

2015

Cultural Heritage Conservation Easements: The Problem Of Using Property Law Tools For Heritage Protection

Jessica Owley

University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/articles>



Part of the [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

Jessica Owley, *Cultural Heritage Conservation Easements: The Problem Of Using Property Law Tools For Heritage Protection*, 49 *Land Use Pol'y* 177 (2015).

Available at: <https://digitalcommons.law.buffalo.edu/articles/159>

© 2015 Elsevier Ltd. This manuscript version is made available under the CC-BY-NC-ND 4.0 license <http://creativecommons.org/licenses/by-nc-nd/4.0/>. Version of record available at: [10.1016/j.landusepol.2015.07.007](https://doi.org/10.1016/j.landusepol.2015.07.007).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

1 CULTURAL HERITAGE CONSERVATION EASEMENTS:
2 HERITAGE PROTECTION WITH PROPERTY LAW TOOLS

3
4 ABSTRACT: Conservation easements are quickly becoming a favored tool for protection of
5 cultural heritage. Perpetual encumbrances on the use of private land, most cultural heritage
6 conservation easements are held by private conservation organizations known as land trusts. With
7 minimal public oversight, land trusts decide which lands to protect in perpetuity and what the rules
8 regarding use of those lands should be. A variety of concerns arise when protection of cultural
9 heritage resides with private organizations. First, as governments abdicate cultural heritage
10 protection to private organizations, the public's role in site protection shifts. When private
11 organizations and landowners negotiate which properties to protect and how to protect them, some
12 culturally important sites go unprotected. Privatizing protection of cultural sites may reduce the
13 ability of some members of the public to become involved in the decision of what to protect as
14 well as hamper public oversight and enforcement of land-use restrictions. It may even reduce
15 overall protection as public entities remove themselves from the cultural heritage protection game,
16 ceding the territory to land trusts. Second, private perpetual restrictions problematize the balance
17 between intergenerational rights and present responsibilities. Reverence of past cultural events and
18 properties may hamper future growth as users of conservation easements restrict properties in
19 perpetuity without enabling communities to revisit or modify the restrictions. Third, conservation
20 easements may be protecting sites that were not in danger of exploitation. In such cases,
21 conservation easements subsidize landowners with questionable public benefits. Finally, using
22 conservation easements to protect sacred sites commoditizes cultural heritage. Paying people to
23 protect cultural heritage could degrade cultural heritage or civic responsibility.

24
25 KEYWORDS: conservation easements; cultural heritage; land trusts; privatization

26 HIGHLIGHTS:

27

28 **1 Introduction**

29 The use of property law tools to protect important sites is not new (Fairfax, et al. 2005)
30 However, the use of conservation easements (CEs) to protect cultural property has played second
31 fiddle to efforts to protect environmentally important properties until recently.¹ CEs are quickly
32 becoming one of the most popular mechanisms to protect important properties (Cheever &
33 Owley 2015). CEs are nonpossessory rights in land that seek to yield conservation benefits. The
34 most common conservation easements (and those chiefly used for heritage protection) are
35 perpetual but most states allow nonperpetual CEs (McLaughlin 2005). While most CEs preserve
36 land for ecological goals, the use of the tool to protect historic, cultural, and archaeological sites
37 is growing. Most state laws identify such uses as valid, and the federal government provides tax
38 incentives to promote the use of CEs as a protector of cultural heritage (Katz 1986). While
39 national and subnational governments hold many CEs, most cultural heritage CEs are held by
40 private conservation organizations known as land trusts (Chang 2011). With minimal public
41 oversight, these land trusts (working in the context of state and federal law governing charitable
42 organizations) wield great power in deciding which lands to protect in perpetuity and what the
43 rules regarding use of those lands should be.

44 A variety of concerns arise when protection of cultural heritage resides with private
45 organizations. First, when private organizations and landowners negotiate which properties to
46 protect and how to protect them, important sites may receive little acknowledgement or support.
47 Privatizing protection of cultural sites may reduce the ability of the public to become involved in
48 the decision of what to protect as well as hamper public oversight and enforcement of land-use

¹ The earliest conservation easements protected public parks and other environmental amenities. The Fens in Boston is a great example (Morris 2008). Early private land conservation also protected cultural sites, including battlefields and historical homes like Mount Vernon (Fairfax, et al. 2005). Generally, however, such sites were protected with fee simple ownership, not with conservation easements or other nonpossessory property rights.

49 restrictions (Owley 2012b). Second, private perpetual restrictions problematize the balance
50 between intergenerational rights and present responsibilities (Thompson 2004). Reverence of
51 past cultural events and properties may hamper future growth as users of CEs restrict properties
52 in perpetuity without enabling communities to revisit or modify the restrictions. Third, CEs may
53 be protecting sites that were not in danger of exploitation. In such cases, CEs subsidize wealthy
54 landowners with little public benefit. The result is overuse of the tool and an inappropriate strain
55 on the public fisc.

56 Finally, using CEs to protect sacred sites commoditizes cultural heritage. The
57 appropriateness of putting a dollar value on, for example, the ability of tribes to exercise their
58 religion or carry out cultural ceremonies is questionable (Sandel 2012). Do landowners deserve
59 payment for *not* destroying the ruins of revolutionary war era buildings or civil war cemeteries?
60 Paying people to protect cultural heritage could degrade cultural heritage or civic responsibility.
61 (Dorfman & Harel, 2013)

62 **2 Conservation Easement Basics**

63 Conservation easements are nonpossessory property interests, meaning the CE holder has
64 a property right in a piece of land but is not the landowner or occupier. Conceptually, a CE is
65 akin to a contract where the holder enters into an agreement with a landowner whereby the
66 landowner agrees to refrain from engaging in an otherwise permissible activity. In exchange for
67 this restriction, the landowner may receive benefits such as a permit to develop, a cash payment,
68 or tax deduction. CEs differ from contracts because the restriction is tied to the land, not the
69 landowner. When the landowner sells her property, the new landowner will be bound by the
70 agreement. CEs are usually, but not necessarily, perpetual (McLaughlin 2007). State law defines
71 who can hold a CE, but usually they can be held by either government entities or land trusts. In

72 some states this explicitly includes Native American tribes and in other states it implicitly
73 includes them.

74 By state law, the restriction embodied in a CE must have conservation as its purpose or
75 intended outcome. To qualify for federal tax benefits, conservation easements must be donated in
76 perpetuity to a qualifying organization for a conservation purpose (I.R.C. § 170(h)).
77 Conservation purposes cover a broad array of goals including preservation of areas for education,
78 recreation, natural habitat, open space, scenic values, and historically important areas (I.R.C.
79 § 170(h)(4)(A)). State CE laws take a broad view of what constitutes “conservation.” Most
80 scholarship on CEs has focused on restrictions that seek to protect open space, scenic, and
81 ecological values (E.g., Cheever 1996; Merenlender et al. 2004). As the broad list of permissible
82 purposes demonstrates, CEs can serve other purposes including protection of working landscapes
83 like forests and farms (Rissman 2011). This Viewpoint examines CEs used to protect cultural
84 heritage. These generally take three forms: historic preservation, archaeological, and cultural.

85 **2.1 Historic Preservation Conservation Easements**

86 Historic preservation CEs seek to maintain historic interiors, façades, or other
87 architectural features. Most CE enabling statutes recognize protection of historic buildings and
88 architectural features as acceptable purposes. For example, the Uniform Conservation Easement
89 Act identifies “preserving the historical, architectural, archaeological, or cultural aspects of real
90 property” as an acceptable purpose (UCEA 1981;§1(1)).

91 The IRS allows tax deductions when landowners donate historic preservation CEs to a
92 qualifying land trust. Acceptable purposes for deductible CEs include “the preservation of a
93 historically important land area or certified historic structure” (I.R.C. §170(h)(4)(A)(iv)). The
94 code further details special rules for which historic buildings and structures qualify (include a

95 wide buildings, structures “or land areas” listed in the National Register as well as buildings in
96 historic districts. (I.R.C. §170(h)(4)(B) & (C)). In exchange for agreeing to maintain their
97 buildings’ historic façades, landowners can claim a tax deduction for the value of the CE as a
98 charitable contribution. The value of the contribution is determined by subtracting the fair market
99 value of the property with the CE from the fair market value of the property without the CE. In
100 many jurisdictions, if the CE reduces the property value, property taxes will also be reduced.

101 **2.2 Archeological Conservation Easements**

102 Many states allow CEs for protection of archaeological sites. States that have adopted the
103 UCEA explicitly allow archaeological CEs. In other states, it is less clear. For example,
104 California permits CEs that have the purpose of retaining “land predominantly in its natural,
105 scenic, historical, agricultural, forested, or open-space condition” (Cal. Civil Code §815).
106 Archaeological CEs may fall under natural or historical but it depends on the property. New
107 York’s law is more generous, explicitly recognizing the purposes of “of preserving or
108 maintaining the scenic, open, historic, archaeological, architectural, or natural condition,
109 character, significance or amenities of the real property...” (N.Y. Env. Conserv. §49-0303). New
110 Mexico is the only state whose CE statute specifically addresses archeological and cultural CEs.
111 The New Mexico Cultural Properties Preservation Easement Act protects “structure[s], place[s],
112 site[s] or object[s] having historical, archaeological, scientific, architectural or other cultural
113 significance deemed potentially eligible for inclusion in the national register of historic places”
114 (N.Mex Stat. Ann. § 47-12A-2). Note, the law does not indicate who determines whether sites
115 are “potentially eligible for inclusion in the national register.” The eligibility criteria for listing in
116 the national register are readily available (National Park Service 2015), but the statute does not
117 indicate who will review the criteria and determine whether the site fits the bill. Many states

118 have additional statutes regarding historic preservation easements alongside their general
119 conservation easement enabling act. These preservation easements follow the same contours as
120 other CEs but are more likely to explicitly recognize sites listed on the historic register. Maine
121 for example has a separate statutory section for “Archeological Site Easements” (33 MRSA
122 §§1551-1555).

123 Even where archaeological CEs are permissible under state law, landowners may not be
124 able to claim charitable tax deductions for donations of them. IRS regulations clarify that tax
125 deductions are available for CEs that preserve a “historically important land area.” Yet, only one
126 case has considered what constitutes a “historically important land area.” In *Turner v.*
127 *Commissioner of Internal Revenue*, the Tax Court examined the legislative history of the tax
128 code in attempt to ascertain the meaning of the phrase. The Senate Report quoted by the tax court
129 explained:

130 The term “historically important land area” is intended to include independently
131 significant land areas (for example, a civil war battlefield) and historic sites and
132 related land areas, the physical or environmental features of which contribute to
133 the historic or cultural importance and continuing integrity of certified historic
134 structures such as Mount Vernon, or historic districts, such as Waterford,
135 Virginia, or Harper's Ferry, West Virginia [Turner v. C.I.R (citing S. Rept. 96–
136 1007 at 12)].

137 This complicated sentence is the only guidance regarding what qualifies as a historically
138 important land area. It is not clear that archaeological sites would fall under these categories if
139 not associated with an historic structure or in an historic district. The battlefield example
140 illustrates an extension to protecting something other than buildings, but there seems to be an

141 emphasis on early American history in this passage. Even if archaeological sites would meet
142 these criteria, the law does not indicate how a site's worth is measured or who gets to decide
143 which sites are important enough to merit preservation.

144 Archaeological CEs differ from historic preservation CEs because they usually seek to
145 protect resources in the ground, instead of a building currently in use. Moreover, archaeological
146 CEs protect land for archeology goals. This may include site disruption. Instead of keeping
147 people off the land or a particular area undisturbed, archaeological CEs contain terms explaining
148 who will have the right to exploit archaeological resources and who will oversee any such
149 explorations. For example, Archaeology Southwest, a holder of archeological CEs over pueblos
150 in the southwest holds CEs not just to protect sites but also to facilitate what it views as the
151 proper methods for conducting archaeological digs (methods that involve limited excavation)
152 (Archaeology Southwest 2012). In other jurisdictions, covering areas of archaeological resources
153 with either a parking lot or golf course may be deemed an acceptable or desirable as a way to
154 protect resources (Florida Department of State).

155 **2.3 Cultural Conservation Easements**

156 Cultural CEs protect sites that have cultural but not necessarily archaeological
157 importance. The site disturbance permitted by archaeological CEs may be directly at odds with
158 the goals of cultural CEs. Yet, cultural CEs tend to differ from traditional environmental CEs by
159 allowing access to and use of the sites (at least to specified groups of people).

160 Research on cultural conservation easements has focused on use in conjunction with
161 tribes and tribal interests. Yet, the history of cultural conservation in the United States and
162 elsewhere goes far beyond indigenous interests. For example, CEs can protect cultural sites such
163 as civil war battlefields or locations of important historic events (Fairfax et al. 2005). In many

164 nations such protections are carried out by government entities, but where governments are
165 uninterested or unable to protect these resources, cultural conservation easements may offer a
166 venue for preservation.

167 In the United States, tribes and tribal organizations have turned to cultural CEs to protect
168 culturally important sites. The InterTribal Sinkyone Wilderness Council identifies cultural CEs
169 as “important for ensuring protection of and access to culturally important Native American sites
170 that may not be in Tribal ownership” (Trees Foundation 2012). To date, cultural CEs have only
171 been written about as mechanisms to protect Native American tribal sites (Middleton 2011).
172 Tribal interests represent a particularly challenging case for protection via property law tools
173 because of concerns with issues like tribal sovereignty, varying concepts of property law, and a
174 unique governmental relationship among states, tribes, and the federal government. Similar
175 conundrums are present outside of the United States where indigenous property rules or
176 environmental protection schemes fail to coincide with the more dominant legal regime (Owley
177 2012a). Drawing upon the power of familiar entities like land trusts and conservation easement
178 statutes may offer an additional venue of cultural site protection.

179 **3 Challenges of Using Conservation Easements for Heritage Protection**

180 CEs harness the power of citizens engaged in protecting special places. Through land
181 trusts, private citizens can achieve greater heritage protection than currently occurs through
182 public channels. There is little doubt that the CE tool protects lands that would otherwise be
183 converted to less desirable uses from an ecological, cultural, or social viewpoint. However, CEs
184 are not without problems. This author and others have documented concerns with CEs, focusing
185 on those seeking to provide ecological benefits (Owley 2011; Owley 2013; Mahoney 2002; Jay
186 2012). This Viewpoint focuses on issues pertinent to cultural heritage CEs.

187 **3.1 Privatization**

188 Cultural heritage CEs are a mechanism for private parties to protect important sites. This
189 raises the question of who is the appropriate entity for protecting cultural heritage. Some might
190 argue that it is a government role; indeed, many of our protected sites are owned and managed by
191 government agencies (Phelan 1993). Some may even argue there is a public duty to protect such
192 sites (Renaud 2000). This ideal aligns with the modes of heritage protection present throughout
193 Europe and South America. If protection of heritage is a governmental duty, there may be
194 concern regarding land trusts performing this duty.

195 Land trusts may not focus on the right sites or make the rights rules for those sites
196 (Merenlender et al. 2004). When land trusts and landowners negotiate which properties to protect
197 and how to protect them, important sites may receive little acknowledgement or protection. The
198 heritage protection site selection and rule choices are more likely to be driven by individual
199 landowner desires and organization goals. For example, reliance on landowner donation of
200 cultural heritage CEs leads to protection of sites that the landowners are already inclined to
201 encumber, not necessarily the sites most in need of (or deserving of) protection.

202 Land trusts efforts may deter government action (Echeverria & Pidot 2009).
203 Governments may see the job of heritage protection as covered and address other needs without
204 investigating the nature or scope of the private heritage protection regimes. Land trusts, however,
205 are likely expanding the number of sites being protected instead of replacing or usurping
206 government protection regimes. Even so, privatizing protection of cultural sites reduces public
207 involvement in deciding what to protect and may hamper public oversight and enforcement of
208 land-use restrictions.

209 **3.2 Static Perpetual Agreements**

210 Most CEs are perpetual. Some states require perpetuity and most make perpetuity the
211 default duration. To qualify as a tax-deductible donation, a CE must be perpetual. The perpetual
212 aspect of CEs has been critiqued as hampering ecological goals, especially when combined with
213 static rules (Mahoney 2002; Rissman 2010) and as limiting development of social goals
214 (Korngold 2008; Richardson and Bernard 2011). Cultural heritage CEs also encounter perpetuity
215 problems. Protecting fixed cultural sites in perpetuity may conflict with the idea that sites evolve
216 and change.

217 Perpetuity concerns are salient largely because most CEs are static. That is, the rules
218 regarding the land, buildings, and resources lock-in the status quo. This freezes heritage in time.
219 In some ways, this converts active cultural spaces into a distributed museum. Fixing the sites in
220 time and place hampers the evolution of the sites' use and contributes to a loss in an
221 understanding of the role a place plays in its surroundings. While CEs present a promising tool
222 for protecting culturally important sites, the perpetual static nature of the tool means that we
223 should be cautious about overusing it.

224 The static nature of land protection in this way can be directly at odds with some of the
225 goals of the parties entering into the agreements. Tribes, for example, often challenge the notion
226 that heritage protection governs unchanging patterns of lands and practices. This has also been
227 articulated in legal agreements. A Memorandum of Understanding between the Kashaya² and the
228 California State Department of Transportation recognizes “that Traditional Kashaya Places
229 change over time.” Members of the Maidu tribes believe that cultural sites move with the seasons
230 and over the years and are not a single locked-in-time-and-place concept. Many Maidu also
231 believe in managing their landscape instead of letting it stand idle. Maidu member Trina

² Sometimes spelled Kashia or Kahsa-ya.

232 Cunningham explains that to the Maidu “land needs to be harvested, tended, walked on and sung
233 to—it can’t just sit there idle and neglected” (Knadler 2009). While tribes may view involvement
234 with the land as an essential element of a cultural CE, it is a rare cultural CE that enables such a
235 relationship between landowner and holder. Even where cultural CEs allow land access, land
236 management and changing the landscape would be a departure from former and current CE use.
237 The idea that places (and not just practices) evolve has been slowly embraced by government
238 agencies and is not yet embodied in the idea of cultural heritage CEs

239 Creating islands (piecemeal and ad hoc ones) of protected sites within a landscape may
240 hamper development and use of an area not just for economic development but for cultural
241 development. Reverence of past cultural events and properties may hamper growth as users of
242 CEs restrict use of properties in perpetuity without enabling communities to revisit or modify the
243 restrictions.

244 **3.3 Effectiveness and Valuation**

245 Even if parties determine that CEs as a concept will meet land protection needs, there is a
246 question about which lands should be protected with CEs. Evidence suggests that land protected
247 with CEs may be in the least danger of being converted to conflicting land uses (Owley &
248 Tulowiecki 2012). This phenomenon is likely present with many types of CEs but may be even
249 more prevalent with historic façade CEs. Historic façade CEs have come under increased
250 scrutiny from the IRS (Colinvaux 2013). There is little evidence to suggest that owners of
251 historic buildings would have changed the buildings’ façade in the absence of tax breaks. Often
252 such features were the attraction of the purchase. In fact, some landowners have described the
253 tax deductions as getting money for something they would have done anyway. CEs may not
254 change the level of threat to the landmarks. Thus, many historic preservation CEs seek to solve a

255 non-existent problem. Citizens lose the benefit of tax payments that could support social services
256 and those mostly likely to benefit from the tax deductions are wealthy landowners.

257 Where a cultural heritage CE seeks to secure access, use, or investigation of a site, this
258 concern differs. At times a CE may be the easiest tool to secure something more reliable than a
259 license and donations of such CEs may provide needed assurances even if the same benefits may
260 have been available without crediting large donations.

261 **3.4 Social Justice**

262 The nature of the CE mechanism raises concerns about social justice. Social justice is the
263 view that everyone deserves equal economic, political, and social rights (Miller 2009). An
264 environmental justice view elaborates this view to include a belief that everyone should have
265 equal access to environmental amenities (Sister et al. 2010). The financial incentives associated
266 with conservation easements lead to a greater chance that the protected areas will be far from
267 population centers (Owley 2012b). The suburban and rural concentration of open space and
268 environmental CEs means that large portions of society do not get the direct benefits of the
269 preservation programs. The rural focus often applies to cultural and archaeological conservation
270 easements as well. To the extent that these easements have specific purposes or goals that are not
271 widely experienced social amenities, this may be unoffensive. Where such CEs expand the use
272 and application of open space CEs, further funding and supporting rural CEs may detract from
273 efforts to protect and provide access to urban landscapes.

274 Historic preservation CEs present a unique situation. Historic preservation CEs are likely
275 to be located in urban settings or population centers, as opposed to archaeology, cultural, or
276 ecological CEs. This may equate with a greater number of people enjoying the properties and a
277 greater diversity of people viewing the protected sites. More people may be able to access the

278 social benefit or amenity that is preservation of cultural heritage. However, most landowners
279 using historic preservation CEs are relatively wealthy. Indeed, they tend to have enough income
280 to make the tax breaks worthwhile. Thus while the community benefits may be more widely felt,
281 the tax benefits more commonly reside with wealthier landowners for any of the CE types.

282 **3.5 Commodification of Heritage**

283 The final critique of cultural heritage CEs contained herein questions whether it is ever
284 appropriate to pay landowners *not* to destroy cultural sites. Essentially, we should consider
285 whether there are some things that money shouldn't buy (Sandel 2012, Dorfman and Harel
286 2013). Perhaps protecting important lands, buildings, and sites are things that should not be
287 commoditized. This may be particularly persuasive in the context of sacred sites. For example, it
288 may seem inappropriate to put a dollar value on the ability of tribes to exercise their religion or
289 carry out cultural ceremonies. We must also ask whether we should have to pay landowners not
290 to destroy ruins or civil war cemeteries. When we pay people to protect our cultural heritage, do
291 we degrade cultural heritage or civic responsibility?

292 **4 Conclusion: Implications for the Future**

293 CEs tend to be perpetual agreements. They lock-in today's land uses and preferences,
294 usually preserving land in a static fashion (Richardson 2010). Securing resources in perpetuity
295 ties the hands of future landowners and communities who may seek to alter the landscape, treat
296 resources differently, or simply change their priorities for protecting cultural heritage sites. The
297 permanent nature of encumbrances that remain as ownership changes (and are difficult to
298 dissolve) hampers future community members (Thompson 2004). This concern related to all CEs
299 takes on a unique character in the context of cultural heritage CEs. If the goal of the restrictions
300 is static in situ protection of cultural heritage, CEs may be an appropriate tool. Perpetually

301 maintaining the status quo in this way is akin to the preservation work done in museum settings.
302 Even where cultural heritage CEs facilitate stewardship and use of a site, compliance with state
303 laws and tax codes may limit the ways the CEs can change over time. For example, California is
304 one of the states requiring CEs to be perpetual. It is not clear when perpetual CEs can be changed
305 or modified (Owley 2011; McLaughlin 2007). Illinois only allows amendment where it enhances
306 conservation value or is directly in line with existing CE purposes. The IRS provides a further
307 constraint, limiting levels of holder discretion for deductible conservation easements (Jay 2012).

308 Historic preservation CEs generally seek to preserve façades and interior designs to
309 protect examples of architectural work or period pieces. Thus, protecting them in perpetuity with
310 only minimal allowance for changes may be an appropriate approach. The main concern related
311 to historic preservation CEs is assessing the correct value of the restriction and determining
312 whether allowing tax deductions for the restrictions actually results in greater protection and
313 protection of the most desirable properties. In economically depressed areas with architectural
314 resources, these tax breaks may help attract developers. In many situations, however, the tax
315 breaks do not change landowner behavior or result in added heritage protection.

316 Archaeology CEs are still few in number. Whether CEs are an appropriate tool to protect
317 archaeological resources will vary with the site. Where the land is still actively used for cultural
318 practices, creating static perpetual restrictions may be at odds with the changing nature and use
319 of the land. Where the restrictions govern site disturbance, one must examine whether such
320 disturbance conflicts with other cultural or ecological goals. If active use of the land is intended,
321 CEs may not make as much sense. In such cases, it may be advisable to hold the land in fee
322 simple. Finally, while the same concerns regarding tax breaks above apply here, there is an
323 additional question of whether CEs that facilitate archaeological exploration merit tax

324 deductions. The legislative history of the tax deductions and accompanying regulations do not
325 discuss archaeology to any great extent and it may be that legislators did not contemplate this use
326 of the tool.

327 Cultural CEs differ from the previous two categories because they tend to acknowledge
328 that the location and use of sacred sites can change. Cultural CEs often allow direct access and
329 use of the land by CE holders or third-party beneficiaries. In this way, cultural conservation
330 easements resemble traditional affirmative easements and those may be a more appropriate tool
331 where permissible by state or tribal law. Moreover, because stewarding CEs with access and use
332 rights can be more complicated than overseeing ecological CEs, it may be that fee simple
333 ownership is the most appropriate land protection technique and should be favored where
334 possible. The strength of the cultural CE is that it enables land protection and use by tribes and
335 other groups even in the absence of regulatory power, eminent domain power, or the ability to
336 purchase land. Yet, the inherent static nature of the tool can be hard to reconcile with evolving
337 cultural sites and uses.

338 While the use of CEs to protect cultural heritage is likely to continue growing, it may be
339 that much of this growth will be hidden from view. Instead of explicitly categorizing CEs as
340 protecting cultural heritage, it may be easier from a legal standpoint to protect these same sites as
341 open space. In many areas, culturally important properties may also provide ecosystem services
342 like wildlife habitat and watershed protection. Land trusts seeking to protect archaeological sites
343 may use the label scenic or open space CEs instead of calling them archaeological CEs to avoid
344 any uncertainty as to whether the structure will be enforceable under state CE statutes or the
345 federal tax code (Florida Department of State). Additionally, identifying properties as cultural
346 protection sites, by for example publicly labeling the protection an archaeology easement, may

347 publicize cultural resources in a greater extent that parties desire, potentially drawing looters
348 (Middleton 2011) It may be easier for courts and CE holders to grapple with environmental
349 metrics (Middleton 2011; Wood & O'Brien 2008). Assessing ecosystem health or preventing
350 development may be simpler than determining whether something is culturally important and
351 merits protection.

352 Determining when to use CEs to protect cultural heritage (as opposed to other property
353 law tools) may be a challenging task, but it is relatively straightforward. The more complicated
354 task is assessing who gets to decide what happens to cultural sites. Is cultural heritage protection
355 an appropriate role for land trusts or should it be done by government agencies and incorporate
356 public processes? What does it mean for a private organization to hold a cultural heritage CE?
357 Do they become owners or stewards of the past? Cultural heritage CEs present some difficult
358 decisions and challenges logistically but we must go beyond considering the nuances of the tool
359 to explore the larger decisions of who gets to protect what and how.

360

361 **Acknowledgements**

362 I am grateful to Cinnamon Carlarne for her thoughtful comments and feedback as well as the
363 participants at the Colorado Law and Duke School of Law's Annual Summer Works-in-Progress
364 Symposium and the symposium on The Future of Heritage: Laws, Ethics and Sustainability at
365 SUNY Buffalo. Research support provided by the Baldy Center for Law & Social Policy.

366

367 **REFERENCES CITED**

368
369 Archaeology Southwest. 2012. Electronic document,
370 <http://www.archaeologysouthwest.org>, accessed April 19, 2015.

371
372 Center for Desert Archeology, 2012. *Preserving the Places of Our Shared Past*.
373 Electronic document,
374 http://www.archaeologysouthwest.org/pdf/conservation_easement_fact_sheet.pdf, accessed April
375 19, 2015.

376
377 Chang, Katie, 2011. *2010 National Land Trust Census Report* (Land Trust Alliance
378 publisher), available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/census>.

379
380 Cheever, Federico, 1996. Public Good and Private Magic in the Law of Land Trusts and
381 Conservation Easements: A Happy Present and a Troubled Future. *Denver University Law*
382 *Review* 73:1077–1102.

383
384 Cheever, Federico and Jessica Owley, (forthcoming 2016). Enhancing Conservation
385 Options: An Argument for Statutory Recognition of Options to Purchase Conservation
386 Easements (OPCEs), *Harvard Environmental Law Review* 40.

387
388 Colinvaux, Roger 2013. Conservation Easements: Design Flaws, Enforcement
389 Challenges, and Reform. *Utah Law Review* 33: 755-771.

390
391 Echeverria, John D. and Jeffrey Pidot, 2009. Drawing the Line: Striking a Principled
392 Balance between Regulating and Paying to Protect the Land. *Environmental Law Reporter*
393 39:10868–10880.

394
395 Dorfman, Avihay and Alon Harel, 2013. The Case against Privatization *Philosophy &*
396 *Public Affairs* 41: 67-102.

397
398 Fairfax, Sally K., Lauren Gwin, Mary Ann King, Leigh Raymond, and Laura A. Watt,
399 2005. *Buying Nature: The Limits of Land Acquisition as a Conservation Strategy, 1780-2004*.
400 MIT Press, Cambridge.

401
402 Florida Department of State, Bureau of Archaeological Research, Division of Historical
403 Resources, 2012. Conservation Easements: Protecting Archaeological Sites and Historic
404 Buildings on Private Lands. Electronic document
405 <http://www.flheritage.com/archaeology/education/culturalmgmt/easement.pdf>, accessed July 31,
406 2012

407
408 Jay, Jessica E. 2012. When Perpetual is Not Forever: The Challenge of Changing
409 Conditions, Amendment, and Termination of Perpetual Conservation Easements, *Harvard*
410 *Environmental Law Review* 36: 1-78.
411
412 Katz, Ellen Edge, 1986. *Conserving the Nation's Heritage Using the Uniform*
413 *Conservation Easement Act*, Washington and Lee Law Review 43: 369-398.
414
415 Knadler, Alicia, 2009. Cultural Conservation Easements: from the Feather River and
416 Maidu Perspective. *Indian Valley Editor* 8 April, available at
417 http://www.frlt.org/docs/cultural_easements.pdf and
418 <http://inv.stparchive.com/Archive/INV/INV04082009p02.php>
419
420 Korngold, Gerald, 2007. Solving the Contentious Issues of Private Conservation
421 Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process,
422 *Utah Law Review* 2007:1039–1084.
423
424 Mahoney, Julia, 2002. Perpetual Restrictions on Land and the Problem of the Future,
425 *Virginia Law Review* 88:739–787.
426
427 Maine Revised Statutes Annotated (MRSA). Chapter 33, Section 1551-1555.
428
429 McLaughlin, Nancy A., 2005. Rethinking the Perpetual Nature of Conservation
430 Easements, *Harvard Environmental Law Review* 29: 421-521.
431
432 McLaughlin, Nancy A., 2007 Conservation Easements: Perpetuity and Beyond, *Ecology*
433 *Law Quarterly* 34: 637-677.
434
435 Merenlender, Adina M., L. Huntsinger, G. Guthey, and S.K. Fairfax, 2004. Land Trusts
436 and Conservation Easements: Who is Conserving What and For Whom? *Conservation Biology*
437 18: 65–75.
438
439 Middleton, Beth Rose, 2011. *Trust in the Land: New Directions in Tribal Conservation*.
440 University of Arizona Press, Tuscon.
441
442 Miller, David, 2009. *Principles of Social Justice*, Harvard University Press, Cambridge.
443
444 Morris, Amy Wilson, 2008. Easing Conservation? Conservation Easements, Public
445 Accountability, and Neoliberalism, *Geoforum* 39:1215-1227.
446

447 National Conference of Commissioners on Uniform State Law (NCCUSL) 1981.
448 Uniform Conservation Easement Act (UCEA)
449

450 National Conference of Commissioners on Uniform State Laws, 2010. Legislative Fact
451 Sheet–Conservation Easement Act. Electronic document,
452 [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Ac](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act)
453 [t](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act) accessed April 19, 2015.
454

455 National Park Service, 2015. National Register Criteria for Evaluation, available at
456 http://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm, accessed April 19, 2015.
457

458 Owley, Jessica, 2013. From Citizen Suits To Conservation Easements: The Increasing
459 Private Role In Public Permit Enforcement, *Environmental Law Reporter* 43:10486-10491.
460

461 Owley, Jessica, 2012a. Neoliberal Land Conservation and Social Justice. *IUCN Academy*
462 *Environmental Law E-Journal* 3:6–17.
463

464 Owley, Jessica, 2012b. Tribes as Conservation Easement Holders: Is a Partial Property
465 Interest Better than None?, in *Tribes, Land And The Environment* 171-194 (Ezra Rosser & Sarah
466 Krakoff eds)
467

468 Owley, Jessica and Stephen Tulowiecki, 2012. Who Should Protect the Forest?:
469 Conservation Easements in the Forest Legacy Program, *Public Land and Resources Law Review*
470 33: 47-93.
471

472 Owley, Jessica 2011. Changing Property in a Changing World: A Call for the End of
473 Perpetual Conservation Easements, *Stanford Environmental Law Journal* 30: 121-173.
474

475 Phelan, Marilyn, 1993. A Synopsis of the Laws Protecting Our Cultural Heritage. *New*
476 *England Law Review* 28: 63–108.
477

478 Renaud, Susan L. Henry, Patricia Mercado-Allinger, Kater Willard, Christopher Judge,
479 and Robert Vogel, 2000. Strategies for Protecting Archeological Resources on Private Lands,
480 electronic document, www.nps.gov/hps/pad/strategies/, accessed July 31, 2012.
481

482 Richardson Jr., Jesse J. and Amanda C. Bernard, 2011. Zoning for Conservation
483 Easements. *Law and Contemporary Problems* 74: 83–108.
484

485 Richardson Jr., Jesse J., 2010. Conservation Easements and Adaptive Management, *Sea*
486 *Grant Law and Policy Journal* 3:31-59.

487
488 Rissman, Adena R., 2010. Designing Perpetual Conservation Agreements for Land
489 Management. *Rangeland Ecology and Management* 63: 167-175.
490
491 Rissman, Adena R. and Nathan F. Sayre, 2011. Conservation Outcomes and Social
492 Relations: A Comparative Study of Private Ranchland Conservation Easements. *Society and*
493 *Natural Resources* 25: 523-538.
494
495 Sandel, Michael J., 2012. *What Money Can't Buy: The Moral Limits of Markets*. Farrar,
496 Straus & Giroux, New York.
497
498 Sister, Chona, Jennifer Wolch, and John Wilson, 2010. Got Green? Addressing
499 Environmental Justice in Park Provision. *GeoJournal* 75:229-248.
500
501 Trees Foundation, Affiliate Partners, 2012. InterTribal Sinkyone Wilderness Council-
502 Cultural Conservation Easement Workshop. Electronic document,
503 <http://www.treesfoundation.org/affiliates/update-101>, accessed May 16, 2012.
504
505 Thompson Jr., Barton H., 2004. The Trouble with Time: Influencing the Conservation
506 Choices of Future Generations. *Natural Resources Journal* 44: 601-620.
507
508 Wilson, Paul E. and H. James Winkler, 1971. The Response of State Legislation to
509 Historic Preservation *Law and Contemporary Problems* 36: 329-347.
510
511 Wood, Mary Christina and Matthew O'Brien, Tribes as Trustees Again (Part II):
512 Evaluating Four Models of Tribal Participation in the Conservation Trust Movement, *Stanford*
513 *Environmental Law Journal* 27: 477-544.
514