

A R T I C L E

# Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)

by Federico Cheever and Jessica Owley

Federico Cheever was a Professor of Law and the Co-Director of the Environmental and Natural Resources Program at the University of Denver Sturm College of Law. Jessica Owley is a Professor of Law at SUNY Buffalo Law School.

## I. Introduction

Land conservation transactions have been the most active component of the conservation movement in the United States for the past three decades.<sup>1</sup> Practitioners use traditional real estate tools to preserve habitat, scenery, and historically significant places. Sometimes these tools are used by government entities, but they often involve nonprofit land conservation organizations known as land trusts, which buy and accept donations of land and conservation easements encumbering land. According to the Land Trust Alliance 2010 National Census, more than 1,700 land trusts (local, state, and national) are active in the United States.<sup>2</sup> These organizations are staffed and supported by almost 5 million people.<sup>3</sup> A conservation easement, the primary private land conservation tool, is a non-possessory property right restricting a landowner's use of a parcel of land to yield a conservation benefit.<sup>4</sup> The National Conservation Easement Database estimates that approximately

40,000,000 acres of land have been protected by conservation easement in the United States.<sup>5</sup>

The prospect of climate change diminishes the value of most real estate tools currently used by proponents of land conservation transactions.<sup>6</sup> A conservation easement binds only the parcel of land described. What scientists know of climate change suggests a natural world in motion; there is no guarantee that the things people value on specific parcels will continue to be there in future decades. This Article outlines one potential response to the challenge of private land conservation under climate change: a reinvigorated use of real estate options to purchase conservation easements (OPCEs).

In the world climate change is creating, with its substantial uncertainties and shifting windows of opportunity, OPCEs can serve strategic purposes. For example, if a potential conservation easement holder knows that a particularly valuable species habitat will migrate over time, but does not know exactly where or when it will migrate, the prospective conservation easement holder could choose to purchase options to preserve habitat along a number of potential migration pathways intending, eventually, only to purchase conservation easements along one pathway as the actual migration pattern emerges. Similarly, potential conservation easement holders—committed to preserving coastal habitats and aware that sea level will rise, but unable to determine how far sea level will rise and how sea level rise and storm surge will affect coastal configuration and usage—might purchase options across a broad zone of potential future shoreline habitat with the intent to

---

*This Article is adapted from Federico Cheever & Jessica Owley, Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs), 40 HARV. ENVTL. L. REV. 1 (2016), and is reprinted with permission. Copyright in the Environmental Law Review is held by the President and Fellows of Harvard College, and copyright in the Article is held by the authors.*

1. See WILLIAM H. RODGERS, ENVIRONMENTAL LAW viii–ix (2d ed. 1994); ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 15–16 (2012); Don Gourlie, *The Wilderness Act at 50*, 44 ENVTL. L. 285, 285 (2014).
2. KATIE CHANG, LAND TRUST ALLIANCE, 2010 NATIONAL LAND TRUST CENSUS REPORT 5 (2011), <http://perma.cc/A6DS-RURA>.
3. *Id.* at 8.
4. ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 14–22 (2d ed. 2005).

5. NATIONAL CONSERVATION EASEMENT DATABASE, *Completeness*, <http://perma.cc/8UBB-2NJT>.
6. See Jessica Owley, *Property Constructs and Nature's Challenge to Perpetuity*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64 (Keith Hirokawa ed., 2014) (discussing the inherent mismatch between static property tools and the changing world).

eventually purchase conservation easements to create new shoreline habitat preserves and storm buffers once they have learned enough to know where that shoreline will be.<sup>7</sup>

The ability of OPCEs to protect land in the context of uncertainty would be significantly increased if state legislatures amended current conservation easement enabling statutes<sup>8</sup> to: (1) specifically recognize OPCEs, (2) immunize OPCEs from a range of potential common law challenges, and (3) integrate OPCEs into the burgeoning body of conservation easement law.

Part II describes the current relationship between the land trust community and climate change, then introduces OPCEs and discusses how they could fit into a conservation strategy. Part III examines the advantages OPCEs could provide in the shifting world climate change is creating, and addresses some potential objections. Part IV describes problems under the common law and the corresponding virtues of statutory recognition of OPCEs.

## II. New Problems, Old Tools

Many species are at risk of extinction as a result of climate change-related impacts, such as ecosystem shifts, habitat modifications, and introductions of invasive species including diseases.<sup>9</sup> Researchers still struggle to predict patterns of species dispersal and migration and rates of coastal loss.<sup>10</sup> Programs to protect species will need to be flexible to account for multiple future scenarios.<sup>11</sup> Yet, even with the knowledge of impending changes to the land and need to retard climate change, land conservation organizations have been slow to change policies, programs, or choice of land conservation tools. While the Nature Conservancy—the world's largest and most sophisticated land trust—urges preserving larger portions of important ecosystems to adapt to the impacts of climate change,<sup>12</sup> it has not adopted an overarching approach for dealing with the

effects of climate change on its conservation strategy. Similarly, interviews we conducted with land trust professionals as part of a distributed seminar conducted in 2011 revealed that a third of the participants believed that it is likely or very likely that climate change will negatively affect the goals of their conservation easements.<sup>13</sup> Twenty-two percent stated that climate change already was affecting their conservation work.<sup>14</sup> While the majority of interviewees believed their conservation easements were flexible enough to deal with climate change,<sup>15</sup> their responses expressed a clear sense that more could be done. Only 8% said that their organizations had either changed their conservation easement language or conservation easement acquisition policies to better deal with climate change, and just 17% stated that their land conservation organizations were actively considering how to respond to climate change.<sup>16</sup> By far the most common response was that their organizations were doing “nothing” to prepare for climate change.<sup>17</sup> In some cases, the lack of action could be due to uncertainty in available mechanisms for protecting a changing world.

Real estate options generally allow investing parties to mitigate risks associated with a lack of knowledge about the future by granting the right to purchase without the requirement to purchase. A more extensive use of OPCEs would offer conservation organizations a proven tool to deal with uncertain future scenarios such as shifting habitats and sea-level rise.

Imagine a conservation organization committed to preserving a species that depends upon a particular plant. The organization knows that the plant's range will migrate over time, but it does not know how fast or where it will migrate. OPCEs could enable the organization to purchase the right to preserve lands along various potential migratory corridors for the habitat, only exercising certain options as the habitat moves, as studies clarify where it will move, or preemptively to allow time for restoration of habitat that has been degraded.

7. For a more detailed discussion of these strategies, see *infra* Part IV.

8. As conservation easements ran into conflicts with historical property law rules for easements and covenants, states passed enabling acts to ensure their enforceability. See ROBERT H. LEVIN, LAND TRUST ALLIANCE, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES (2010).

9. WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 1, 4, 6, 14-17, 23 (2014), <http://perma.cc/W59H-WZ4U>.

10. See, e.g., Terence P. Dawson et al., *Beyond Predictions: Biodiversity Conservation in a Changing Climate*, 332 SCI. 53, 53 (2011); Damien A. Fordham et al., *Plant Extinction Risk Under Climate Change: Are Forecast Range Shifts Alone a Good Indicator of Species Vulnerability to Global Warming?*, 18 GLOBAL CHANGE BIOLOGY 1357, 1357 (2012).

11. See, e.g., Robert J. Nicholls & Anny Cazenave, *Sea-Level Rise and Its Impact on Coastal Zones*, 328 SCI. 1517, 1517 (2010); Rebecca K. Runting et al., *Does More Mean Less? The Value of Information for Conservation Planning Under Sea Level Rise*, 19 GLOBAL CHANGE BIOLOGY 352, 352-54 (2013); Carla M. Sgrò et al., *Building Evolutionary Resilience for Conserving Biodiversity Under Climate Change*, 4 EVOLUTIONARY APPLICATIONS 326, 332-33 (2011) (suggesting protecting areas with a range of habitats, gradients, and refugia, and not focusing solely on connectedness); see also Lee Hannah et al., *Protected Area Needs in a Changing Climate*, 5 FRONTIERS IN ECOLOGY & ENV'T 131 (2007) (objecting to the current mode of fixed protected areas).

12. See THE NATURE CONSERVANCY, *Climate Change: Our Priorities*, <http://perma.cc/TX4C-KNDV>.

13. Adena Rissman et al., Presentation at Land Trust Alliance Rally in Milwaukee, WI: Conservation Easements in a Changing Climate (Oct. 15, 2011) (on file with authors); see also Jessica Owley & Adena R. Rissman, *Distributed Graduate Seminars: An Interdisciplinary Approach to Studying Land Conservation*, 2 PACE ENVTL. L. REV. ONLINE COMPANION 88, 88 (2011) (describing the distributed graduate seminar). Researchers interviewed more than 70 representatives from the land conservation community, including both nonprofit land trusts and government conservation agencies, and reviewed more than 250 conservation easements. See Adena R. Rissman et al., *Adapting Conservation Easements to Climate Change*, 8 CONSERVATION LETTERS 69 (2015) (describing data gathering).

14. Adena Rissman et al., Presentation at Land Trust Alliance Rally in Milwaukee, WI: Conservation Easements in a Changing Climate (Oct. 15, 2011) (on file with authors).

15. *Id.*

16. *Id.*

17. *Id.* However, in a Land Trust Alliance webinar for coastal land trusts, 33 of 43 respondents stated that their land trust was doing some type of climate change adaptation planning (but with 99 participants on the webinar, the majority of participants did not respond). Among barriers land trusts identified was uncertainty with how to proceed, both programmatically and with respect to expected climate change impacts. LAND TRUST ALLIANCE, *Coastal Land Trusts and Climate Change Adaptation*, <http://perma.cc/DER9-397X>.

Similarly, imagine a conservation organization committed to preserving a beach ecosystem, aware that sea levels will rise but unaware how far and how fast. The organization could purchase OPCEs reaching onto dry land, and then exercise or release OPCEs as the shoreline shifts. Such an approach may be particularly salient as a response to catastrophic weather events, where both damaged and threatened areas can change rapidly without notice.

In both of the scenarios above, the flexibility of OPCEs could add to the repertoire of land trusts and other organizations working to protect important species and lands. Using options in land conservation endeavors is not new, but their true potential to combat and adapt to climate change has not yet been realized.

Several land trusts already have experience using options to meet other important goals. For example, the Pennsylvania Land Trust Association suggests that options can be used for (1) “buying time,” for example, to secure financing; (2) “reducing risk” when “a land trust may tentatively identify a property as . . . important . . . but cannot risk purchase before a thorough investigation”; (3) “assembling parcels” when a particular conservation process depends on encumbering multiple parcels; (4) “handling messy ownership situations” allowing conservation organizations to acquire the right to purchase rights to a single piece of land separately from multiple owners; (5) “incentivizing action” using the limits of the option to motivate donors to act; (6) “compensating for lost opportunity” when a landowner must be compensated for keeping her land off the market; and (7) “controlling outcomes,” for example, “a land trust that transfers property to a local government may want an option to reacquire the property for a nominal or below-market value if the government’s promises are not kept.”<sup>18</sup>

### III. The Promise and Peril of OPCEs

#### A. Recognized Benefits of OPCEs

The many advantages of OPCEs, six of which are listed below, can help conservation organizations better respond to uncertainties caused by climate change.

First, OPCEs allow conservation organizations time to marshal funding or arrange government acquisition. If conservation organizations acquire OPCEs in areas where conservation easements might mitigate extreme weather events, post-disaster funding could be used to exercise existing OPCEs. This would put in place property-based protections to preserve natural resources and protect against future extreme weather events. Land subject to predictable flooding or fire could be preserved undeveloped subject to conservation easements purchased with disaster relief money. In particularly disaster-prone areas, funds released after the first flood or fire could be used to purchase OPCEs. Funds after

subsequent catastrophes could be used to exercise specific options to purchase conservation easements to mitigate additional future events.

Second, land trusts sometimes purchase conservation easements preemptively, even when there is no obvious threat of development, but then their ability to control development is limited to terms negotiated before the threat materialized. OPCEs can protect against future threats of development without these complications. Once the threat emerges, the option can be exercised with terms that better anticipate the actual development threat. Should the land no longer be valuable for conservation, the organization has no obligation to exercise the OPCE.

Third, habitat corridors cannot function without sufficient concentrations of protected habitat.<sup>19</sup> Broad habitat acquisition deals could use OPCEs to preserve species migration corridors or larger, more resilient blocks of protected habitat by assembling parcels.

Fourth, OPCEs might discourage harmful types of development on adjacent lands. Because private developers are not qualified holders of conservation easements, they cannot obtain OPCEs in advance to eliminate the possibility of their exercise.<sup>20</sup>

Fifth, OPCEs might be used in conjunction with conservation leases or fixed-term conservation easements, allowing organizations to determine whether perpetual protection of the land is warranted during or after the original term. For example, a conservation organization might lease a parcel of land for 50 years to preserve its habitat values. In conjunction with the lease, the landowner could grant the organization an option to purchase a perpetual conservation easement on the parcel with an option period coterminous with the lease, thus ensuring that the land is protected for 50 years while reserving the right to determine whether the land should continue to be protected in perpetuity.

Sixth, options may tip the balance of power in favor of the option holder and therefore can be used to counter misconduct by ostensible conservation partners who fail to fulfill their conservation obligations.<sup>21</sup> For example, a county might grant an OPCE to a private conservation organization to serve as a deterrent for government conduct inconsistent with the original conservation purpose.<sup>22</sup> Rather than sue a public agency for its conduct, the private conservation organization could exercise the preexisting OPCE to buy the conservation land at a below-market price.

#### B. Anticipating Objections to OPCEs

An expanded use of OPCEs could face objections. First, some land trust professionals have asserted that long-term options would likely cost as much as actual conservation

18. PA LAND TRUST ASS'N, *Purchase Options: Gaining the Rate Without the Obligation to Acquire Property Interests*, <http://conservationtools.org/guides/27-purchase-options>.

19. See MALCOM L. HUNTER & JAMES GIBBS, *FUNDAMENTALS OF CONSERVATION BIOLOGY* 235-38 (3d ed. 2007).

20. See, e.g., Uniform Conservation Easement Act §1(2), 12 U.L.A. 174 (1981).

21. See PA LAND TRUST ASS'N, *supra* note 18.

22. See A. BENEDICT & EDWARD T. MCMAHON, *GREEN INFRASTRUCTURE: LINKING LANDSCAPES AND COMMUNITIES* 1 (2006).



easements.<sup>23</sup> This objection is based on the traditional view of using OPCEs to buy financing time where the transaction is fully expected to go forward. Accordingly, it makes sense for the option price to be a significant portion of the final price of the conservation easement, as a down payment.

In contrast, OPCEs for climate change adaptation would be purchased as risk management devices with a relatively low probability of being exercised. Landowners should therefore be willing to grant options at relatively low prices, discounted by the probability that they will never be exercised. It is also worth noting that, in some land trust professionals' experience, options are often sold for far less than their reasonable value.<sup>24</sup> Because an option is no more than a right to future purchase, OPCEs generally do not give option holders rights to manage activities on the ground, thereby limiting potential stewardship costs.

Another critique is that a landowner might destroy the values an OPCE was intended to preserve before the option is exercised. Still, because OPCEs must be voluntarily granted, it is likely that the initial landowner is sympathetic to their purpose. When a landowner is less sympathetic or land changes hands, options may need to be reinforced with other interim protections. Conservation options could be coupled with conservation leases, term conservation easements, or even zoning to preserve baseline habitat values.<sup>25</sup> Further, by destroying habitat the OPCE was designed to preserve, landowners would destroy any possibility of the option being exercised, and thereby eliminate any possibility of payment or tax benefit. In situations where development value exceeds conservation value, this would be no protection. However, where values are similar, the presence of an OPCE would make landowners think twice before destroying habitat.

Overall, there is little "downside" to clarifying and reinforcing the power to grant options. The "upside" may be difficult to predict, but that is no reason not to offer OPCEs as an enhanced tool for conservationists.

## IV. Updating the Law

### A. Problems With the Common Law of OPCEs

Confusion surrounding the use of OPCEs results in large part from whether parties and courts think of the option

primarily as a contract or real estate interest.<sup>26</sup> How the OPCE is characterized bears on the applicability of common law rules such as rules against perpetuities and unreasonable restraints on alienation, rules related to transfer of the property,<sup>27</sup> and the remedies available for breach of an option agreement.<sup>28</sup> Litigation often arises when a party seeks to exercise an option and the optionor asserts that it is not enforceable. Optionors commonly argue that the option (1) is too vague to be enforced,<sup>29</sup> (2) constitutes an unreasonable restraint on alienation,<sup>30</sup> (3) was not intended to burden successors in interest,<sup>31</sup> or (4) was purportedly transferred, but was not transferable.<sup>32</sup> As discussed below, all of these problems are aggravated in the conservation easement context.

### I. Too Vague to Be Enforced

An option to purchase a conservation easement may be entered into before all of the specific provisions of the conservation easement have been negotiated.<sup>33</sup> It may not be possible to specify all terms when creating the option to purchase agreement.<sup>34</sup> Conditions may change or new scientific knowledge may suggest different approaches, particularly if an option is intended to last for a significant period. Thus, courts may treat OPCEs as "agreements to agree" or "letters of intent" and refuse to enforce them.<sup>35</sup>

Additionally, OPCEs may require the landowner to maintain the property in its current state or, at least, to preserve the conservation values articulated in the draft conservation easement. A contractual obligation to preserve land over a long period could easily become a source

23. E-mail from Ann Taylor Schwing, Of Counsel, Best Best & Krieger LLP, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with authors); E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Jessica Owley, Associate Professor, SUNY Buffalo Law School (Oct. 19, 2015) (on file with author).

24. E-mail from W. William Weeks, Professor, Indiana University Maurer School of Law, to Federico Cheever, Law Professor, University of Denver Sturm College of Law (Aug. 15, 2014) (on file with author).

25. See, e.g., *North Grand Mall Assocs. v. Grand Ctr., Ltd.*, 278 F.3d 854 (8th Cir. 2002); *Kelley v. Burnsed*, 805 So. 2d 1101 (Fla. Dist. Ct. App. 2002); *Venture Stores, Inc. v. Pac. Beach Co.*, 980 S.W.2d 176 (Mo. Ct. App. 1998); *Coomler v. Shell Oil Co.*, 814 P.2d 184 (Or. Ct. App. 1991).

26. See Gregory Gosfield, *A Primer on Real Estate Options*, 35 REAL PROP., PROB., & TR. J. 129, 138-39, 151-53 (2000) (discussing alternative characterizations of options to purchase as either contract or property interests).

27. Compare Ronald B. Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 187-88 (1987); 2 COLO. PRAC., METHODS OF PRACTICE §61:27 (6th ed.); 63 TEX. JUR. 3D REAL ESTATE Sales §324; *Melrose Enters. v. Pawtucket Form Constr.*, 550 A.2d 300 (R.I. 1988); and *Scott v. Fox Bros. Enters.*, 667 P.2d 773, 774 (Colo. App. 1983) (contract interests), with, e.g., *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (N.Y. App. 1996); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3(2) cmt. c (2000); Gosfield, *supra* note 26 at 138-39; *Atlantic Richfield Co. v. Whiting Oil & Gas Corp.*, 320 P.3d 1179, 1191 (Colo. 2014); *Bauermeister v. Waste Mgmt. Co. of Neb.*, 783 N.W.2d 594, 600 (Neb. 2010); *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 858-59 (Utah 1998); *Nolan v. Nolan*, 262 S.E.2d 719, 724-25 (N.C. Ct. App. 1980) (property interests). See also *Anderson v. Parker*, 351 S.W.3d 827, 831 (Mo. App. 2011).

28. Compare RESTATEMENT (SECOND) OF CONTRACTS §359 (1981), with RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §8.3 (2000).

29. See, e.g., *Marshall v. Floyd*, 664 S.E.2d 793, 795-96 (Ga. Ct. App. 2008); *Cochran v. DeShazo*, 579 S.W.2d 408, 410 (Mo. Ct. App. 1979).

30. See, e.g., *Cole v. Peters*, 3 S.W.3d 846, 852 (Mo. Ct. App. 1999).

31. See, e.g., *Beeren & Barry Invs., v. Equity Trustee, LLC*, 2007 WL 6013583, at \*2 (Va. Cir. Ct. June 25, 2007).

32. See, e.g., *Shower v. Fischer*, 737 P.2d 291, 295 (Wash. Ct. App. 1987).

33. ME. COAST HERITAGE TR., CONSERVATION OPTIONS: A GUIDE FOR MAINE LANDOWNERS (Forest Dillion et al. eds., 5th ed. 2003), <http://perma.cc/9KT2-SJD4>.

34. See Telephone Interview with Karin Marchetti Ponte, Gen. Counsel, Me. Coast Heritage Tr. (Dec. 12, 2014); Telephone Interview with Vanessa Johnson-Hall, Assistant Dir. of Land Conservation, Essex Cty. Greenbelt Ass'n (Dec. 3, 2014).

35. See Gosfield, *supra* note 26, at 134-35; see also WILLISTON ON CONTRACTS §70:95 (4th ed. 2015).

of ambiguity because natural systems are inherently dynamic. The impact on such ambiguity on enforceability is unclear.

## 2. Unreasonable Restraint on Alienation

An OPCE might need to be in place for decades before a conservation organization can determine whether its exercise would benefit the resource the OPCE was intended to protect. That does not mean the original option needs to last for half a century. However, it might mean that the option holder may need to be able to extend the option period for that long. Allowing an OPCE to remain unexercised for decades raises thorny questions regarding a variety of doctrines designed to further transferability and strike down unreasonable restraints on alienation.<sup>36</sup> Without legislative direction, it is not clear how courts will grapple with this issue.

## 3. No Intent to Bind Successors in Interest

The potentially long time frames of OPCEs also support arguments against the responsibilities of successors to the original optionor. *American Law of Property* states, “there is a strong tendency to construe options and rights of first refusal to be limited to the lives of the parties unless there is evidence of a contrary intent.”<sup>37</sup> However, with options to purchase held for long periods, both the property subject to the option and the option itself will likely change hands before the option is exercised. Technical property law arguments may allow optionors’ successors to challenge the exercise of options. This concern may be abated by articulating transferability in the option agreement and by legislative clarification.

## 4. Non-Transferability

Courts sometimes presume that options to purchase are “personal” to the original parties.<sup>38</sup> The ability to transfer the OPCE would be enormously important. While many land trusts are stable and well-managed, organizations sometimes dissolve, change priorities, or are unable to find hoped-for funding. While conservation goals may be advanced with some personal OPCEs, the most potentially beneficial agreements will include provisions for transferability. Again, legislative recognition of transferability would increase the usefulness of this tool.

## B. Statutory Amendments to Clarify and Reinforce OPCEs

Even though OPCEs are already in use by numerous conservation organizations,<sup>39</sup> state enabling statutes do not recognize their existence. Modest amendments to existing conservation easement legislation could leave unaltered the broad existing pattern of land conservation in the United States and help guarantee OPCE law will be consistent with existing conservation easement law.

### I. The Uniform Conservation Easement Act as Precedent

The Uniform Conservation Easement Act (UCEA) is the dominant conservation easement enabling law in roughly half the states.<sup>40</sup> We use it to show how any state’s legislation might reinforce and clarify OPCEs. The current version of the UCEA does not include any reference to real estate options.

First, we propose a statutory amendment to each state’s conservation easement enabling act, officially recognizing the existence and enforceability of OPCEs in the same way it does for conservation easements generally. Statutory recognition of OPCEs might increase their use.

Second, statutory amendments should limit the purposes for which OPCEs could be used, as the UCEA does through its definition of “conservation easement.”<sup>41</sup> OPCE amendments could simply incorporate the conservation purposes currently applied to conservation easements in the state. This would integrate OPCEs into the growing body of conservation easement case law while limiting negative impact on non-conservation transactions.

Third, amendments should limit potential OPCE holders to parties capable of holding conservation easements, generally government entities and nonprofit organizations committed to conservation.<sup>42</sup> This would enhance public legitimacy, and parties may be more amenable to allowing conservation easements in perpetuity.

Fourth, OPCE amendments could address potential common law infirmities: ambiguity, restraints on alienation, transferability of the burdens of the option to subsequent landowners, and transferability of the benefits of the option from one qualified holder to another. Conservation easement statutes have remedied similar common law infirmities for conservation easements. While the issues are sometimes different for OPCEs, the statutory structure can be easily adapted.

For example, section 4 of the Uniform Conservation Easement Act, titled “Validity,” states that a conservation easement is valid even if:

36. See generally JESSE DUKEMEINIER ET AL., PROPERTY 208 (7th ed. 2010); see also e.g., RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3(2) (2000); GA. CODE §44-5-60(b) (2012) and MASS. GEN. LAWS ch. 184 §23 (2014).  
37. 6 AMERICAN LAW OF PROPERTY §26.67 (Supp. 1977); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.3 (2000).  
38. See, e.g., *In re Maguire’s Estate*, 466 P.2d 358, 688-89 (Kan. 1970). But see *El Paso Prod. Co. v. PWG P’ship*, 866 P.2d 311, 315-16 (N.M. 1993).

39. See *supra* introduction.

40. See K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 775; LEVIN, *supra* note 8.

41. Uniform Conservation Easement Act §1(1), 12 U.L.A. 174 (1981).

42. *Id.* §1(2).

- (1) it is not appurtenant to an interest in real property;
- (2) it can be or has been assigned to another holder;
- (3) it is not of a character that has been recognized traditionally at common law;
- (4) it imposes a negative burden;
- (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;
- (6) the benefit does not touch and concern real property; or
- (7) there is no privity of estate or of contract.<sup>43</sup>

Because an “appurtenant” easement is sturdier in our common law system than an easement “in gross,” subsection (1) should be retained in amendments reinforcing and clarifying OPCEs.<sup>44</sup> Similarly, subsection (2)—intended to ensure that the interest (the “benefit”) created was transferable—also applies to OPCEs. Subsection (3) is a broad antidote to arguments based on traditional common law doctrines. Subsections (4), regarding the imposition of negative burdens, and subsection (5), regarding affirmative burdens, might be relevant to the degree an OPCE might impose restrictions on land before the option was actually exercised. Subsections (6) and (7), regarding “touch and concern” and “privity of estate or contract” deal with specific doctrinal limitations on interests that “run with the land.” Because courts characterize options binding subsequent landowners as real covenants “running with land,” these provisions are also relevant to OPCEs.

An amendment applying the validity sections of conservation easement statutes to OPCEs could be as simple as inserting the words “or an option to purchase a conservation easement” after “conservation easement” in the first line of the UCEA’s §4. This amendment would also serve the purpose of integrating OPCEs into the growing body of conservation easement law.

## 2. Addressing Special OPCE Problems

The need for supplemental validity provisions regarding OPCEs arises from questions of vagueness and restraints on alienability. Conservation easement statutes could be amended to state: “options to purchase conservation easements shall not be void or unenforceable because the terms

of the conservation easements to be purchased have not been identified.” If a state legislature felt that authorizing such an open-ended conservation easement might put landowners at a disadvantage, the statute might further require that “the conservation purposes of the conservation easement have been identified and included in the purchase option agreement and the specific prohibitions and rights reserved by the landowner have been identified and included in the agreement document.”

Concerning the unreasonable restraint on alienability issue, a statutory amendment could provide: “options to purchase conservation easements shall not be deemed unreasonable restraints on alienation so long as they do not directly affect the transferability of the land encumbered by the option.” If this language seems intolerably broad to legislators, OPCEs could be limited to 50 years or even 30 years.

Finally, the dual nature of OPCEs—in contract and property—can create confusion regarding remedies. Although the UCEA contains no provision regarding remedies, the Colorado Conservation Easement Act does.<sup>45</sup> Including such a provision in OPCE amendments to conservation easement statutes would avoid confusion when breaches take place. A provision for the resolution of disputes that arise could also be added to facilitate enforceability.

It is not our purpose to resolve all OPCE issues with one stroke. Many will take issue with a broad statutory mandate for remedies for breach of an option. However, broad effective remedies will help make sure that options are effective tools for conservation.

## V. Conclusion

The land trust community currently lacks the tools to deal with long-term climate change. Purchasers of both conservation easements and real estate in fee simple obtain rights to land without any guarantee that its conservation values will persist. Reviving and reinforcing OPCEs may offer land trusts a cost-effective tool for mitigating this problem. Only the decisions that specific landowners and conservation easement holders make in the decades to come will prove or disprove the actual utility of OPCEs. However, in light of the potentially dire effects of climate change on our current system of land conservation, it would be wise to include such an “option” in our conservation toolbox.

43. *Id.*, §4.

44. See 4 POWELL ON REAL PROPERTY §34.02[d] (Michael Allan Wolf ed., 2013).

45. COLO. REV. STAT. §§38-30.5-108(2), (3) (2014).