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# The Use of Property Law Tools for Soil Protection

Jessica Owley

Literally speaking, the health and the productivity of the ground that we stand on will largely determine the future prosperity and security of humankind.<sup>1</sup>

## 1 Introduction

While there is no doubt among conservationists that protection of the soil is important for the health and prosperity of the planet,<sup>2</sup> it is a resource that fails to garner the same attention as other aspects of our natural world. Even in the realm of land conservation, an area that one might think would be dominated by questions of soil health and conservation, the discussion is more likely to center on scenic values, water, biodiversity, and other ecosystem services. Such an approach may be particularly shortsighted in a world marked by climate change.

Soil conservation practices can do more to mitigate climate change than other approaches, and the role of healthy soil in adaptation efforts is unquestionable.<sup>3</sup> As protecting the soil can be more forward thinking than making land-conservation decisions based on other environmental characteristics, soil protection can be viewed as environmental protection writ large.

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<sup>1</sup>UNCCD Executive Secretary Monique Barbut in September of 2015 in response to the 2030 Agenda for Sustainable Development; <http://sdg.iisd.org/news/unccd-unesp-release-infographic-and-video-to-welcome-adoption-of-sdg-target-on-ldn/>.

<sup>2</sup>Davidson and Janssens (2006), Lal (2004).

<sup>3</sup>Pacala and Socolow (2004).

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H. Ginzky et al. (eds.), *International Yearbook of Soil Law and Policy 2017*,  
International Yearbook of Soil Law and Policy,  
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As conservationists have considered how to incorporate climate change into their planning, some have advocated for shifting from a focus on species or even on the historical or present ecosystems to thinking about “conserving nature’s stage.”<sup>4</sup> That is, some conservation scientists recommend looking at the geophysical characteristics of a landscape, advocating that we shift our conservation focus from current ecosystems and refugia to something that considers the potential ecosystem makeup, and these researchers assert that the best way to make that assessment is by considering soils, geology, elevation, and similar characteristics.<sup>5</sup> This suggests that looking at the geological composition of the landscape and the components of the soil will provide better indicators of which lands are worthy of protection. Indeed, they argue that examination of the conditions beneath the surface may be the most useful in determining which ecosystems (and their associated services) will be able to thrive as the climatic conditions change.<sup>6</sup> This approach to conservation (which is gaining broader acceptance)<sup>7</sup> highlights the importance of soil integrity as an element of ecosystem protection.

The international community has recognized the importance of soil protection. We can see this most prominently in the Sustainable Development Goals and the United Nations Convention to Combat Desertification. The Sustainable Development Goals (a project led by the United Nations with the support of over 190 countries) set 17 global goals with 169 total targets within those goals.<sup>8</sup> Goal 15 is to “[p]rotect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.”<sup>9</sup> This goal clearly ties to the conservation of soil, and the goal’s 12 targets with their indicators show an even stronger link.<sup>10</sup>

Target 15.3 gives a clear mandate from the international community as it seeks to “combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world.”<sup>11</sup> The Sustainable Development Goals set a date of 2030 for meeting this target and lists “proportion of land that is degraded over total land area” as the indicator for determining whether the goal has been met (but does not dictate what this proportion must be).<sup>12</sup> Referred to as Land Degradation Neutrality or LDN, Target 15.3 has been a focus of the UN Convention to Combat Deserti-

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<sup>4</sup>Anderson and Ferree (2010), Lawler et al. (2015a).

<sup>5</sup>Anderson and Ferree (2010).

<sup>6</sup>Id.

<sup>7</sup>Lawler et al. (2015b).

<sup>8</sup>United Nations (2017b).

<sup>9</sup>United Nations (2017a).

<sup>10</sup>Id.

<sup>11</sup>Id.

<sup>12</sup>Id.

fication (UNCCD) and the United Nations Environment Programme (UNEP).<sup>13</sup> Thus identified as a major concern of our era, the negative trends on land and soil has harmed food and water security and reduced the ability of communities to be resilient in the face of climatic changes.<sup>14</sup> Moreover, soil health is indicative of agricultural productivity.<sup>15</sup>

Achieving land degradation neutrality is no easy task, and the established work plan begins with a target-setting process where countries determine national baselines, set land degradation targets, and explore measures to reach those targets.<sup>16</sup> Currently, over 100 countries are involved in this effort.<sup>17</sup> The hardest step in this process is undoubtedly trying to determine (and then implement) the strategies that actually conserve the land. Once we acknowledge that soil conservation is important, what can we do to prevent degradation and promote and protect healthy soils? How can we actually reach the land neutrality targets, and equally importantly, how can we ensure that we do not backslide once those targets have been achieved? How do we maintain the vigilance needed to ensure that successful land protection projects remain in place? Additionally, once we agree that soils should be protected, we need to identify which soils. Which areas should we choose? How should we choose them? Acknowledging that some development is not only inevitable but desirable, we do not want to protect all soils to the detriment of other societally beneficial land uses.

This chapter seeks to explore these questions through the lens of property law, with a focus on the development of property law in common law countries but with an acknowledgment that these arrangements occur all over the world, with different terms but similar concepts. This chapter begins in Sect. 2 with a brief glimpse into how countries are addressing soil conservation before investigating, in Sect. 3, public and private approaches to land degradation. From there, the chapter touches briefly on the contract law approach to conservation in Sect. 4 before describing in detail the property law approaches in Sect. 5—the heart of the chapter. These property law tools vary from complete control over a parcel to limited ability to control certain aspects of land use for a limited time. There is a variety of property law tools available, and this area continues to develop. Land conservationists, however, must consider their choice of property tool carefully as the restrictions can be hard to change and may not always be consistent with changing societal needs. Thus, the chapter ends in Sect. 6 with a note of caution.

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<sup>13</sup>United Nations Convention to Combat Desertification (2017).

<sup>14</sup>FAO (2015), Allouche (2010).

<sup>15</sup>Doran and Safley (1997), Kibblewhite et al. (2008).

<sup>16</sup>See Chasek et al. (2015).

<sup>17</sup>UNCCD (2016), IUCN (2015), United Nations (2015).

## 2 Soil Protection and Land Conservation

To understand the role that law can play in soil conservation, we can begin by thinking about the measures that countries might use to meet those land conservation anti-degradation targets. To consider a few examples (but far from an exhaustive list), we see that some countries are focusing on protection of forestland and planning to implement projects to restore degraded forests.<sup>18</sup> Other countries are working to promote sustainable land management. For example, in Kenya, the government is promoting sustainable land management as a way to achieve land degradation neutrality.<sup>19</sup> Colombia, which identifies its major soil concern as erosion, has created a national policy for sustainable soil management.<sup>20</sup> Some projects focus on simply ceasing restrictive activity, while others call for more active land management behavior. How do we protect such land though, and once you have implemented your on-the-ground projects, how do you ensure that they remain in place?

For most countries, we do not yet have information about land protection goals or implementation. We are quite a way off from having implementation plans or rules for conservation. Most countries are at the stage of formulating their plans. They are identifying their priorities and setting goals, but they have not drilled down into all the details of how the targets will be reached. Countries set land degradation neutrality targets and then work with the United Nations and other agencies to help meet those targets. This chapter can help with that phase. As we seek to protect land and prevent further degradation, the mechanisms available through property law may facilitate building rules for ecological management.

## 3 Approaches to Land Conservation

There are a number of legal tools at our disposal for soil protection. We can largely think of the approach as following either a public route or a private one. In terms of public land protection, we see governments controlling the land uses and practices on government-held land. We also see the government acting as a regulator. In legislating for the public health, safety, and welfare, governments at all levels constrain individual behavior with the hope of improving environmental conditions. Thus, the public land conservation route involves the government either constraining its own behavior or constraining the behavior of people within its jurisdiction. Unfortunately, our public regulations have focused on pollution control and land use without addressing soil health and protection directly.

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<sup>18</sup>E.g., República de Costa Rica (2015), Republic of Indonesia (2015).

<sup>19</sup>UNCCD (2017a).

<sup>20</sup>UNCCD (2017b).

On the private actor side, we look to nonprofit organizations and individuals who do not have the power to legislate as governments do. Nor do they hold the power to acquire land for public use through eminent domain or similar mechanisms. This leaves private actors with the more traditional private law tools of torts, contracts, and property law. Tort law has not been particularly helpful in soil conservation, offering only limited assistance in the realm of nuisance law. Contract law and property law have been more promising, with the use of property law flourishing in the context of land conservation.

This section considers both public and private land conservation strategies from the legal perspective. It begins with an overview of the public conservation efforts and then addresses the private methods. The following section goes into more detail about the workings and potentials of property law as a land conservation avenue.

### ***3.1 Public Land Conservation***

A primary tool of land conservation worldwide is government ownership of at-risk areas. The government then places these special areas under its protection and limits the activities that can be done on the land. In this way, we have something that looks like state action, but, in reality, the state is behaving more like a run-of-the-mill private landowner who can decide what she wants to do with her land and chooses to be as environmentally protective as she wants to be. A difference occurs between the private landowner and the state as landowner because many jurisdictions view the state as having an obligation to protect the land and other natural resources on behalf of its citizens. Sometimes called the public trust doctrine, this theory places differing level constraints on government behavior in different countries.<sup>21</sup>

Beyond acting as a conservation-minded proprietor or landowner, the government can also protect soils by regulation of harmful activities, something common and uncontroversial in most countries. For example, government agencies can mandate specific agricultural techniques or limit the amount of developable land area on a parcel. The effectiveness of such a technique depends on the strength of the governmental institutions, on other legal structures and restrictions, and on the capacity of the governmental entities involved. It may be particularly hard, for example, for government officials to monitor agricultural or forestry practices. Such an action clearly requires a lot of funding and staff—not something always in ample supply. In fact, constraints on public entities and their lack of capacity to monitor the land have led to (1) government entities building partnerships with NGOs and seeking their assistance in implementing or enforcing public goals and (2) NGOs setting out on their own to protect soils based on their belief that the government is

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<sup>21</sup>Owley and Takacs (2016).

not doing an adequate job on this task. In the first scenario, we see that even what we label as public land conservation can be dominated by private action. In the second, we see a frustration with public action leading to an increase in private action. Either way, the pattern seems to be an increasingly important role for private conservationists.

### ***3.2 Private Land Conservation***

Contrasted with public efforts are the private law avenues for land conservation. As noted above, this often occurs where conservationists are dissatisfied with the public methods or extent of conservation. Where a private organization or individual seeks to protect soils, however, the legal tools available for such protection vary. NGOs do not have the same ability to pass laws and promulgate regulations to shape land use as government entities do. Nor do they have the power of acquiring land through eminent domain. Instead, NGOs and the government agencies that they work with are turning to other legal tools that are better fits, in what we think of as the realm of private law. Most markedly, this occurs in the realm of contract law and property law.

When we discuss private land conservation efforts, we need to identify the private parties we are talking about. While one might envision wealthy individuals with an interest in environmental protection taking action in this realm,<sup>22</sup> we are mostly referring to nongovernmental organizations: NGOs of different sizes and styles that come together to use property and contract law to protect the land. Notice that these NGOs differ from other environmental NGOs because of the tools they use. Less likely to spend energy on lobbying politicians or using public pressure or litigation to achieve their goals, these NGOs are less likely to be seen organizing a protest or circulating a petition (although of course some of them engage in such activities). Instead, we see a class of NGOs that focus their time and energy on securing property rights to land (or entering into contracts with landowners). We are particularly interested here in the NGOs that use property tools. In the United States, these organizations are labeled land trusts, perhaps because of their link to older trustee organizations but also because of their link to older ideas of trust lands in both the United States and the United Kingdom (school trust lands, the National Trust, etc.). In Latin America or Europe, these groups are often labeled land custodians, land stewards, or custodial entities. Phrases that also seem to indicate a standard of care regarding the land that is something more than landownership.

While we are chiefly interested in this chapter with exploring the property law tools available for soil conservation, a brief foray into contract law can help illustrate the options available and why property law has become the tool of choice.

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<sup>22</sup>And we do see this with wealthy families like the Rockefellers and individuals like Ted Turner. Brechin (2015) Turner Foundation (2017), Turner Enterprises (2017).

## 4 Contracts for Land Conservation

Contract law can serve as an avenue for land conservation. Landowners can enter into contracts with NGOs that take the form of payments for ecosystem services.<sup>23</sup> The landowner agrees to engage in certain land-use practices that enhance or preserve the soil (or perhaps agrees to refrain from engaging in activities that would damage the soil).<sup>24</sup> In return (as consideration), the NGOs provide the landowners with payments or some other valuable item (facilitating a permit application, for example).<sup>25</sup> The contract agreement protects the individual parcel to which it applies and can be tailored to fit the circumstances involved. Thus, the contract can be a more fine-tuned tool than a government regulation, which is likely to apply more broadly. Contracts are voluntary, though, and will only be useful where the landowner is willing to be bound by one. The parties involved negotiate the terms, and it may be hard to create coherent rules across parcels as the landowners involved might have different goals for the land or ecology.

There is, however, an even greater concern than coherency with contract law in that a contract only binds the parties that enter into the contract. In the realm of soil conservation, this means that only the landowner who signed the contract will be required to comply with the terms of the contract. If the landowner sells the property, the restrictions will not be enforceable against the subsequent landowner. Therefore, whenever a landowner wants to change land uses, she need only sell the land to wipe the restrictions away. Thus, a more desirable restriction is one that binds even the subsequent landowners. But we do not do that with contract law—we do not like to require things of nonparties. This is where property law comes in handy for NGOs that believe that the government is not doing enough through public law.

## 5 Property Restrictions for Land Conservation

Unlike contract law, property rights in the land can be associated with a parcel and not solely with an individual. Property rights come in many shapes and sizes, and this section describes different types of property rights before delving more deeply into the partial nonpossessory property rights that have become the favored tool of land conservationists in the United States that we now see spreading across the globe.

For purposes of our discussion here, we can group property rights into full or partial and possessory or nonpossessory. The sections below describe each type and

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<sup>23</sup>Mercer et al. (2011), Boyd and Banzhaf (2006).

<sup>24</sup>Owley and Takacs (2016) at 79.

<sup>25</sup>Owley (2006).

illustrate how the nonpossessory partial interest in land has become a particularly useful tool for conservation.

## **5.1 Possessory Interests**

### **5.1.1 Full Fee Simple Absolute**

One of the most straightforward ways to use property rights to protect land is through purchase of the land. In the common law system, we use the phrase “fee simple” to describe present possessory interest in the land. Where a landowner has the present possessory rights in a parcel, she has the ability to make decisions regarding the use of that land subject to general rules and regulations of the governments that have jurisdiction over the land and also in accordance with general laws of landownership, like nuisance, that prohibit a landowner from using her property in ways that unreasonably harm neighboring property. Holding title to the land bestows the landowner with freedom of action regarding the land and can enable land preservation alongside active conservation and management. Where an NGO wants extensive control over the activities on the land, this might be the best option. Moreover, if an NGO identifies that a parcel could potentially benefit from active soil conservation measures, the NGO would be most secure in holding the title to the land. With title, there will be little objection to whichever land conservation measures the NGO determines will be most beneficial.

Yet the ability to conserve soil through ownership by NGOs or conservation-minded individuals is limited. An obvious obstacle is the expense. Not only can land be expensive to purchase, but added costs come from management of the land. The NGOs not only need money for land purchases but also need capacity to staff, manage, and monitor the soil conservation efforts. In some places, this may mean being full-time occupiers of the land. Lack of vigilance could lead to interlopers. Additionally, depending on the interventions needed, the staff may need training or equipment that can add to the expenses.

Conservation efforts through fee simple ownership are also limited to where there are willing sellers. Without the government power to condemn land, NGOs can only gain title where landowners are willing to sell. This may not be beneficial for strategic soil conservation. Even where conservationists can identify the parcels that are most important for soil conservation, it does them little good if landowners are unwilling to sell those parcels. This means that strategic or important areas could go unpreserved with energy (and funding) being applied to marginal soils. This limitation makes it difficult to take a holistic or strategic approach to soil conservation.<sup>26</sup>

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<sup>26</sup>A 2017 report from the Brookings Institute suggest that current patterns of conservation easement use are not likely to preserve lands strategically to meet environmental goals and instead are more likely to maximize private goals like tax savings. Looney (2017). Recent work from

Where NGOs hold fee simple title, land may be taken completely out of production and even result in a removal of people from the land. Such a development can change the patterns and composition of communities. Where we think of conservation as originating in a park-like concept that separates people from the land, NGOs can take on the aspect of a neocolonial power dictating land uses and community makeup. This may be particularly pronounced when international or foreign NGOs (or individuals) purchase land. Decision making may be coming from people who have no experience working the land or working with the people. While this concern has lessened over the years as NGOs have improved their working relationships within the communities they operate, we still see objections in the United States and across the world when private nonprofit organizations shape the landscape.<sup>27</sup> In some jurisdictions, this can have an added financial dimension as, in many cases, NGOs pay lower taxes and, in some cases, no property tax. The lower tax base can result from the status of the landowner as an NGO or the limitations on land use that restrict the development of the highest and best use of the land. To alleviate such concerns, NGOs sometimes make voluntary tax-like payments in the regions where they own land to avoid impacts on schools on other social services that might occur with reduced public funding.

### 5.1.2 Co-ownership (in Fee Simple Absolute)

Because of the inherent limits of soil conservation by fee simple ownership, conservationists began to explore partial property rights. Is there a way for us to get some of the same soil conservation benefits without needing to be the owner of the land?

In some cases, this might occur with a possessory interest like joint ownership. Where a property owner holds a portion of the property rights, she has the ability to control or at least influence conduct on the land. In the common law tradition, this ability is clear. Co-owners of property that all hold possessory interests have the right to use and occupy the whole.<sup>28</sup> Furthermore, co-owners have an obligation to each other to prevent abuse of the land and will be liable to one another for damage done to the land.<sup>29</sup> These background principles, however, may do little to prevent negative impacts on the soil. In the eyes of most courts, there is nothing unreasonable about traditional exploitation of the land (through forestry, agriculture, or grazing) and little that would limit development of natural resources. At some

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economists at the University of Wisconsin and North Carolina State, however, argue that there is no evidence that conservation easements are concentrated on lower quality lands because conservation easement holders serve a gatekeeping function that prevents such a pattern from developing. (Parker and Thurman 2017).

<sup>27</sup>7-49 Powell on Real Property § 49.01 (2017).

<sup>28</sup>7-50 Powell on Real Property § 50.03 (2017).

<sup>29</sup>Id., 7-50 Powell on Real Property § 50.06 (2017) l; *Watts v. Krebs*, 131 Idaho 616, 962 P.2d 387 (1998).

level of exploitation, some methods would become unsupportable, particularly if they started to look like nuisance or waste, but court interpretations of such behavior are uncertain, and seeking to constrain land by simply holding a small percentage of the present possessory interest would be ill-advised.

### 5.1.3 Defeasible Fees

One of the easiest and earliest examples one learns about when studying property law is the defeasible fee. A defeasible fee looks similar to fee simple ownership because the property rights holder has the ability to presently occupy and use the land. However, the word defeasible indicates that there is a way the landowner could lose her property rights. That is, upon the occurrence of a certain action (or the failure of a required occurrence), the holder of the defeasible fee loses her property right, and it is then transferred to another.<sup>30</sup> This happens when a landowner places constraints on her land at the time of conveyance. This could happen in a deed transfer at any time, but we see it most commonly in wills. Here are some examples of how one might write a defeasible fee restriction for soil conservation:

- I leave my land to my son Jaime so long as he continues to employ soil conservation techniques.
- All of my property to my sister Victoria and her heirs, but if the soil quality reduces appreciably during their tenure, then to The Nature Conservancy.

Through language such as this, present-day landowners can make long-term decisions regarding their land. In these examples, both Jaime and Victoria have a right to hold and possess the land. Indeed, their rights look similar to the rights of a fee simple landowner. Yet the rights are not as complete because of the possibility that they will lose their property rights. In this way, defeasible fees constrain the activity of the landowner. The person creating the defeasible fee (often a person writing a will, but again the transfer need not be upon the death of a former owner) plays a powerful role, setting the agenda for the future of the land. The length of their control is limited by the law of the jurisdiction. Some countries may not allow such dead hand control, while others may be quite willing for a person living today to decide what may or may not happen on her land far into the future. A limitation of conservation by defeasible fee is the rigidity of the constraint. Careful drafting is needed to enable desirable changes to the land. For example, a restriction that

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<sup>30</sup>Defeasible fees and future interests (discussed below) are much more complicated than these simple examples indicate. What is important to understand for the purposes of this chapter is that one can place constraints on land uses when conveying land. Additionally, in some jurisdictions a landowner can voluntarily constrain her rights by converting her fee simple absolute into a defeasible fee. 1-13 Powell on Real Property § 13.02 (2017); 1-13 Powell on Real Property § 13.05 (2017). The contours of such conveyances and how long the constraints might last differ by jurisdiction and should always be confirmed with legal counsel.

requires a tobacco farm to continue to be a tobacco farm might hamper development in a world that no longer wants as much tobacco or hamper the ecology of a region that no longer has the right conditions for tobacco farming. Such rigid constraints can be particularly troublesome as climate change, and the uncertainty of the exact scope and location of its effects, shapes our land.

## 5.2 *Nonpossessory Property Rights*

The limitations on possessory ownership lead us to examine nonpossessory interests. These can take the form of either present or future interests. The essential feature of a nonpossessory interest is that the holder of that interest does not have the ability to presently occupy and use the land. This does not make it less of a property right, though. The holder still has a valuable right that she can buy and sell. Moreover, she also has the ability to constrain the actions of possessory holders to protect her rights.

### 5.2.1 **Future Interests**

A concept that often confuses students and laypeople is the idea of the future interest. Although not recognized in all countries, the future interest is a nonpossessory interest that can be invoked to achieve some soil protection goals. The holder of a future interest holds a valuable property right today—one that can be bought, sold, and passed on to heirs like other property rights. The holder does not yet have the right to use and possess the land, however. This means that associated with every future interest is another property holder who has the present possessory interest. The future interest is waiting in the wings (sometimes patiently and sometimes no) for her nonpossessory property right to become possessory.

Depending on the jurisdiction in which you are operating, these property rights can take many forms and be rather complicated. For the purposes of this chapter, however, we need only understand that a known future landowner can have a say over what the current landowner can do on the property. Generally, the limitations are embodied in the doctrine of waste. This doctrine limits the ability of the current landowner to use the property in such a way as to hamper the future landowner. This can prevent destruction of a house, depletion of natural resources, and similar behavior. Unfortunately, the doctrine is coarse and cannot work to protect soils unless it can be shown that the depletion of the soil by the present landowner is an unreasonable and destructive use of the property. Reasonable and customary land uses (perhaps the ones that have led to environmental problems to begin with) will not meet the threshold of harm needed for the future interest holder to be able to constrain the activity.<sup>31</sup>

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<sup>31</sup>Pappas (2014) at 745.

### 5.2.2 Servitudes

More useful than the future interest is a present interest even if that interest is nonpossessory. Indeed, the present nonpossessory interest is an attractive tool for many, meeting many land conservation goals.

The most classic example (and in the most widespread use) is the easement. An easement allows someone to have a right in someone else's land without actually becoming the owner or permanent occupier of the entire parcel land.<sup>32</sup> The most common example is an access easement. Your neighbors have the right to drive across your land to access their home. The electric company has a right to place and maintain electrical poles and wires on your property. Easements can take several forms and could include things like a right to hunt or gather wood. The easement holder might be an individual, a family, a business, or a group.

Traditionally, easements gave someone other than the fee simple landowner the right to do something on the land that the landowner would have otherwise been able to prevent. That is, they gave the easement holder an affirmative right. In some narrow circumstances, some jurisdictions also recognized negative easements. A negative easement prohibits a landowner from engaging in an otherwise lawful activity on her land. The most common examples of negative easements are prohibitions on disrupting free flowing water or sunlight. Where enforceable, negative easements are few, and the options are specifically enumerated by statute.

Traditional easements also were constrained as to who was recognized as a legitimate easement holder. As a property rights arrangement, easements were viewed as agreements binding the land. Such an arrangement has the benefit of creating agreements that remain tied to the land regardless of who owns the land, but they also limit the number of people or entities that can enter into an easement. To begin with, one has to be a landowner, but some jurisdictions go even further and limit the acceptable parties to adjacent landowners. A common exception to this rule is the utility easement. All states in the United States recognize the ability of utilities to hold easements for pipelines, power lines, cables, and similar equipment. Yet they do not recognize this based on the status of the utility as a landowner. In property law terms, we label such easements as "in gross" as opposed to "appurtenant." In gross easements do not have a benefited parcel of land, only a benefited person or entity. Such easements were historically disfavored and maybe limited by statute or common law.<sup>33</sup>

The limitations of the easement for protection of the soil thus become clear. In many jurisdictions, there is a limitation on using easements to control the *landowner's* behavior; they are more focused on the *easement holder's* behavior. One could envision an affirmative easement that allowed the easement holder to engage in activities to protect the soil, but without accompanying restrictions on the landowner that may not be that fruitful. Additionally, operating by affirmative

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<sup>32</sup>4-34 Powell on Real Property Chapter 34.syn (2017).

<sup>33</sup>Id.

action may be more cumbersome (and more expensive in terms of the staffing needed) than enforcing a negative restriction on behavior. The limits on who can enter into such an agreement also presents a quandary as it would only enable landowners to do so and might require purchases of small anchor parcels beside any land where one seeks an easement. The impracticality of such a rule for NGOs seeking to protect the soil is obvious.

The limitations of easements gave birth to two additional types of servitudes: real covenants (also labeled restrictive covenants) and equitable servitudes. These restrictions look a bit more like contracts than easements do. Indeed, they are sometimes called promises regarding the land. While the terms may look like contracts, the essential difference is that real covenant and equitable servitudes can bind future landowners and have life beyond the original parties to the agreements. However, various limitations on the use of these tools also limit their utility for soil conservation. Without delving too deeply into the potential variations in every jurisdiction, we can highlight a few concerns. Many restrictive covenants can only be enforced with damages. That is, when a landowner breaks a promise, the court just requires the landowner to make a payment for what it calculates to be the value of the promise. It does not require the landowner to actually change behavior and implement the soil conservation measures.

Another hindrance occurs in jurisdictions that put rigid limitations on who can enforce the agreement over time. In particular, we see restraints on who assumes the burden or the benefit of the promise with strict rules on transferability (or in property law terms, whether the agreements will run with the land). The conclusion then is that such servitudes can provide an avenue for soil conservation, but one has to look very carefully at the laws of the jurisdiction to ensure that the tool does not come with limitations that impede soil conservation efforts.

### 5.2.3 Conservation Easements

Discontent with the options above, conservationists began to seek out ways to use partial property rights to achieve land conservation goals but without the complications described above. In the United States, this led to the birth of the conservation easement. The use of the word “easement” places the tool in the context of servitudes, but it would be a mistake to think of it as a traditional easement because it has different rules and lifts many of the restriction associated with easements.

A conservation easement then is a nonpossessory property right that limits landowner behavior with the goal of producing a conservation benefit.<sup>34</sup> The agreements must have the purpose of producing one of the conservation benefits enumerated in the statute that governs that jurisdiction. There is no requirement that the agreements actually yield a benefit, just that they seek to do so.<sup>35</sup> While the list

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<sup>34</sup>Cheever and McLaughlin (2015).

<sup>35</sup>Owley and Doane (2017).

of acceptable conservation purposes varies slightly by jurisdiction, they generally follow the pattern of the Uniform Conservation Easement Act (UCEA). Acceptable purposes for conservation easements under the UCEA “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.”<sup>36</sup>

Conservation easements have the benefit of being enforceable not just with damages like a real covenant but also with injunctive relief—meaning that one can actually force the landowner to comply with the restrictions. Conservation easement enabling acts set forth acceptable holders as governmental agencies and nonprofit organizations that have conservation as part of their central purposes.<sup>37</sup> This obviates the requirement that holders have to own an anchor parcel or indeed need to be landowners at all.

Finally, the statutes confirm the ability of both the benefit and the burden of conservation easements to run with the land, that is, changes to the identity of the landowner or the conservation easement holder to not hinder enforcement of the agreement. A hallmark of conservation easements and what has made them especially attractive to conservationists is the fact that they are usually perpetual. Indeed, in the United States, three states (California, Hawaii, and Florida) require the agreements to be perpetual.<sup>38</sup> Most states make it the default duration, and only one state prohibits it (North Dakota limits conservation easements to 99 years).<sup>39</sup>

While conservation easements are most popular in the United States (where we see the first laws enabling them), they are growing in popularity across the globe, although they sometimes have a different name. They are now well developed in

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<sup>36</sup>UCEA § 1(1).

<sup>37</sup>Again, the exact contours of eligible holders vary by jurisdiction. For example, some places require certain tax status for the NGOs, others specifically identify Native American tribes as eligible holders. Owley (2012c). The Uniform Conservation Act (a model act that nearly have of the U.S. States have adopted) lists the following acceptable holders:

- (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, assuring the availability of real property 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

<sup>38</sup>California, Hawaii, and Florida require conservation easements to be perpetual (CALIFORNIA CIVIL CODE § 815.2(b); HAWAII REVISED STATUTE § 198-2(b), FLORIDA STATUTES Ch. § 704.06(2)) as does the Internal Revenue Code for those hoping to associate their conservation easement with a tax deduction (Internal Revenue Code § 170(h)(2)(c)). See Korngold (2007).

<sup>39</sup>N.D. Cent. Code sec. 20.1-02-18.2; see *Wachter v. Commissioner of Internal Revenue*, 142 Tax Court No. 7 (March 11, 2014).

Canada and Australia. They are growing in New Zealand, Spain, and Scotland. There is a proposed law enabling them in England and Wales. Kenya, Chile, Columbia, and Mexico are developing similar ideas. And these are but a few examples. We also see the idea being exported by companies and intergovernmental organizations that are investing in climate change adaptation and other environmental projects abroad. They want guarantees that their projects will have longevity and are requiring conservation-easement-like arrangements to achieve that goal.<sup>40</sup>

The benefits of conservation easements for soil conservation are clear. With this tool, conservationists (government agencies or NGOs) can tailor restrictions to individual parcels, implementing conservation programs across the landscape. Landowners get to remain on their land, and community composition does not change. Instead, communities receive payments or other amenities to make smaller changes to behavior. The conservationists can pay for exactly what they want to implement. On some parcels, land uses might be curtailed severely where in others it is a smaller restriction on certain farming techniques. Scientists can work with the lawyers to craft agreements that best achieve soil conservation goals. The agreements last forever and are often enforced by private organizations, limiting the strain on the public coffers as government agencies can remain on the sidelines if they so desire.

#### 5.2.4 Other Ideas

Beyond the options discussed here, conservationists have been exploring other ways that concepts from property law might protect land. These ideas are still theoretical and experimental, so we do not yet have a full understanding of how they might work. Some have argued that real estate options could be a way to achieve environmental goals. An option gives someone a right to acquire land for a certain time period but does not obligate that person to acquire the land. When real estate is burdened by an option, the landowner cannot materially change or degrade the land without violating the terms of the option. As the penalty is usually paying back the option price and the conservation is a passive one, it may not suit the needs of many who are working in land conservation. Yet the existence of this idea shows the efforts underway to explore new ways to achieve land conservation goals through property rights trends. We also see proposals for options to purchase conservation easements, annuity easements, and moveable easements. There are likely many other creative arrangements connected to ideas of private law developing around the world.

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<sup>40</sup>Owley (work in progress).

## 6 Conclusion

While the development of private law tools to protect soil offers encouraging news for those seeking more ways to protect the land, we also need to be cautious about the use of these tools.

First of all, turning from public law to private law (even if the line between them is a blurry one) can raise concerns about democracy. These property law arrangements are available to government agencies but mostly reside in the hands of NGOs. This tool actually enables those NGOs to circumvent public plans for the landscape. For example, elected officials may create a development plan that protects some areas but allows development in others. A nonprofit organization may be unhappy about the planned development and use conservation easements to prevent development even in the area chosen for that purpose. Where we agree with the NGO, we may like the tool, but we need to recognize that it is not a democratic tool. Indeed, patterns of usage in the United States suggest that the individuals most likely to benefit from conservation efforts of this type are wealthy landowners who had little intention of engaging in destructive practices to begin with.<sup>41</sup>

Even where government agencies are using the tool, they may be doing so to prevent future changes by other government officials. Elected officials could often achieve the same goals by regulation. They may choose property tools over regulation because it appears more politically palatable or because they can draw upon the power of NGOs for assistance, but some local governments have also stated that they use conservation easements because they are more permanent than legislation that can be changed by the next legislature and want to prevent future politicians from making decisions that the current politicians do not like.<sup>42</sup> To a supporter of conservation, this may seem like a desired outcome. To a supporter of democracy, this is unquestionably problematic. If we think that partial property rights hinder government action, then we may have a problem. If we think that partial property rights can disrupt community efforts to make decisions, we might have an issue with that too.

Permanence may be both part of the solution and part of the problem. One of the most attractive aspects of partial property rights is the ability for the agreements to be perpetual. Generally, we view a contract as only binding the parties that enter into the contract. But property rights are something different. Property rights are agreements regarding the land and that stay with the land. This is attractive from a land conservation standpoint because they enable long-term protection of the land. Transferring the ownership of the land (or the ownership of the partial nonpossessory property right) does not remove the protection. This gives us some peace of mind for soil conservation: protections put in place will not easily disappear.

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<sup>41</sup>Owley (2012a), Looney (2017).

<sup>42</sup>Owley (2012b).

However, it is not just that they do not easily disappear, they also do not change that easily either. The details of the agreements are written today, with today's goals and today's knowledge. They are often written in static terms, seeking to preserve the status quo or protect specific landscapes and practices. They offer little room for changing societal goals, but perhaps even more troublesome they offer little room to adjust to changing environmental circumstances or changing information. New studies that provide better guidance on soil management, for example, may not be able to influence conduct on land encumbered by a conservation easement as that agreement already sets the rules. Jurisdictions differ on the degree to which they are willing to allow changes or adjustment to such agreements, but the trend is toward only allowing agreements that remain in line with stated purposes. This means that a measure that is more protective of the soil on a conservation easement that seeks to protect the soil will probably be allowed (but not necessarily so), but a change from protecting species to protecting soil would not be permitted even if studies reveal that such efforts would be a better use of the land.<sup>43</sup>

In the end, this chapter presents a complicated story. The development of private law tools to protect the soil is exciting. It demonstrates a new energy to achieve conservation goals with engagement of new (and more players). People are thinking creatively about what can be done to improve the world we live in. Yet the excitement of using property law tools sometimes leads organizations to quickly tie up the land with agreements that have complicated and uncertain implications. As with all legal strategies, we must think carefully before assessing which tool is right for the project we want. In our current world, we must always assume change. As things get worse (or better) for soils, will we be able to achieve our goals with the tools we have chosen?

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<sup>43</sup>A related concern may be present in the United States where conservation easements tend to list multiple purposes. We don't know what would happen where efforts to meet the various purposes conflict. There is no clear way to determine which purposes should take precedence. Owley and Rissman (2016).

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