



Photograph by Alice Kubler of the Archer Taylor Preserve

Climate Change and Conservation Easement Clause Databank

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This Databank is a work in progress assembled by the Stanford Conservation and Climate Change Drafting Committee and a number of conservation easement attorneys and professionals assisting in the work. See the web site at the Stanford Institute for the Environment at <http://environment.stanford.edu/cgi-bin/index.php>

Additional paragraphs will be added as they become available, and existing paragraphs will be edited or commentary added when reasons to do so become apparent. Please send suggestions and examples to Ann Taylor Schwing at aschwing@mhalaw.com.

The Databank assumes its users are knowledgeable and thoughtful conservation easement professionals or volunteers. It is not a teaching text. Instead, it offers source material and ideas, sometimes conflicting and inconsistent ideas, that may be appropriate to adapt into particular conservation easements in certain circumstances. The Databank is not legal advice; various paragraphs conflict and many would be inappropriate to specific circumstances or under the law of particular States.

The Committee is concentrating its early effort on paragraphs that address climate change issues and the need to draft easements for perpetuity in a changing world. The Databank has been prepared specifically for donated easements and land trusts. Although some paragraphs may be appropriate in other circumstances, and the Databank may be expanded in the future, the Committee has not included paragraphs specifically intended for mitigation or purchased easements.

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[Reservation of Forest Carbon Services](#)— The Land Trust shall hold, market, and transfer any and all rights related to the Forest Carbon, including but not limited to mitigation credits or offsets, now present or existing in the future, and the right to report such mitigation credits or offsets to any relevant public or private regulatory/oversight body or registry whether pursuant to a voluntary system or created by local, federal, or international law or regulation, which rights arise from or are generated by or from the Property on or after the date of this Conservation Easement (collectively, the “**Forest Carbon Services**”). The Forest Carbon Services retained hereunder shall specifically include, but shall not be limited to, the right to hold, reserve, report, market or retire any greenhouse gas mitigation credits or offsets that may be generated upon the Property, and other types of mitigation credits or offsets that arise from the production of Forest Carbon. Land Trust shall have the absolute discretion in determining the purchaser(s) and/or recipient(s) of any Forest Carbon Services and the consideration for such Forest Carbon Services shall inure to the sole benefit of Land Trust.

[Additional Rights](#)—The Land Trust shall have the right to exercise such additional rights as may be reasonably necessary to effectuate the purposes of this Conservation Easement .

Commentary. This “elastic clause” is quite broad and accords the land trust significant protection. Many other types of rights might be included in such a section. These two examples specifically relate to climate change. Some type of introductory clause is advisable such as: To accomplish the purposes of this Easement, the following rights are expressly conveyed to Land Trust by Owner:

[Ecosystem Functions](#)— Owner may, consistent with the provisions governing

use of the land as set forth in this Conservation Easement , develop ecosystem functions on the Property including, but not limited to, carbon sinks, stream bank restoration, biodiversity mitigation, carbon sequestration and wetland and stream mitigation (other than creation of wetlands from historically upland property, such as hillsides or sites with no more than one of the following: current or historical evidence of hydric soils, hydrophytic vegetation, or wetland hydrology), provided that such developments are not in conflict or inconsistent with the conservation purpose of or the restrictions set forth in this Conservation Easement and that prior written approval for same shall have been obtained from Land Trust. Land Trust is not responsible for monitoring any such activities for compliance with permit(s) therefore, and Land Trust has no obligation to enforce said permits.

Commentary. Consider whether to address limitations on surface activities as carbon sequestration could involve piping and wells.

Ecosystem Services Credits—Owner reserves the right to enter into agreements whereby (1) the Owner agrees to manage the natural resources associated with the Property in a specific manner consistent with this Conservation Easement or (2) permits a third party to manage such natural resources in a specific manner consistent with this Conservation Easement. In addition, Owner reserves the right to sell, trade, or exchange quantifiable ecosystem services credits associated with the Property, provided that such sales, trades, or exchanges are exercised in a manner that is consistent with this Conservation Easement. Such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to the terms and conditions of this Conservation Easement, and Owner shall at all times remain responsible for compliance with the terms of this Conservation Easement. One example of such agreement, sale, trade, or exchange is one under which Owner receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program. Another example would be agreeing to restore, enhance or manage a wetland as part of a wetland banking or credit program, provided that such activities do not reduce existing areas of productive timberlands on the Property and further provided that Owner may not benefit from any compensation or credits available through such programs or agreements in the event that such restoration is required as a result of Owner’s violation of this Conservation Easement. Owner and Land Trust acknowledge that because the conservation interests protected by this Conservation Easement shall not be adversely affected by such agreements, exchanges or trades, and the only interest affected shall be Owner’s interest, any compensation received by Owner for such agreements, exchanges or trades shall be payable in its entirety to Owner. Owner and Land Trust acknowledge and agree that this reserved right does not include the right to exchange, trade, extract, license, lease, transfer, or sell topsoil, minerals, or water located on the Property.

Property Resources Values—“Property Resources Values” shall mean value obtained through enhancement of the ecosystems or environments on the Property and/or value obtained through Owner’s refraining from exercising, in whole or in part, any Reserved Right. Property Resources Values include, but are not limited to mitigation or restoration credits for wetlands, forests, prairies, habitats, streams, cultural significance, energy, emissions, carbon sequestration, aquifer recharge, water

quality, nutrients, and endangered species habitat or any other similar currency or credit asset for which a market may now or later come to exist. Owner reserves the right to manage or enhance the Conservation Values and/or to refrain, in whole or in part, from exercising Reserved Rights (including rights to conduct Forest Management Activities), and to sell any Property Resources Values based upon and associated therewith, provided any such sale shall not physically harm the Property's Conservation Values and shall not be inconsistent with the Purpose of this Conservation Easement. For example, Owner may create a mitigation bank or participate with other Parties or persons to create a mitigation bank based upon the Reserved Rights in a portion of the Property's carbon sequestration value or watershed value and receive compensation for the sale of credits from such bank.

Mitigation Programs—Subject to Land Trust's prior written consent, not to be unreasonably withheld, conditioned or delayed, the right to participate in, and retain any income received therefrom, any current or future programs with state or federal agencies or private entities intended to provide incentive or compensation for the restoration or relocation of rare, imperiled, threatened, or endangered species or communities on the Property in a manner designed to restore historic natural systems, or for other environmental preservation or enhancement efforts (including, for example, wetland mitigation, carbon credit, and similar programs), provided such program is consistent with the Purpose of this Conservation Easement and enhances the Conservation Values.

Natural Resource Benefits—Owner additionally reserves the right to sell, trade, or exchange quantifiable natural resource benefits associated with the Property, provided that such sales, trades, or exchanges are exercised in a manner that is consistent with this Conservation Easement. Such agreements, and any management of such natural resources in accordance with such agreements, or to accomplish such sales, trades or exchanges, shall be subject to the terms and conditions of this Conservation Easement, and Owner shall at all times remain responsible for compliance with the terms of this Conservation Easement. One example of such agreement, sale, trade or exchange is one under which Owner receives compensation, including transferable credits, for participating in a greenhouse gas emissions offset program. Another example would be agreeing to restore, enhance or manage endangered species habitat as part of a conservation banking or credit program, provided Owner may not benefit from any compensation or credits available through such programs or agreements in the event that such restoration is required as a result of Owner's violation of this Conservation Easement. The Parties acknowledge that, because the conservation interests protected by this Conservation Easement shall not be adversely affected by such agreements, exchanges or trades, and the only interest affected shall be Owner's interest, any compensation for such agreements, exchanges or trades shall be payable in its entirety to Owner.

Other Activities. _____

Commentary. Think about all the possibilities and try to address any that are plausible or possible. Some examples would be the following. Consider whether monitoring difficulty outweighs the benefit of these provisions.

Ecological/Scientific Research—Owner may engage in and permit others to engage in ecological research on the Property that is consistent with the intent of this Conservation Easement provided that Land Trust’s approval is obtained as provided herein if the research is more than merely observational.

Educational Activities—Owner may carry out educational activities related to the agricultural use of the Property, including but not limited to educational activities addressing the subjects of sustainable agriculture, food production and nutrition, environmental conservation, and ecology.

Optional Management Plans—In addition to any management plans required by this Conservation Easement for the exercise of specifically reserved rights, Owner and Land Trust may mutually agree on a management plan for the Property intended to implement the provisions of this Conservation Easement, including but not limited to the initiation or continuation of activities requiring Land Trust’s prior approval, for a specified period not to exceed _____ years. Neither this provision nor any management plan agreed to by the Parties shall be construed to modify the terms and restrictions of this Conservation Easement.

Natural Acts Beyond Owner’s Control. Nothing contained in this Conservation Easement shall be construed to entitle Land Trust to bring any action against Owner for any injury to or change in the Property resulting from natural causes beyond Owner’s control, including fire, flood, storm, and natural earth movement, or other natural events, or from any prudent action taken by Owner in an emergency to prevent, abate, or mitigate significant injury to the Property resulting from such natural causes.

Commentary. Consider whether to omit unless the donor asks for this provision.

Permitted Amendment. If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate, Owner and Land Trust may jointly amend this Conservation Easement; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Conservation Easement or the status of Land Trust under any applicable laws, including sections ____ et seq. of ____ [state law] ____ or section 170(h) of the Internal Revenue Code of 1986, as amended, and (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Conservation Easement, and shall not affect its perpetual duration. Any amendment or modification shall be recorded in the Official Records of _____ County, _____. This Conservation Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Conservation Easement, nor the status or rights of the Land Trust under this Conservation Easement.

Commentary. See Land Trust Standards and Practices 111.

Amendments. It is the Parties’ expectation that this Conservation Easement will not be amended or modified. Upon request by the Owner, Land Trust may in its sole discretion agree to amend or modify this Conservation Easement, but in no event shall such amendment be made without compliance with both the Land Trust’s internal procedures and standards for such modification and state and local laws regarding the creation and amendment of conservation easements and in

conformity with federal laws (including tax laws) associated with conservation easement creation. No amendment shall be allowed that would adversely affect the qualifications of this Conservation Easement as a charitable gift or the status of Land Trust under any applicable laws, including section 170(h) of the Internal Revenue Code or the laws of the State of _____, serves to weaken the Easement in terms of protection of the Conservation Values or affects its perpetual duration. Any such amendment shall be recorded in the official records of the county in which the Property is located.

Permitted Amendment. If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate, Owner and Land Trust may jointly amend this Conservation Easement ; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Conservation Easement or the status of Land Trust under any applicable laws, including sections ____ et seq. of ___[state law]___ or section 170(h) of the Internal Revenue Code of 1986, as amended, and (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Conservation Easement , and shall not affect its perpetual duration. Any amendment or modification shall be recorded in the Official Records of _____ County, _____. This Conservation Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Conservation Easement, nor the status or rights of the Land Trust under the terms of this Conservation Easement.

Commentary. See Land Trust Standards and Practices 111.

Amendments. It is the Parties' expectation that this Conservation Easement will be amended or modified only in a manner consistent with the Purposes of this Conservation Easement. Upon request by the Owner, Land Trust may in its sole discretion agree to amend or modify this Conservation Easement, but in no event shall such amendment be made without compliance with both the Land Trust's internal procedures and standards for such modification and state and local laws regarding the creation and amendment of conservation easements and in conformity with federal laws (including tax laws) associated with conservation easement creation. No amendment shall be allowed that would adversely affect the qualifications of this Conservation Easement as a charitable gift or the status of Land Trust under any applicable laws, including section 170(h) of the Internal Revenue Code or the laws of the State of _____, serves to weaken the Purposes of this Conservation Easement or affects its perpetual duration. Any such amendment shall be recorded in the official records of the county in which the Property is located.

Permitted Amendment. If circumstances arise under which an amendment to or modification of this Conservation Easement would be appropriate, Owner and Land Trust may jointly amend this Conservation Easement ; provided, however, that (i) no amendment or modification shall be allowed that will adversely affect the qualification of this Conservation Easement or the status of Land Trust under any applicable laws, including sections ____ et seq. of ___[state law]___ or section 170(h) of the Internal Revenue Code of 1986, as amended, and (ii) any amendment or modification shall not harm Conservation Values, shall be consistent with the purposes of this Conservation Easement , and shall not affect its perpetual duration. Any amendment or modification shall be recorded in the Official Records of _____ County, _____. This

Conservation Easement is not otherwise subject to amendment or modification of any sort. No amendment shall diminish or affect the perpetual duration or the Purpose of this Conservation Easement, nor the status or rights of the Land Trust under the terms of this Conservation Easement .

Commentary. See Land Trust Standards and Practices 11I.

Discretionary Approval Process.

(1) **Notice of Intent to Undertake Activities or Uses.** Owner must notify Land Trust and obtain approval before undertaking activities or uses (1) not documented in the Baseline, (2) not affirmatively permitted herein or (3) inconsistent with Purposes of this Conservation Easement and the Conservation Values protected.

Commentary. See Land Trust Standards and Practices 11F.

(a) **Purpose**—Notice affords Land Trust an opportunity to determine whether the proposed activities or uses are permitted under this Conservation Easement and, if so, to ensure that they are designed and carried out in a manner that is consistent with this Conservation Easement, as well as to enable Owner to engage in permitted activities confident that they create no unintended violations.

(b) **Application**—Owner shall submit a written description of the proposed activity or use (an “**Application**”) explaining its nature, scope, design, location, timetable, and other material aspects in sufficient detail to permit Land Trust to make an informed judgment.

(c) **Initial Response**—Within ___ business days after receipt of the Application, Land Trust shall inform Owner in writing whether the Application is complete or whether additional, specified information is required for a complete Application.

(d) **Costs**—If Land Trust reasonably determines that (i) the advice of a consultant such as an engineer, ecologist, attorney or surveyor is necessary to determine whether an Application is complete and/or to assist Land Trust in reviewing the Application, or (ii) more than 10 person-hours of Land Trust’s personnel will be or have been spent annually responding to Application(s) submitted by Owner, a fee based upon Land Trust’s estimate of costs of consultants and/or Land Trust personnel (collectively “**Land Trust’s Costs**”), Owner shall pay Land Trust’s Costs upon notification of the amount or withdraw the Application. If payment is made, Land Trust’s time to determine that the Application is complete shall be extended until the consultant’s work, if any, is done. If payment is not made, the Application is deemed denied. After Land Trust completes its response to the Application, Land Trust shall submit a final statement of the aggregate amount of Land Trust’s Costs, and appropriate adjustments shall be made at that time.

Land Trust’s Approval. Criteria that Land Trust may consider in reviewing Owner’s Application include, without limitation, compliance with the provisions and Purposes of this Conservation Easement, the capability of the proposed activity or use to preserve and enhance Conservation Values, the manner in which the proposed activity or use is to be carried out, and its likely effect upon Purposes and the Conservation Values. Land Trust’s approval may be withheld or conditioned upon a good-faith determination by Land Trust that there is a significant risk that the activity

or use as proposed would be inconsistent with the Purposes of this Conservation Easement. Approval or disapproval is within the sole discretion of Land Trust, and approval may only be granted upon conditions that are not inconsistent with the Purposes of this Conservation Easement. Failure of Land Trust to respond to a notice of intention within ___ business days of receipt of that notice shall constitute a denial.

AND?

Land Trust shall grant permission or approval to Owner only where Land Trust, acting in Land Trust's sole [reasonable] discretion and in good faith, determines that the proposed action will not significantly diminish or impair the Purposes of this Conservation Easement.

Amendment and Discretionary Consents. Owner and Land Trust recognize that circumstances could arise that justify amendment of certain of the terms, covenants, or restrictions contained in this Conservation Easement, and that some activities may require the discretionary consent of Land Trust. To this end, Owner and Land Trust have the right to agree to amendments and discretionary consents to this Conservation Easement without prior notice to any other party, provided that in the sole and exclusive judgment of the Land Trust, such amendment or discretionary consent furthers or is not inconsistent with the purpose of this grant. Amendments will become effective upon recording at the ____ County Registry of Deeds.

Notwithstanding the foregoing, the Land Trust and Owner have no right or power to consent to any action or agree to any amendment that would [*insert standards based on the purpose of the Easement—for example, for easements that allow limited development:*

increase the level of residential development permitted by the express terms of this Conservation Easement, *OR for Forever- Wild Easements:* result in substantial alteration to or destruction of important natural resources,] or limit the term or result in termination of this Conservation Easement, or adversely affect the qualification of this Conservation Easement or the status of Land Trust under applicable laws, including [*cite state enabling statute, if any*] §170(h) or 501(c)(3) of the Internal Revenue Code, successor provisions thereof, and regulations issued pursuant thereto.

Economic Hardship. In making this grant, Owner has considered the possibility that uses prohibited by the terms of this Conservation Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. It is the intent of both Owner and Land Trust that any such changes shall not be deemed to be circumstances justifying the termination or extinguishment of this Conservation Easement. In addition, the inability of the Owner, or his/her heirs, successors, or assigns, to conduct or implement any or all

of the uses permitted under the terms of this Conservation Easement, or the unprofitability of doing so, shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment.

Future Technology. No use shall be made of the Property, and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purposes of this Conservation Easement. Owner and Land Trust acknowledge that, in view of the perpetual nature of this Conservation Easement, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Conservation Easement. Land Trust therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Conservation Easement or (b) alterations in existing uses or structures, are consistent with the Purposes of this Conservation Easement.

Commentary. If you are unable to negotiate the sole discretion standard, then consider a mutual agreement standard. At minimum articulate a review standard that does not bind the land trust to be reasonable. Reasonableness is highly circumstantial and in this instance the land trust need to have the ability to determine what is consistent with the conservation purposes and values without reference to economic or contractual reasonableness.