the exacted conservation easements in question satisfy the state conservation easement statutes. *See supra* note 212. If there is a conflict with the state conservation easement statutes, there are still potential avenues of enforcement based on state common law, but they are not discussed here.

²⁴⁸ Every state but Wyoming has done so.

²⁴⁹ Unif. Conservation Easement Act § 1(3), 12 U.L.A. 170 (1981).

²⁵⁰ *Id.* § 3(12).

²⁵¹ Rob Levin & Jessica Jay, *Memorandum of Law: Legal Roundtable on Third-Party Standing*, presented at the LTA Rally (Oct. 2003).

²⁵² *Id.*

²⁵³ *Id.*

Even with provisions allowing for third-party beneficiaries, groups may have trouble bringing actions. In New York, the state conservation easement statute only allows for third-party enforcement by groups specifically mentioned in the terms of the conservation easement agreement.²⁵⁴ Connecticut, which has conservation easement legislation that predates the UCEA, does not have a clear articulation of third-party enforcement rights. In *Burgess v. Breakell*, a Connecticut Superior Court did not allow a neighbor to bring an action against an easement violator, holding that the state's conservation easement statute limits the right to bring an enforcement action against the easement holder.²⁵⁵ In Massachusetts, where the conservation easement statute is similar to Connecticut's, the Supreme Judicial Court did recognize the right of some public officials and charitable organizations to enforce "certain easements in gross."²⁵⁶

Because of the uncertainty surrounding enforcement rights under state conservation easement statutes, state enforcement is not a secure route to guarantee protection of endangered species and their habitat. Every state statute has a different structure, and even when the statutes are similar, the courts of different states may interpret them in conflicting ways. Generally, however, statutes providing for some type of third-party enforcement open the door to securing better compliance with conservation easements and HCPs.

ii. Based on State Charitable Organization Statutes

As discussed earlier, state attorneys general may have the ability to enforce conservation easements when they are held by charitable organizations. In most states, the attorney general has the power to oversee public charities as part of her duty to represent the public. Because the Services require conservation easements created in conjunction with HCPs to be held by either government agencies or charitable organizations, an attorney general should have the right to enforce many of these conservation easements. State conservation easement statutes vary as to whether they specifically detail the rights of the attorney general. In *Friends of Shawanagunks*, the New York

²⁵⁴ See *Friends of the Shawanagunks, Inc. v. Knowlton*, 476 N.E.2d 988, 991 n.4 (N.Y. 1985).

²⁵⁵ *Burgess v. Breakell*, 14 Conn. L. Rptr. 610, No. CV 95 0068033, 1995 WL 476782, at *3 (Conn. Super. Ct., 1995) (unpublished opinion).

²⁵⁶ *Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365, 1367 (Mass. 1991).

case mentioned above, the state statute discussed had originally included a right of enforcement by the New York Attorney General, but a later amendment removed it.²⁵⁷ Nevertheless, the court upheld the right of the Attorney General to enforce based on his overall authority over public charities.²⁵⁸

In some states, the attorney general plays an integral role in the drafting, monitoring, and enforcement of conservation easements. In Maryland, for example, the state conservation easement statute is silent on the role of the Attorney General; yet, there are assistant attorneys general whose major responsibilities are drafting and enforcing conservation easements.²⁵⁹

iii. Based on State Administrative Procedure Acts

States often have their own version of the federal APA. These statutes could be invoked to enforce exacted conservation easements held by state agencies. Additionally, some state conservation easement statutes specifically detail administrative procedures for and review of state agencies that hold conservation easements.²⁶⁰

iv. Based on State Public Trust Responsibilities

The public trust doctrine is rooted in traditions of Roman and English law.²⁶¹ Originating out of public values of navigation and fishing, the early articulation of the doctrine protected navigable waters, the lands beneath them, and shores and tidelands.²⁶² These resources are held by the state in trust for the people of the state. More recently, states have begun to expand their notion of public trust to encompass other lands and natural resources.²⁶³

The public trust doctrine is a matter of state law, and state courts range from clear rejection of the doctrine in any form to wide expansion of the doctrine to cover many types of lands, waters, and resources. Because of this wide variation from state to state, it is

²⁵⁷ *Shawanagunks*, 476 N.E.2d at 991 n.4.

²⁵⁸ *Id.*

²⁵⁹ Levin & Jay, *supra* note 251, at 8-9.

²⁶⁰ See *supra* note 220 and accompanying text.

²⁶¹ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

²⁶² JOSEPH SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 529 (2000).

²⁶³ Michael C. Blumm, *Public Property and the Democritization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 599-600 (1989).

unclear how useful the doctrine can be in seeking enforcement of conservation easements. Because the public trust involves state ownership, this would only implicate easements that are held by state and local government agencies. For an enforcement action to be brought under the public trust doctrine, a state would have to view the conservation easement as a natural resource that should be protected on behalf of its people. The state of New Hampshire has recognized such an interest—specifically acknowledging that conservation easements purchased through one particular state-funded program are to be held in public trust by the state.²⁶⁴

D. A Way to Address Enforcement Concerns

The cleanest way to address enforcement concerns is to make sure that there are multiple routes of enforcement. Currently, the holders of an exacted conservation easement are usually the only ones who can enforce the easement. It is important to develop a second route of enforcement in case an easement holder cannot, or chooses not to, enforce an easement. The next key question is: who else should have the right of enforcement? Because everyone has an interest in biodiversity and forwarding the goals of the ESA, there is a strong argument that private citizens and organizations should be able to bring enforcement actions either through an ESA citizen suit action or under the APA. However, the most straightforward solution may be to create third-party enforcer status for federal government agencies.

The most straightforward way to incorporate more enforcement routes would be to establish the DOI as having a third party right of enforcement. The DOI has already begun to get itself included in conservation easements as an enforcer. This method makes sense because it is the federal government that ultimately holds the responsibility for enforcing the ESA. This procedure should be codified in regulations to ensure that exacted conservation easements have some level of uniformity in enforcement routes. Private citizens could then bring violations to the attention of the DOI, which could then enforce the exacted conservation easement. If the DOI shows itself to be an ineffective enforcer, citizens should be able to bring APA suits against the DOI requiring the Department to do its job and follow its own regulations.

²⁶⁴ N.H. REV. STAT. ANN. § 486-A:13 (2000).

While this solution may seem simple, there is no precedent for including third-party enforcers or beneficiaries in traditional easements. Indeed, it goes against the very notion of easements, which represent private rights and agreements between parties. Expanding the number of enforcers or beneficiaries could create a public right in millions of acres of private land. This change would likely need to come by statute, because there is no analogous system in the common law.

CONCLUSION

One key to protecting threatened species is to find incentives for people to protect them. Aldo Leopold argued that species generally become threatened because it is in no one's self-interest to manage for them.²⁶⁵ Threatened and endangered species are generally not overtly commercial species — they are not hunted or traded. Although some of the most famous endangered species are sought out by birdwatchers and wildlife enthusiasts, the vast majority of listed species are not well known. This is why government agencies and conservationists are looking for new tools to protect habitat. Conservation easements can provide the incentive for private landowners to protect endangered species habitat on their land. But what happens when we are not talking about voluntary conservation easements? These exacted conservation easements are not incentive-based; rather, they are coercive. Conservation easements are touted as a new and exciting flexible land preservation tool, but this is only when discussing conservation easements that are undertaken more willingly—not when developers are coerced to purchase or create conservation easements to meet other goals they have.

The ESA has only been “minimally successful” at preserving species and their habitat.²⁶⁶ It is difficult to really measure the success of the program for several reasons. What should be the indicator of success? The delisting of a species? Perhaps the increased listing of species represents the fact that the law is working well to bring more areas under protection. But if the goal of the law is to improve species numbers and protect their habitat, things do not look good for the ESA. Some species have recovered and there is

²⁶⁵ See ALDO LEOPOLD, *THREATENED SPECIES* (1936), reprinted in *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS* 231 (Susan L. Fader & J. Baird Callicot eds., 1991).

²⁶⁶ Brown, *supra* note 105, at 169.

anecdotal evidence that the program is a success—just look at the reintroduction of the grey wolf or the recovery of bald eagle populations. However, seven previously listed species have been declared extinct by the FWS.²⁶⁷ Additionally, some scholars argue that many species have gone extinct while waiting to be listed.²⁶⁸ Estimates on the number of these species vary from thirty-four to three hundred.²⁶⁹ Professor Jacqueline Lesley Brown argues that the success of the ESA should be measured by looking at the number of recovered species, the number of downlisted species, and the number of species progressing toward recovery.²⁷⁰ When Professor Brown examined this data, she concluded that the ESA merely slows, but does not stop the extinction of species.²⁷¹ Clearly current practices must be strengthened to meet ESA goals.

Conservation easements can be valuable land conservation tools because they allow private citizens to take an active role in protecting lands. However, in the end, it is unclear whether these conservation easements actually help meet the goals of the ESA. In general, they prohibit harmful activities, but because conservation easements encumber private land, there are no active management or recovery plan requirements associated with conservation easements. As Michael Bean of Environmental Defense has pointed out, “it is insufficient simply to prohibit harmful activities.”²⁷² Conservation easements exacted under the ESA are becoming increasingly sophisticated; as both conservation easements and HCPs age. The players are learning more about how to make the agreements more successful. The next step in the process is to make sure that these agreements will be enforced.

²⁶⁷ United States Fish & Wildlife Service, Threatened and Endangered Species System (TESS), *Delisted Species Report* (2005), at http://ecos.fws.gov/tess_public/TESSWebpageDelisted?listings=0 (last updated Jan. 19, 2005).

²⁶⁸ Brown, *supra* note 105, at 170.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 171.

²⁷¹ *Id.* at 177.

²⁷² Michael J. Bean, *Overcoming Unintended Consequences of Endangered Species Regulation*, 38 IDAHO L. REV. 409, 414 (2002).