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Private Lands Conservation in Jamaica

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## Table of Acronyms

- **GDP** – Gross Domestic Product
- **JLP** – Jamaican Labor Party
- **MLE** – Ministry of Land and Environment
- **NGO** – Non-Governmental Organization
- **NLA** – National Land Agency
- **NEPA** – National Environment & Planning Agency
- **PNP** – People’s National Party
- **UCEA** – Uniform Conservation Easement Act
**BRIEF QUESTIONS**

1. **What legal tools are in place for the purpose of achieving private lands conservation in Jamaica?**

   There are no statutory provisions for conservation easements in Jamaica. Environmental Executive Agencies and Governmental Ministries, with the objective of land conservation do exist, although they have concentrated more on the conservation of government lands than of private lands. Through the Forest Act, the Forestry Department has created a Fund intended to aid private lands conservation, and notes that the Fund may be supported by outside organizations. Thus far however, the extent of this effort by the Forestry Department has focused primarily on a Private Plantings Program to provide free seedlings to private land owners.

2. **What legal tools are recognized by the legal system and capable of being used for private lands conservation in Jamaica?**

   Easements and covenants are both recognized in Jamaica as valid land restrictions and uses. While current Jamaican property law allows for both easements and covenants, neither of these tools are ideal for the achievement of private lands conservation. Neither are defined as being capable of running in perpetuity, as with a conservation easement. Further, both of these tools require the existence of a dominant tenement to which the right or restriction is attached. In other words, both require that the right or restriction be appurtenant to land, as Jamaican law does not recognize easements in gross.

   Leaseholds are also recognized in Jamaica and their interests are strictly enforced.

3. **Given the legal authorities governing land tenure, what novel legal tools could be introduced to achieve the goal of private lands conservation in Jamaica?**

   The enactment of conservation easement legislation and the development of such precedent in Jamaican courts is a possibility. The Attorney General’s office has addressed the possibility of drafting legislation to provide for conservation easements, noting that it might be the only way to
achieve private lands conservation in perpetuity. The importance placed on custom in matters involving land might make enforcement extremely difficult. In recent years however, the government of Jamaica has struggled to create a land tenure system that incorporates both Custom and the Common Law. Registered Titles and Common law Titles are being filed and tracked. This may gradually produce a land tenure system in Jamaica that could successfully incorporate conservation easements into its legislation.

A temporary solution to private lands conservation might be found through leasehold agreements. While it is not entirely clear whether land may be leased for conservation purposes, it is not expressly disallowed. Therefore, it might be possible to acquire a lease with land use restrictions.
INTRODUCTION

This report provides the reader with a basic understanding of the legal instruments, processes and institutions within Jamaica that are relevant to private lands conservation; and to evaluate the legal feasibility of introducing conservation easements and other tools into the Jamaican legal system for the purpose of achieving private lands conservation.

Section I of the report provides relevant background information on the history, culture, economy and governmental structure of Jamaica, as well as historical and contemporary trends in the Jamaican system of land tenure.

Section II of the report provides an overview of the legal context, including a discussion of the judicial system, the Jamaican Constitution, relevant statutes and codes, the influence of common law, and relevant customary law.

Section III of the report discusses private land administration in Jamaica. It describes the institutional framework in place for the recording and enforcement of property rights. It describes the methods by which land may be registered and transferred in Jamaica.

Section IV of the report describes the legal tools currently available for private lands conservation in Jamaica. First, the Section provides definitions of covenants and easements, and discusses their current place in the Jamaican legal system. Section IV next discusses the role of the Forestry Department in private lands conservation in Jamaica. Finally, Section IV addresses other potential tools which provide short term solutions to private lands conservation, such as leases, “leaseback” agreements, and reserved life interests.

Section V of the report discusses the feasibility of introducing new tools for private lands conservation in Jamaica. The primary tool discussed in Section V is the conservation easement.
Finally, Section VI of the report poses recommendations in furtherance of the goal of private lands conservation in Jamaica.

I. RELEVANT BACKGROUND

A. History

Originally settled by the Arawak Indians, Jamaica became a Spanish colony in 1494, upon the arrival of Christopher Columbus. During Spanish colonization, slaves from West Africa were brought to Jamaica. Jamaica remained a Spanish colony until the arrival of British soldiers in 1655. Shortly thereafter, British forces conquered the island, ousting the Spanish. A small number of Spanish colonists remained on the island and fled to the interior. Before departing, the Spanish also freed their slaves and left them behind in the mountains, intending to harry the English until they could amass a force for reconquest of Jamaica. These freed slaves became known as “Maroons,” and their descendents remain on the island today. Approximately 500 Maroon residents live in Accompong Town, a town established by the Maroons after being freed by the Spanish. An estimated 5,000 other Maroons live scattered throughout the island.\(^1\)

Jamaica remained a British colony for three centuries, during which time it was variously administered by a governor and a planter-controlled legislature and by Crown Colony rule from London. The island’s economy was based on sugar production with labor supplied by slaves from West Africa, who outnumbered the European inhabitants. Slavery was abolished in 1834. Universal adult suffrage was granted in 1944 and in 1959 internal self-government was introduced. On August 6, 1962, Jamaica became an independent country within the British Commonwealth.\(^2\) Jamaica’s two primary political parties, the Jamaica Labor Party (JLP) and the People’s National Party (PNP) both aided the country’s struggle for independence.

B. Location and Geography

A member of the Greater Antilles in the Caribbean Sea, Jamaica lies 150 kilometers south of Cuba and 160 kilometers west of Haiti. Jamaica is the largest of the West Indian islands. It has an area of 11,424 square kilometers, and is 243 kilometers long – a total land area slightly smaller than Connecticut. The terrain is mostly mountainous, with narrow, discontinuous coastal plains. 14% of the land is arable, 6% consists of permanent crops, 24% of permanent pastures, and 17% of the land is covered by forests and woodland.3

I. Forestland

Over 30% of Jamaica is classified as “forest.” In 2000, the Forest Department and the Trees for Tomorrow Project (TFT) analyzed forest cover change over a ten-year period, between 1989 and 1998.4 In that time, there was a loss of forest land amounting to 3,064 hectares (0.91% of the forest land in 1989). On an annual basis, this represents a decrease in forest land of approximately 0.1%.

C. Society, Population, and Economy

The population of Jamaica is currently estimated at 2,713,130.5 Approximately 50.4% of the population lives in rural areas.6 In recent years, people have been consistently migrating from rural to urban areas. The ethnic origin of Jamaicans is primarily African (over 90%). An estimated 30% of the population is of mixed ethnic origins - East Indian, Chinese and European. Although Christian denominations predominate, diverse religious beliefs are represented. The official language is English. However, most of the people speak an English based creole - patois.

After five years of recession in the 1990s, the economy grew 0.8% in 2000 and 1.1% in

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3 See Jamaica Geography 2000, available at photius.com/wfb2Q00/countries/jamaica/jamaica_geography.html.
2001. The global economic slowdown however, particularly in the United States, has severely curtailed economic recovery in Jamaica.  

The Jamaican economy is heavily dependent on services, which now accounts for an estimated 56.2% of the GDP. An estimated 6.7% of the GDP is derived from agriculture, and 37.2% is derived from industry. Jamaica’s primary agricultural products are sugarcane, bananas, coffee, citrus, yams, vegetables, poultry, goats, milk, crustaceans, and mollusks. Jamaica’s primary industries are tourism, bauxite/alumina, textiles, agro processing, wearing apparel, light manufactures, rum, cement, metal, paper, chemical products, and telecommunications. The country continues to derive most of its foreign exchange from tourism, remittances, and bauxite/alumina.

D. Government

Jamaica’s Independence Constitution, established in 1944, provides the foundation for the governmental structure. National legislative power is vested in the Parliament comprised of a House of Representative with 60 members, and a Senate with 21. General elections are constitutionally due every five years. The Government is headed by a Prime Minister. He is assisted by a Cabinet of fellow ministers. The Queen of England is formally recognized as head of state. She is represented by the Governor General whose duties are purely formal and ceremonial. There are two major political parties.

The Jamaican Parliament, as stated above, consists of two Houses: (1) the Senate (or Upper House), and (2) the House of Representatives (or Lower House). The Senate’s primary purpose

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9 See id.
10 See id.
is to serve as a review chamber; it reviews legislation passed by the House of Representatives. The Cabinet – consisting of a Prime Minister and at least 13 other ministers of government – serves as the principal instrument of government policy. A system of local government, organized by parish, is also in place in Jamaica. Each of the 187 electoral divisions on the island is represented by a parish councilor for local government.

II. OVERVIEW OF LEGAL CONTEXT

An independent member of the British Commonwealth of Nations, Jamaica established its first independent constitution on November 20, 1944, and achieved complete independence in 1962. The Independence Constitution expressly designates the constitution as the supreme law of Jamaica, and requires that all other laws be secondary to it and dependent on it. However, as a Caribbean legal system, Jamaica owes its “residuary base” or source of “basic concepts” to English common law, which was brought to Jamaica with settlement in 1661. In drafting legislation and its interpretation, Jamaica still adheres closely to the English model. Central to the concept of common law as a legal source is the doctrine of precedent, or stare decisis. The doctrine of judicial precedent proceeds on the assumption that, “where there are no appreciable statutes on a particular legal issue, the judge must look to case law to find relevant law upon which to base his decision.” Traditionally, because of its background as a British colony, British case law provided the foundation for this legal precedent. The Jamaican legal system consists of a Supreme Court, a Court of Appeal and local courts. Final appeals are made to the Judicial Committee of the Privy Council in the United Kingdom.

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13 See id.
14 See id.
15 See id.
A. Jamaican Judicial System

Jamaica’s self-contained judicial system was established in the Independence Constitution. The Constitution provided for the appointment of both a Governor General and a Privy Council – a Judicial Committee housed in London, and the only foreign committee responsible for administration of Jamaican law. It also established a Supreme Court and Court of Appeal, Judicial, Public, and Police Service Commissions, and the appointment of a director of Public Prosecutions.18

Appeals beyond Jamaica’s Court of Appeal are directed to the Privy Council in London, Jamaica’s final Court of Appeal. The Privy Council hears claims of “(1) $1000 or more, (2) dissolution or nullification of marriage, (3) civil, criminal, or other questions as to the interpretation of the Constitution, and (4) such other cases prescribed by Parliament.”19 The fact that a British Council is considered the highest body within the Jamaican judicial branch has led to debate about whether Jamaica’s legal system is truly independent.

At the apex of the Jamaican court system is the Court of Appeal. The Court of Appeal is headed by the Court President, appointed by the Governor General.

Below the Court of Appeal is the Supreme Court, which maintains both appellate and original jurisdiction. The Supreme Court is authorized to administer both criminal and civil law. A chief justice, senior puisne judge, and various other puisne judges prescribed by Parliament lead the Supreme Court. The chief justice’s office is secured by the constitution, and all judges are appointed by the Governor General.

18 See Kritzer supra at 769.
19 See id. at 770.
Finally, an elaborate system of lower courts exists, consisting of Resident Magistrates’ Courts sharing jurisdiction with Justices of the Peace. Inferior courts are courts of summary jurisdiction made up of magistrate courts, petty sessional courts and coroners’ courts. They have a dual function – investigative and trial in criminal matters. However its jurisdiction is limited by the nature of civil offenses.

B. Jamaica Constitution

The Constitution was drafted by a bipartisan joint committee of the Jamaican legislature in 1961-62, approved in the United Kingdom and included as the Second Schedule of the Jamaica (Constitution) Order in Council, under the West Indies Act of 1962. It came into force with the Jamaica Independence Act of the U.K. Parliament, which gave Jamaica political independence. Chapter III of the Constitution addresses “Fundamental Rights and Freedoms,” and within that Chapter, “Compulsory Acquisition of Property,” and “Protection for...Property” are included. This guarantees a fundamental right to enjoyment of property, though the right is qualified as "subject to respect for the rights and freedoms of others and for the public interest." Beyond the enumeration of the enjoyment of property as a fundamental right, there is an absence of Constitutional language dealing with land issues and land policy.

C. Jamaican Statutes and Codes

There are few laws which pertain to land issues in general. The Forest Act of 1937 seeks to protect the forests of Jamaica by granting power to the Minister “to declare Crown land to be a forest reserve, and any private land to be a protected area in which harmful environmental practices

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20 See Reynolds, supra at 4.
22 The Jamaica Constitution, Ch. III § 18.
such as the clearing of vegetation and depasturing of cattle are prohibited or controlled. In 1996, the Act was updated and replaced by the Forest Act. Quite similar to the earlier act, the Forest Act of 1996 includes provisions for increased fines for breaches of forestry regulations. Administrative duties of the Act are allocated to “forest officers,” appointed by the Governor General. Under the Act, Crown land, which has been declared a forest reserve, is protected in a number of ways. Damaging, felling, or cutting of trees, and the cleaning or cultivation of any land are considered to be offenses of the Act. By contrast, Minister regulation of practices within “protected areas” on private lands is much less active. Environmental Laws of the Commonwealth Caribbean states that “provision is made for compulsory acquisition of protected areas for public purposes, but financial constraints usually frustrate any such efforts.” The Act does allow an owner, on a voluntary basis, to bring forest on his land under the control of the Forest Division—a approach, according to Environmental Laws, which “places the public function of protecting the country’s forestry reserves in the hands of private initiative and perspective.”

Finally, the Land Acquisition Act of 1947 establishes circumstances and procedures for government takings of privately held lands for public purposes. Because the Act deals only with government land acquisitions, it does not provide a possible tool for private land conservation. It is notable however, because it could become a governmental mechanism for conservation if the government were to interpret “public purposes” to include conservation or preservation of land.

D. Governmental Ministries and Executive Agencies

Governmental Ministries and Executive Agencies wield the most authority in land use and management. Of these, the Ministry of Land and Environment, the National Land Agency, and the

24 See id.
25 Id.
National Environment & Planning Agency play the largest roles in Jamaican private and public lands issues.

Executive Agencies, like the National Land Agency, and the National Environment & Planning Agency, are semi-autonomous government agencies. They remain a part of government but have more responsibility for their own management and performance. The primary aim is to reduce central control and delegate authority to the Chief Executive Officers in the various government institutions. Another aim is to substantially improve the quality and quantity of services provided by Government agencies. The emphasis on results is reflected in the Framework Document for each Executive Agency.27

1. *The Jamaican Ministry of Land and Environment*

The Ministry of Land and Environment aims at developing strategies to facilitate land use administration, environmental controls and resource management to “enhance the social and economic well-being of the nation.”28

The Ministry is assigned responsibility for:

- Land development and administration
- Environmental protection and conservation which relates to protection and conservation of the natural resources of the country including its coastal zones
- National physical planning to ensure orderly development and utilization of land and other resources29

2. *The National Environment & Planning Agency*

Accorded Executive Agency status on April 1, 2001, the National Environment & Planning Agency (NEPA) is the government agency responsible for environmental management, land use planning, natural resources conservation and development control services. It was formed in

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26 Id.
29 See id.
keeping with the recommendations of the National Land Policy tabled in 1996 and is a merger of the Town Planning Department, Natural Resources Conservation Authority, and the Land Development and Utilization Commission.\textsuperscript{30}

NEPA operates under a number of Jamaican Acts. Those most relevant to land acquisition and protection are the Natural Resources Conservation Authority Act of 1991 and the Land Development and Utilization Act of 1966. The 1966 Act (also known as the Idle Land Law) allowed the government to encourage either the productive use, sale, or lease of some 40,000 hectares identified for the program.

The Natural Resources Conservation Authority Act provides for the management, conservation and protection of the natural resources of Jamaica.\textsuperscript{31} The Act establishes the Natural Resources Conservation Authority, a body of persons appointed by the Minister of the Environment. The functions of the Authority include taking steps necessary to ensure the effective management of the physical environment of Jamaica; and the management of marine parks and protected areas. Section 5 of the Act allows the Minister to, under recommendation by the Authority, designate any land as national park land or protected area. Section 9 of the Act creates a Ministerial discretion to declare parts of or the entire island a ‘prescribed area,’ in which specified activities require a permit, and for which activities an environmental impact assessment may be required. The Natural Resources Order of 1996 and the Permits & Licensing Regulations were passed pursuant to section 9 of the Natural Resources Conservation Authority Act of 1991. The Order provides that the entire island of Jamaica is a prescribed area and lists specified categories of enterprise, construction or development that require a permit.\textsuperscript{32}

3. \textit{The National Land Agency}


\textsuperscript{31} See National Resources Conservation Authority Act, (July 5, 1991), available at \url{www.nrca.org/legal/nrca_act_part1.htm}.
Accorded Executive Agency status on April 1, 2001, the National Land Agency (NLA) was established pursuant to another recommendation of the National Land Policy. The NLA reports to the Ministry of Land and Environment, and is charged with implementing policy. The goal of the NLA is to streamline the land titling process and modernize land registration systems (including developing a customer oriented service delivery system for program operations), providing a decision support infrastructure by way of a comprehensive mapping program, and supporting the land settlement and titling process in Jamaica.

The agency is accountable for achieving results through a formal system of performance measurement. It also provides land information, land registration, survey and property valuation support to ensure security of tenure, equitable land valuation and a sound basis for planning and development.

The NLA is responsible for:

- Providing land related information to clients
- Issuing titles under the Registration of Titles Act and the Registration of Strata Titles Act
- Land Development and Utilization Commission
- Registering all dealings related to existing titles
- Maintaining the valuation roll for property taxation
- Valuation of land taxation and non-taxation purposes
- Checking survey plans in accordance with the Land Surveyors Act.

E. The Role of Common Law in the Jamaican Legal System

Commonwealth Caribbean countries often look to precedents from other Commonwealth Caribbean jurisdictions and the UK. The Commonwealth Caribbean also looks to precedent from other common law developing countries in cases which touch on such issues as socio-
economic matters. It is also important to note that, because of the political, sociological and economic similarities, and because of the existing notion of a single Commonwealth "community," the members of the Commonwealth Caribbean look to one another for judicial precedent. This becomes even more complex and inter-related because all the jurisdictions share the Privy Council as their final Court of Appeal. The general consensus among the Commonwealth Caribbean, including Jamaica, is that decisions of the Privy Council originating from one Commonwealth jurisdiction will typically bind other jurisdictions in the region.

F. The Role of Customary Law in the Jamaican Legal System

Beyond the common law principle of judicial precedent, custom and convention also act as sources of Commonwealth Caribbean law. In the areas of land law and property law specifically, custom "is of particular importance." Although custom served as the basis of the common law, today, English law distinguishes between the common law and custom. Where common law exists, custom is not considered as a legal source. Further, custom is considered as a source of law only for localized areas. In other words, "when English lawyers speak of custom, they really mean local custom which becomes a source of law." As a legal source, custom has two fundamental characteristics in the Commonwealth Caribbean:

1. It must be an exception to the common law; and
2. It must be confined to a particular locality, such as a parish, borough, or county.

Customary rules of law differ from the common law in that they are not judicially noticed or given any legal recognition until they have been settled by judicial decision. When a party pleads a

37 See id.
38 See id. at 104.
39 See id. at 106.
40 Id. at 134.
41 Id.
42 See Antoine, supra at 134.
customary right in court, the party must prove its existence. In order to do this, the party must satisfactorily convince the court that the custom in question satisfies a number of tests. The party must prove that the custom has existed (a) in the localized area “from time immemorial”, and that it has existed (b) continuously, (c) peaceably, by common consent or without opposition, (d) that it is certain and clear, (f) that it is consistent with other local custom, and (g) that it is reasonable.43

Of course, these are demanding requirements, and therefore, claims of custom in modern times are rare.44 Many of the requirements cannot be easily quantified and cannot be applied easily to the Commonwealth Caribbean. For example, the first test – that the custom has existed from time immemorial – can no longer be employed. The Statute of Westminster fixed the date from which a custom must be proved to have existed, at 1189.45 However, many Commonwealth Caribbean countries, including Jamaica, did not become British colonies until long after that date, and certainly have much newer legal systems. Therefore, if customs are to be recognized in the region, “a different date of antiquity or other test needs to be established.”46

The basis for elevating custom and traditional practices in Jamaica to law is, however, most substantiated in relation to land. Professor Marshall, author of West Indian Land Law, explains that English land law fails to take into account the realities of the socio-economic situation.47 Marshall notes the oddity that “in an area where the vast majority of people are of African or Asian descent, the law relating to land holding and succession should reflect so little of the Caribbean social reality and family structure.”48 For example, Edith Clarke, author of Land Tenure and the Family in Four Communities of Jamaica explains that, in Jamaica, the customary system of land tenure draws a distinction between ‘family land’ and bought land: “Family land in its primary

44 See Antoine, supra at 136.
45 See id.
46 Id.
sense is land inherited from an ancestor who acquired it by gift from the slave owner at the time of emancipation, as distinct from bought land, which is land acquired by purchase subsequent to emancipation. 47 48 49 Family land can also include bought land which has since been passed down to heirs by a system of customary succession or entail. 50 Family land is held in trust by one member of the family, and is considered inalienable and transmissible to any family member. 51 Each family member has use rights over the land, and non-exercise, or lack of use of land does not extinguish these rights. Family land is sometimes sold by agreement between senior family members, but this is viewed with social disapproval. 52

In considering legal mechanisms for conservation of family lands, it might be said that, because Jamaican law does allow for the sale of family lands, it would also allow for the acquisition of rights and restrictions on family lands. A conservation easement, for example, might therefore be a legally permissible conservation tool for family lands. For the same reason that it is socially frowned upon to transfer full title, an attempt to transfer the rights contained in a conservation easement might be similarly frowned upon. The sale of family land by agreement of senior family members is considered “the wrong thing to do” because it deprives future generations their rights to the land. 53 The conveyance of a conservation easement, which runs in perpetuity, by current members of a family, would similarly restrict the rights of future generations. Although a conservation easement might be legally acceptable with regards to family lands, it might not be considered socially acceptable. The number of families willing to make this kind of conveyance might, as a result, be extremely small.

48 Id.
49 Clarke, E, Land Tenure and the Family in Four Communities of Jamaica, 1 Social and Economic Studies 43 (1953).
50 See id.
51 See Antoine, supra at 138.
52 See id. at 138.
53 Id.
By contrast, bought land is much less restricted. Bought land is land that has been purchased, and its title registered. The owner of bought land is free to dispose of the land in any number of ways, including sale or gift. Consequently, bought land could be much more easily subject to the conveyance of something like a conservation easement. However, bought land is inexorably tied to family land in that disposal of bought land by any of the aforementioned methods is subject to social disapproval. Because disposal of bought land is considered to cut across "the natural expectation of the family to inherit...there is constant impetus to the creation of family land..."\textsuperscript{54} This expectation is so strong, that the principle of inalienability is seen to be invoked once bought land has been inherited by the family.\textsuperscript{55}

It should also be noted that the custom of 'squatting' on unoccupied land presents a roadblock to the establishment of strict land tenure systems in the Commonwealth Caribbean. Jamaica's history of slavery produced generations of landless, dispossessed people, who had no choice but to 'squat' illegally on unoccupied land. The tradition continues today, and, as a result, 'squatting' is now "given some legitimacy in certain Caribbean legal systems."\textsuperscript{56} This typically means that, in those regions of the Caribbean, laws on squatting are lenient, with some even allowing long periods of undisturbed squatting to establish clear title.\textsuperscript{57} These laws seem to parallel the concept of adverse possession, a concept rooted in the theory that the basis of title to land in English law is possession.\textsuperscript{58} Because much of Caribbean law is rooted in English common law, it is not surprising that the concept of adverse possession would be applied to the act of squatting. Although many Commonwealth Caribbean countries accept squatting as a certifiable technique for land acquisition, Jamaican case law makes evident the judiciary's disdain for the

\textsuperscript{54} Id. at 138 (quoting Clarke, 1953, p. 45).
\textsuperscript{55} See Antoine, supra at 138.
\textsuperscript{56} Id. at 141.
\textsuperscript{57} See id.
practice of squatting as a means of acquiring title. Most recently, a group of informal squatters, who had built a settlement, were evicted from land which they had occupied since 1960. In that case, a claim of squatters’ rights, with proof of adverse possession over a period of more than forty years was not recognized by the court. It is important to note the distinction here between squatting and acquisition of land based on the Common law Title system of family land acquisition. Common law Title, as discussed in greater detail both above and below (in section IV(B)), exists for land which is unregistered. It is estimated that there are approximately 600,000 parcels of land in Jamaica and of these, approximately 450,000 have registered Titles. There are approximately 150,000 parcels which are without a title. It is these lands, without registered title, over which Common law Title is acquired. The practice of squatting, on the other hand, makes no distinction, in seeking acquisition of title, between registered and unregistered land.

Customary law is, as previously stated, not represented by common law or statute in Jamaica. The tensions between these deeply rooted customary rules and the common law produce conflict. Clarke explains this well when she states:

Disagreements between members of the family over family land are in Jamaica one of the most common causes of litigation and invariably the reason is the attempt of one or more members to establish an individual right by exploiting the conflict between the unwritten traditional system which is current in one segment of the society and the legal code which is applicable to the whole society.

This has potential to adversely affect attempts to conserve private lands by way of either a total conveyance, or a partial conveyance of conservation restrictions. The sale of family land, or the conveyance of rights tied to that land frequently cause both social unrest and litigation. The Jamaican court system has not pronounced whether family land should

61 Antoine, supra at 138 (quoting Clarke, 1953, fn 17, p. 44).
be accorded inalienable rights by family members to the land. However, the courts are beginning to become less and less tolerant of other non-registered claims to land, such as squatting. Further, the registration system, discussed at length in the following pages, is beginning to gain recognition and approval in both the legal system and the Jamaican community. Finally, customary law is very difficult to apply in Jamaica, as explained in Section II(F). All these factors lead to an extrapolation that, in the area of Jamaican land law, establishment of registered title of land is fast becoming the most assuredly recognized way to gain legal title of land in Jamaica. A required land registration system would extinguish the problem of inalienable claims by family members to family land. The current direction of land ownership recognition in Jamaica therefore bodes well for future possibilities of private land conservation.

III. PRIVATE LAND ADMINISTRATION

The right to private property ownership is guaranteed by the Jamaican Constitution. Chapter III of the Constitution enumerates the “Fundamental Rights and Freedoms.” Chapter III(13) states that “...every person in Jamaica is entitled to the fundamental rights and freedoms of the individual...namely...the enjoyment of property....”

It is not required that a landowner have citizenship in Jamaica. In addition there are no foreign exchange restrictions currently in Jamaica, hence anyone can send money to Jamaica and from Jamaica, subject to the prevailing exchange rates at the time of transaction, and the Financial Institution being used.

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62 Jamaica Constitution, 1962, Ch. III.
63 Jamaica Constitution, 1962, Ch. III(13)(a).
Chapter III(18) of the Constitution deals with the compulsory acquisition of property. It states that neither property, nor any interest in property may be compulsorily taken possession of except:

...by or under the provisions of a law that (a) prescribes the principles on which and the manner in which compensation therefore is to be determined and given; and (b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose of:
  i. establishing such interest or right (if any);
  ii. determining the amount of such compensation (if any) to which he is entitled; and
  iii. enforcing his right to any such compensation.

A. Institutional Framework

Jamaica has an institutional framework in place for the recording and enforcement of property rights. Recording and enforcement responsibilities are vested in the National Land Agency (NLA). An Executive Agency which falls under the Ministry of Land and Environment, the NLA is charged with implementing policy on property rights, and is responsible for the issuance of titles under the Registration of Titles Act.

B. Land Registration

There are two types of titles to land in Jamaica, Registered Titles and Common law Titles. The Registered Titles System in Jamaica is governed by the Registration of Titles Act. In order to register land through the Land Titles Division, the applicant must submit:

- an application form,
- a Statutory Declaration to prove possession (a statutory declaration is a written statement confirmed by oath),
- supporting statutory declaration to prove ownership rights by possession from two persons who have known the land for at least 30 years in cases where the applicant has no documentary proof of ownership showing title for himself and predecessors in title for 40 years,
- a current certificate of payment for Property Tax up to date, and a survey pre-checked diagram (if the land is being registered by plan).

See Jamaica Constitution, 1962, Ch. III(18).

Jamaica Constitution, 1962, Ch. III(18)(a-b).
Upon receipt and approval of the application, an Original and a Duplicate Certificate of Title (DCT) are issued in relation to each parcel of land registered under the Act. The original Certificate is filed at the Office of the Registrar of Titles, 23 1/2 Charles Street, Kingston P.O., and the duplicate is retained by the proprietor. Generally, titles issued under the Act are conclusive evidence of the particulars stated on their face.  

Common law titles exist where the land has not been registered under the Act. Proof of ownership of such land is established by possession and/or documentation. Although ownership is proved by possession and/or documentation, there is no determinative period of time upon which possession is determined. Rather, ownership based on possession is determined on a case-by-case basis. Unlike a registered title, the owner of land subject to a common law title must prove to a prospective purchaser his right of title by instrument or facts establishing ownership. Each time property subject to a claim of common law title is transferred, a new conveyance has to be prepared and recorded at the Island Records Office, Central Village, Spanish Town P.O., within three months of its execution. The process of recording gives notice to third parties of the purchaser’s ownership.

There is a move in Jamaica to bring common law lands under the operation of the Act, and so where land is purchased, oftentimes the Purchaser takes steps to have the land registered under the Act and to obtain a title thereunder. Common law titles are therefore becoming somewhat obsolete.

Land Titling Services are provided by the Land Titles Division of the NLA. The NLA has recently undertaken a number of initiatives geared towards improving the quality of service to the

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public. They have introduced eLandjamaica, an internet-based service which provides selected land information to NLA customers. With eLandjamaica and the upgraded services of the NLA, processing periods have been drastically reduced, thereby fostering a climate conducive to real estate development, and facilitating the expeditious completion of land matters by Attorneys for their clients.70

C. Land Transfer

The Property (Transfer) Act of 1845 requires that all assignments of land be by deed.71 Transfer of Title in Jamaica occurs through the NLA, under the Registration of Titles Act, if the land being transferred is registered land. In this case, a transfer document is completed and two copies made. Just as in the case of Registration, in the case of a transfer, the original is filed at the Office of the Registrar of Titles, and the duplicate is retained by the transferee. In the case of Common law Title transfer, each time property is transferred, a new conveyance has to be prepared and recorded at the Island Records Office, Central Village, Spanish Town P.O., within three months of its execution.72 The process of recording gives notice to third parties of the purchaser's ownership.

IV. LEGAL TOOLS IN PLACE FOR PRIVATE LANDS CONSERVATION IN JAMAICA

Currently, there are no statutory provisions for conservation easements in Jamaica. Jamaican property law does, however, recognize both easements and restrictive covenants. Also, as noted above, private land may be held by anyone in Jamaica, whether or not that person is a Jamaican citizen.

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A. Restrictive Covenants, Easements, and Conservation Easements in Jamaica

Easements and covenants are utilized when a landowner wishes to grant certain rights over his land to another person, which fall short of a grant of possession. The rights granted may be ‘positive’ (allowing the grantee to use the grantor’s land in a particular way) or ‘negative’ (prohibiting the grantor from using his land in a particular way.) A land restriction for conservation purposes could, in theory, take on the form of either a restrictive covenant or a conservation easement.

1. Restrictive Covenants

Restrictive covenants are considered to be particularly appropriate where a ‘negative’ right is granted, as is the case in the purchase of a conservation easement. Covenants, or promises made by deed, are contractual obligations which remain enforceable as between the original parties. The problem with consideration of restrictive covenants as a conservation tool is that restrictive covenants do not tend to run in perpetuity. Certainly under common law, it is well established that the burden of a covenant between freeholders does not run. The case in equity is somewhat different. The burden of a restrictive covenant entered into by one land owner with the owner of a neighboring property is seen to impose an equitable burden which is enforceable against all successors in title, except where the bona fide purchaser was not given notice of the covenant. This rule binds successors to the incumbrance on the land created by a restrictive covenant, and seems to allow a restrictive covenant to run in perpetuity.

As a conservation tool however, restrictive covenants are not ideal because they also involve both a burden upon a servient tenement, and a benefit to a dominant tenement. In the case of land conservation, while property is being burdened, there is no dominant property being

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74 See id. at 142.
benefited. In fact, it is a requirement that, for the running of the burden in equity, a covenant must be made for the protection of other land retained by the covenantee.\textsuperscript{76}

2. \textit{Easements}

Easements are a much more appropriate tool for private lands conservation than covenants, although classic easements are also not ideal tools. Negative rights are typically established by way of restrictive covenants, but a negative right can be created by easement. Easements in general, are preferable to covenants, because they are a right \textit{in rem} (binding on the whole world). An easement may not be defeated because a bona fide purchaser can prove that he or she did not have notice of the easement. This makes easements a more effective private lands conservation tool because they have a much stronger likelihood to run in perpetuity.

However, in Jamaica, easements also require both a dominant and servient tenement. An enforceable easement must be \textit{appurtenant} to land, that is, there must be a dominant tenement to which the right is attached.\textsuperscript{77}

3. \textit{Conservation Easements in Jamaica}

Although under current Jamaican property law, conservation easements would require a dominant tenement, easements are still preferable to covenants as a land conservation tool because they are assumed to run with the land. Section 9 of Jamaica’s Conveyancing Act of 1973 provides that, unless a contrary intention is expressed in the conveyance, “a conveyance of land shall be deemed to include...all easements...appertaining...to the land or any part thereof....”\textsuperscript{78} However, in an opinion submitted by the Attorney General’s Chambers (“the AG”) to the Ministry of Land and Environment, the possibility of use of the conservation easement as a conservation tool in

\textsuperscript{75} See \textit{Tulk v. Moxhay}, 41 ER 1143 (1848).
\textsuperscript{76} See Kodilinye, \textit{supra} at 144.
\textsuperscript{77} See id. at 173.
\textsuperscript{78} Conveyancing Act 1973 Rev., §9.
Jamaica was addressed. When asked whether conservation easements could exist in perpetuity in Jamaica, the AG stated:

Common law only provides that easements from a presumed grant can exist in perpetuity. All others are tied to a specific interest, for example, one in fee simple, estate for life, etc. To make a conservation easement last forever, this could only be achieved through legislation if they do not originate from a presumed grant.\textsuperscript{79}

When further asked about the possibility of use of an easement at common law to restrict the use of privately owned lands as a means of conservation, the AG noted that the current list of restrictive easement rights does not include Conservation, but that the list is not restricted in scope, and could be expanded.\textsuperscript{80} However, the AG went on to explain that the right must “maintain the basic features” of an easement in order to be considered for inclusion.\textsuperscript{81} In answering whether a required dominant tenement is considered a “basic feature” of an easement, the AG noted that “the common law requires that both properties exist....Where legislation is used however, the creation of such can be achieved without the two properties.”\textsuperscript{82} This seems to indicate the Attorney General’s Chambers is at least not definitively adverse to the possibility of conservation easement legislation. Upon further questioning, the AG commented that if an act similar to the Uniform Conservation Easement Act were to be established in Jamaica, the adopted process would have to be “administered by a reputable agency.”\textsuperscript{83}

B. Forestry Department

The Forestry Department of Jamaica (“the Department”) only has jurisdiction over approximately 33\% of forestland in Jamaica, as a result of the Forest Act of 1996, which restricts

\begin{itemize}
\item \textsuperscript{79} See Summary of the Opinion submitted by the Attorney General’s Chambers to the Ministry of Land and Environment on the implication of the use of the Conservation Easement as a conservation tool in Jamaica (on file with NRLC).
\item \textsuperscript{80} See id.
\item \textsuperscript{81} See id.
\item \textsuperscript{82} See id.
\item \textsuperscript{83} See id.
\end{itemize}
the jurisdiction of the Department to reserves, management areas, and protected areas. The rest of Jamaica’s unprotected forestland lies in the hands of private ownership. Despite the statutory limitation placed on the Department by the Act, the Forestry Department is required to provide “efficient technical and professional leadership in the conservation, protection, management and development of the forest resources of Jamaica.” Further, the Act mandates that the Department “promote the development of forests on private lands.”

The Department has, in the past few years been exploring the concept of protecting and conserving private forested lands. The Department has determined that sustainable management efforts on their part may extend beyond government owned forestlands, and into the private sector. For support of this conclusion, the Department has turned to the Forest Act of 1996, which mandates that the Department promote development of forests on private lands. As a result of both statutory requirements, and the huge amount of unprotected forestland in Jamaica, the Forestry Department has decided to concentrate its efforts on the establishment of efficient private planters programs.

The Department has sought to fulfill the requirement that they promote forest development on private lands through “promotion of agroforestry practices and reforestation programmes on...private lands, tree nursery development, public education, training and extension activities.” Through their Private Plantings Program, the Department provides free tree seedlings, technical advice, and a small cash grant for private reforestation.

87 See Oliphant, supra.
88 See id.
The Forest Regulations, 2001 provide a mechanism by which the provisions of the Forest Act can be implemented. Section 44 of the Regulations allows for the establishment of a Forestry Development Fund. The Regulations state, in relevant part, that the fund:

...shall be used exclusively in support of the following activities on both public and privately owned lands:

(1) Reforestation
(2) Watershed management
(3) Sustainable forest management
(4) Purchase of private lands for forest reserves and protected areas
(8) Loans and grants for owners and tenants of land for tree planting
(9) Any other purposes specified in the Forest Act.90

Finally, in a statement in Jamaica’s Forest Policy, 2001, the Forestry Department announced that in its efforts to obtain support for the Forestry Development Fund, private sector sponsorship would be sought.91

C. Leases, “Leaseback” Agreements, and Reserved Life Interests

Jamaican property law allows for the operation of lease agreements. The relationship between lessor and lessee in Jamaican law is governed by the law of landlord and tenant. In order for a lease to be able to take effect, the right to exclusive possession must be given, and the duration of the lease must be certain.92 This duration may be a fixed period, periodic tenancy, tenancy at will, tenancy at sufferance, or tenancy by estoppel. A fixed period terminates automatically when the period expires.93 A periodic tenancy (weekly, monthly, quarterly, or yearly tenancies) continues indefinitely until “terminated by a proper notice to quit by the landlord or tenant.”94 A tenancy at will continues indefinitely, with the understanding that the tenant or the

93 See id. at 18.
94 See id.
landlord may terminate at any time. A tenancy at sufferance exists when a tenant remains in possession of the land after the expiry of his lease without the landlord’s assent or dissent. Under these circumstances, the landlord may retake possession at any time. Finally, a tenancy by estoppel exists where a landlord purports to grant a lease to a tenant, but the landlord has no title to the land. Although this lease would be found invalid as against third parties, it is binding upon landlord and tenant.

Long-term lease agreements between a private landowner and a conservation NGO or governmental agency are another method for achieving the goal of private lands conservation. A lease agreement can enable a conservation NGO to temporarily possess the property in exchange for rent payments. Conservation objectives can also be met by including land use limitations in a lease agreement of any lease, be it to a conservation NGO, or a private individual. Of course, in the case of land leased to a conservation NGO, language restricting land use would be unnecessary. A “leaseback” agreement allows a landowner to donate or sell land in fee simple and immediately lease it back for an agreed use and period. In this case, a landowner transfers title to the land to a conservation NGO or governmental agency. As part of the agreement, the conservation NGO leases the land back to the owner using a long-term lease, subject to conditions designed to ensure conservation of the land. Breach of the lease could enable the conservation NGO to terminate the lease and take possession of the land.

A landowner could also transfer fee simple title to the land to a conservation NGO (by donation or sale), but reserve a life interest in the land. This method would enable the landowner

95 See id. at 19.
96 See id. at 20.
97 See id. at 21.
98 Environmental Law Institute, Legal Tools and Incentives for Private Lands Conservation in Latin America: Building Models for Success 30 (2003). In addition to stipulating detailed use-limitations, the lease could include a base-line ecological inventory of the land, using written descriptions, data, photographs, graphs, maps, etc. Breach of the use-conditions would normally entitle the
to remain undisturbed on the land for life. The landowner also has the assurance that without further legal action the conservation NGO will assume control of the land upon his or her death.

Although this report was unable to uncover evidence that leases, “leaseback” agreements, or reserved life interests have been used in Jamaica for conservation purposes, all three are used in Jamaican law.

D. Licenses and Mortgages

Jamaican property law allows for licenses to be granted by landowners. In determining whether a license or lease has been created, it was once the rule that, where exclusive possession was granted, there was a lease. Jamaican courts today typically distinguish a lease from a license by considering whether the landowner intended to give exclusive possession of the premises. If this is the case, a lease will be found to have been created.

Mortgages, defined as “a conveyance or other disposition of an interest in property designed to secure the payment of money or the discharge of some other obligation,” are also provided for in Jamaican Law. A mortgage acts as a real security for the repayment of money lent. The Jamaica Mortgage Bank Act established a national Jamaica Mortgage Bank. A mortgage of land may be legal or equitable, and may relate to either a freehold or leasehold land.

V. FEASIBILITY OF INTRODUCING NEW TOOLS

As discussed above, the most effective and obvious way for Jamaica to establish the legal concept of a conservation easement would be through legislation. The custom and respect surrounding the concept of “family lands” might make the acquisition of conservation easements, and their future enforcement by NGO’s difficult. The Attorney General also suggested that, if

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conservation easements were to be considered as a conservation tool in Jamaica, the adopted process would have to be “administered by a reputable agency.” The NLAS, granted authority through the Ministry of Land and Environment, seems a likely candidate for this administration, as does the Forestry Department. Finally, the Attorney General’s office did not indicate here that an NGO could not act in this capacity either, and it was not stated that the “agency” would have to be a governmental agency. It seems conceivable that an international NGO could qualify as a “reputable agency” by the Office’s standards.

Executive Agencies and Governmental Ministries, established to ensure a more efficient and transparent land titling system, have helped to legitimize private land tenure systems in Jamaica. The understood need for conservation of Jamaican forestlands, and the maturation of legislative property law in Jamaica are creating an environment where the enforcement and monitoring of conservation easements seems realistic.

VI. RECOMMENDATIONS

The drafting of legislative language providing for conservation easements is the ideal solution to private lands conservation in Jamaica. Although no current provisions exist, the introduction of such legislation seems reasonable. The Uniform Conservation Easement Act (UCEA), drafted in 1981 by the National Conference of Commissioners on Uniform State Laws could serve as, at least, a guidepost for the introduction of conservation easements into the Jamaican legal system. At most, it could be accepted directly by the Jamaican government. The Act’s primary objective is to enable “private parties to enter into consensual arrangements with

103 See Summary of the Opinion submitted by the Attorney General’s Chambers to the Ministry of Land and Environment on the implication of the use of the Conservation Easement as a conservation tool in Jamaica (on file with NRLC).
charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments.104

The UCEA defines “conservation easement” as

[a] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include: (1) retaining or protecting natural, scenic, or open-space values of real property; (2) assuring its availability for agricultural, forest, recreational, or open space use; (3) protecting natural resources; (4) maintaining or enhancing air or water quality; or (5) preserving the historical, architectural, archaeological, or cultural aspects of real property.105

Accepting the UCEA would make conservation easements more certain devices by eliminating several English common law impediments. Specifically, the UCEA provides that a conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of contract.106

A unique feature of the Act is the “third-party enforcement right.” Under the Act, an easement may empower an entity other than an immediate holder to enforce its terms. The third-party must be a charitable organization or governmental body eligible to be a holder. Additionally, one organization may own the easement, but delegate enforcement to another, provided the terms of the easement allow it.

Acceptance of the UCEA in Jamaica would be ideal, because the Act would allow for the incorporation of conservation easements into the Jamaican legal system with relative ease and

105 UCEA, §1(1)—Definitions.
simplicity. Further, in Jamaica, a governmental organization such as the Forestry Department, discussed in detail below, could serve as a qualified and appropriate third party for the purposes of “third party enforcement rights.”

In lieu of the drafting of conservation easement legislation, TNC might consider restricted donations to the Jamaican Forestry Department’s Forestry Development Fund. Specifically, the restricted donation could require that money go directly toward the purchase of private lands for forest reserves and protected areas – a purpose directly provided for in the Forest Regulations.

TNC could also allocate funds for leases and “leaseback” programs within Jamaica. Finally, TNC could purchase private land in fee simple. That land could be conserved, and could act as a dominant tenement for neighboring lands. Those lands, in turn, could be burdened by restrictions equivalent to conservation easements.

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