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## **Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?**

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PERPETUAL CONSERVATION EASEMENTS IN THE 21ST CENTURY:  
WHAT HAVE WE LEARNED AND  
WHERE SHOULD WE GO FROM HERE?

Nancy A. McLaughlin\*

INTRODUCTION

The public is investing billions of dollars in conservation easements, which now protect an estimated 40 million acres throughout the United States. But all is not well. Uncertainties in the law and abusive practices threaten to undermine public confidence in and the effectiveness of the conservation easement as a land protection tool. On February 15, 2013, the Wallace Stegner Center at the University of Utah S.J. Quinney College of Law sponsored a conference at which these issues were explored, with the goal of helping to minimize abuses and ensure that conservation easements will actually provide the promised conservation benefits to the public over the long term.

At the conference, leaders in their respective fields addressed (i) the federal tax incentives offered with respect to conservation easements donated as charitable gifts to certain qualified holders; (ii) the state conservation easement enabling statutes; (iii) federal and state oversight of charitable organizations and the assets held by such organizations and government entities on behalf of the public; and (iv) the role of state attorneys general in the charitable sector, including examples of state attorney general offices defending conservation easements and working collaboratively with land trusts to develop strategies and guidelines regarding the long term administration of such easements. This co-publication issue of the *Utah Law Review* and the *Utah Environmental Law Review* includes articles written by

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\* © 2013 Nancy A. McLaughlin, Robert W. Swenson Professor of Law at the University of Utah S.J. Quinney College of Law (J.D. University of Virginia). Professor McLaughlin is an elected member of the American Law Institute, an Academic Fellow of The American College of Trust and Estate Counsel, and serves as a professional editor of the ABA's *Real Property, Trust & Estate Law Journal*. Among other professional activities, she served as a member of the Land Trust Alliance's Conservation Easement Amendment Policy Group; she serves on the Alliance's Conservation Defense Advisory Council; she serves on the advisory boards of Vital Ground and the Humane Society's Wildlife Land Trust, and as an advisor to Utah Open Lands. In 2012, in collaboration with the Conservation Law Center at Indiana University Maurer School of Law, she organized the Protected in Perpetuity Roundtable at which various stakeholders (including Internal Revenue Service (IRS) representatives, state attorney general representatives, land trust professionals, conservation easement donors, conservation lawyers, and landowners) gathered to discuss legal and policy strategies for ensuring that the conservation purposes of tax-deductible conservation easements are "protected in perpetuity" as required by § 170(h), while at the same time acknowledging the need for flexibility to adapt to changing conditions.

many of the speakers at the conference. The articles encapsulate and, in some cases, elaborate upon the comments and insights the speakers shared with attendees.<sup>1</sup>

The conference focused on *perpetual* conservation easements—those that are intended to protect the properties they encumber “in perpetuity” or “forever” and are advertised as such to prospective easement grantors, funders, communities, and the general public.<sup>2</sup> The growth in the use of the perpetual conservation easement as a land protection tool in the United States over the last three decades has been extraordinary. There also have been important developments in the relevant law, practices, and policy. The purpose of the conference was to pause for a moment and take stock. The speakers examined the history and legal underpinnings of this unique tool. They considered the successes as well as problems that have arisen as

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<sup>1</sup> For video recordings of the majority of speaker presentations, see *Perpetual Conservation Easements: What Have We Learned and Where Should We Go From Here?*, ULAWTODAY, [http://www.ulaw.tv/collections/conservation-easements/0\\_gau06voi](http://www.ulaw.tv/collections/conservation-easements/0_gau06voi) (last visited Oct. 15, 2013).

<sup>2</sup> See, e.g., THE CONSERVATION EASEMENT AS A LAND PROTECTION AND FINANCIAL PLANNING TOOL, CONSERVATION EASEMENT GUIDEBOOK 4, available at <http://www.landtrust.org/ProtectingLand/ConsEaseGuidebook.pdf> (“A conservation easement ensures that property will be protected and cared for forever, regardless of who owns the land in the future.”); *Easement Basics*, JACKSON HOLE LAND TRUST, <http://jhlandtrust.org/protection/easement.htm> (last visited Mar. 29, 2013) (“[The land trust has the] obligation to enforce the terms of the easement in perpetuity . . . [and t]he landowner still owns the property and can use it, sell it, or leave it to heirs, but the restrictions of the easement stay with the land forever.”); *FAQ: What is a Conservation Easement?*, LAND TRUST FOR TENN., <http://www.landtrusttn.org/faq.html> (last visited Nov. 24, 2013) (same); *Stewardship*, MINN. LAND TRUST, <http://www.mnland.org/stewardship/> (last visited Mar. 29, 2013) (“Conservation easements are forever.”); *Stewardship: A Perpetual Commitment to Conservation*, VT. LAND TRUST, <http://www.vt.org/land-stewardship> (“[W]e have promised to look after, or steward, the conservation protections placed on this land forever.”) (last visited Nov. 24, 2013); *Conservation Easements*, N.Y. STATE DEP’T OF ENV’T CONSERVATION, <http://www.dec.ny.gov/lands/41156.html> (“When the state accepts and holds a conservation easement it takes on the responsibility to monitor and enforce the terms of the easement in perpetuity (forever).”) (last visited Nov. 24, 2013); *Conservation Easement Overview*, MD. ENVTL. TRUST, [http://www.dnr.state.md.us/met/land\\_conservation.asp](http://www.dnr.state.md.us/met/land_conservation.asp) (last visited Nov. 24, 2013) (“[T]he land is protected **forever** . . . .”) (emphasis in original); see also *106 Acres in Pulaski County Donated to VOF*, VA. OUTDOORS FOUND. NEWSL. (Va. Outdoors Found., Williamsburg, Va.), Summer 2012, at 1, available at [http://www.virginiaoutdoorsfoundation.org/wpcontent/uploads/2012/04/2012\\_SUMMER\\_NEWSLETTER.pdf](http://www.virginiaoutdoorsfoundation.org/wpcontent/uploads/2012/04/2012_SUMMER_NEWSLETTER.pdf) (containing a picture of a donor receiving a sign from the Virginia Outdoors Foundation to be placed on her property that states “[t]his property is forever protected by a conservation easement”). Virginia Outdoors Foundation is a quasi-governmental agency that acquires most of the conservation easements conveyed in the state. See *About VOF*, VA. OUTDOORS FOUND., <http://www.virginiaoutdoorsfoundation.org/about/> (last visited Nov. 24, 2013).

a result of its widespread use. They also discussed proposed reforms and how best to deal with the increasingly difficult issues associated with the long-term administration of these perpetual instruments.

Part I of this Article describes the growth in the use of conservation easements and in the number of nonprofit organizations acquiring such easements (typically referred to as land trusts). Part II notes the various laws that impact the creation and administration of conservation easements and the manner in which the speakers addressed those laws. Part III contains a timeline of important developments. Part IV concludes by discussing the elephant in the room whenever the subject of perpetual conservation easements is discussed—the recent surprising lack of certainty and consensus regarding precisely what it means to protect land “in perpetuity” or “forever” with a conservation easement.

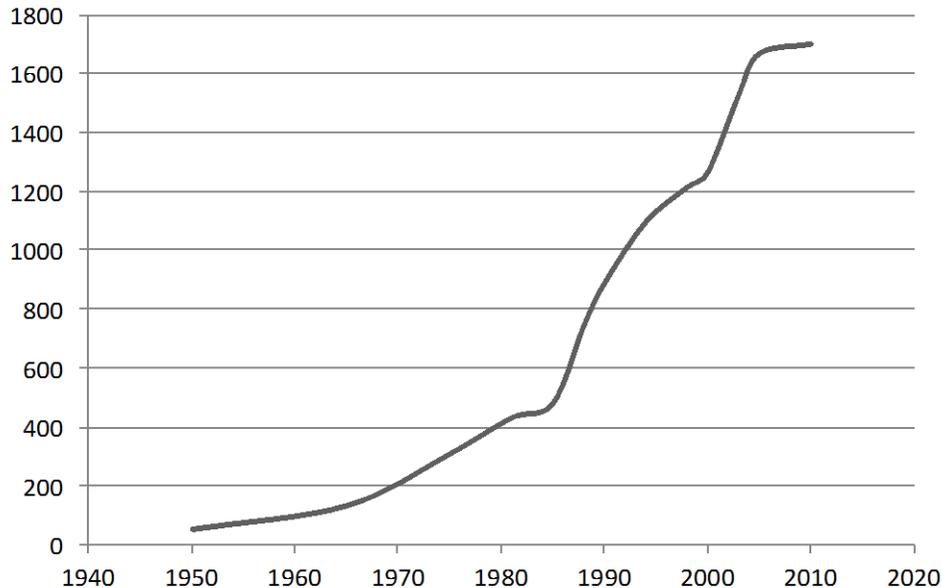
### I. EXTRAORDINARY GROWTH

Based on survey data gathered by the Land Trust Alliance, which is the umbrella organization for the nation’s land trusts, there were only 53 state and local land trusts operating in the United States in 1950 and, at last count in 2010, there were 1,699 such land trusts.<sup>3</sup> As Graph 1 below illustrates, the growth in the number of such land trusts has been steady and dramatic, and only recently has begun to level out.<sup>4</sup>

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<sup>3</sup> ROB ALDRICH & JAMES WYERMAN, LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 12 (2005), available at <http://www.northolympiclandtrust.org/Documents/2005LandTrustCensusReport.pdf>; KATIE CHANG, 2010 NATIONAL LAND TRUST CENSUS REPORT: A LOOK AT VOLUNTARY LAND CONSERVATION IN AMERICA 8 (2011), available at <http://www.landtrustalliance.org/land-trusts/land-trust-census/national-land-trust-census-2010/2010-final-report>; LAND TRUST ALLIANCE, 2003 LAND TRUST ALLIANCE CENSUS ADDENDUM (2004) (on file with author); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 21 (2004) (documenting the reported number of state and local land trusts from 1950 through 2000).

<sup>4</sup> See ALDRICH & WYERMAN, *supra* note 3, at 3 (reporting 1,667 state and local land trusts extant in 2005); CHANG, *supra* note 3, at 8 (reporting 1,699 state and local land trusts extant in 2010).

**Graph 1****Number of State & Local Land Trusts**

The growth in the number of acres encumbered by conservation easements held by state and local land trusts has been similarly dramatic. As Graph 2 below illustrates, in 1980 only approximately 128,000 acres were encumbered by conservation easements held by state and local land trusts. By 2010, that number had grown to more than 8.8 million acres.<sup>5</sup> Graph 2 does not include acres encumbered by conservation easements held by national land trusts, of which there were reportedly 24 in 2010,<sup>6</sup> or by federal, state, and local governmental entities, which also have been active in acquiring conservation easements. The Nature Conservancy, one of the national land trusts, reported holding easements encumbering more than 2.7 million acres as of the end of 2010.<sup>7</sup>

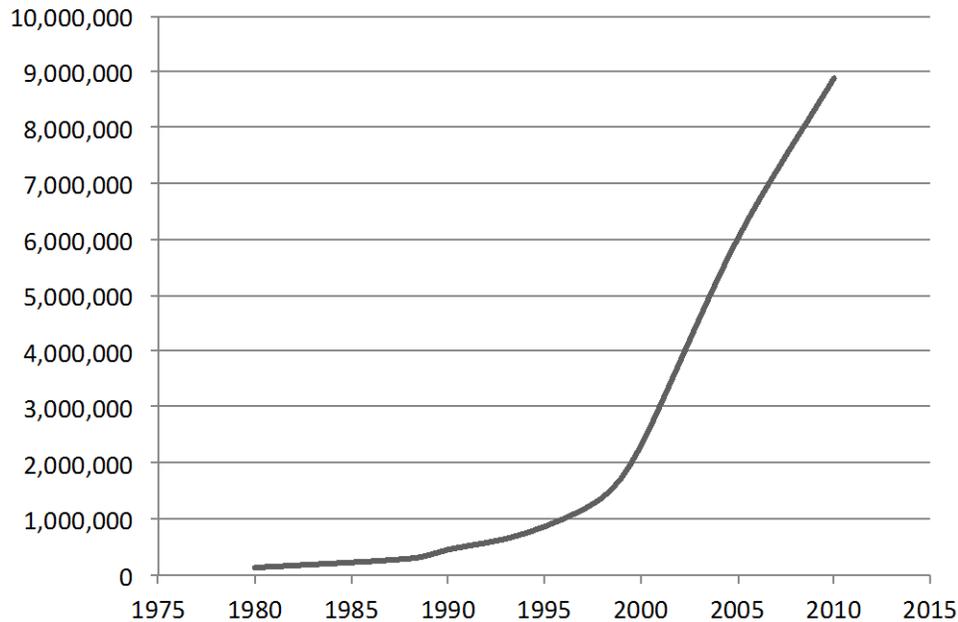
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<sup>5</sup> There are some discrepancies in the Land Trust Alliance's reporting of the number of acres encumbered by conservation easements held by state and local land trusts. Compare CHANG, *supra* note 3, at 5 (stating that there were 2,316,064 acres so encumbered in 2000), with ALDRICH & WYERMAN, *supra* note 3, at 5 (stating there were 2,514,566 acres so encumbered in 2000). The figures in Graph 2 for 2000, 2005, and 2010 were taken from CHANG, *supra* note 3, at 5, and the figures for 1980, 1988, 1990, 1994, and 1998 were taken from McLaughlin, *supra* note 3, at 21.

<sup>6</sup> CHANG, *supra* note 3, at 8.

<sup>7</sup> See Nature Conservancy, Return of Organization Exempt from Income Tax (Form 990) (Feb. 9, 2012), available at [http://www.nature.org/media/annualreport/irs\\_form990\\_](http://www.nature.org/media/annualreport/irs_form990_)

**Graph 2**  
**Acres Encumbered**  
**State & Local Land Trusts**



Graph 3 below provides a more complete picture of the estimated total acres encumbered by conservation easements in the United States. It incorporates data and estimates from the National Conservation Easement Database (NCED), which is gathering data on the number of acres encumbered by state, local, and national land trusts as well as by federal, state, and local government entities.<sup>8</sup> The scale on Graph 3 is different. The darker bars along the horizontal axis indicate the growth in the number of acres encumbered by conservation easements held by state and local land trusts as depicted in Graph 2 above. The middle portion of the bar above 2012 illustrates that, as of September 2012, NCED had gathered data on conservation easements encumbering just over 18 million acres in the United

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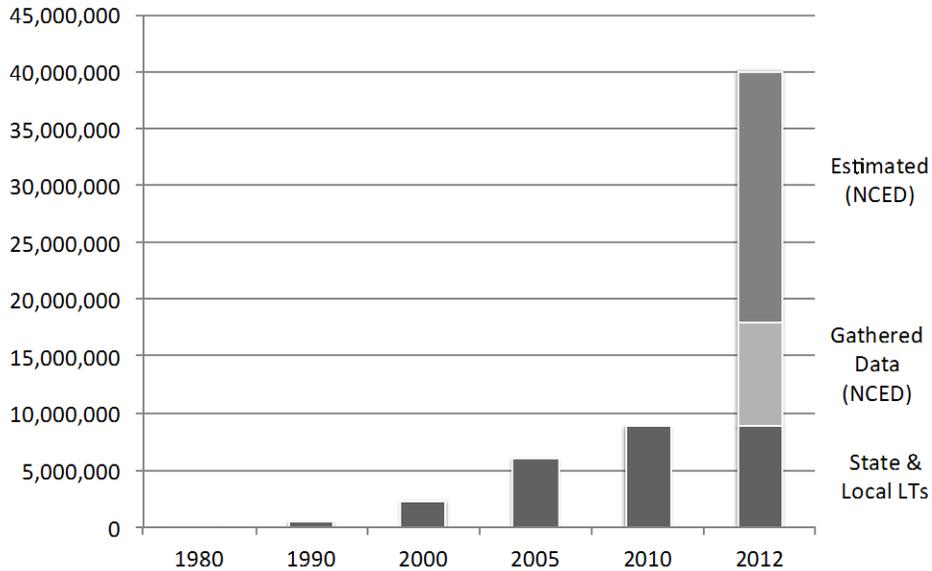
2011.pdf (the organization held 2,300 conservation easements encumbering 2,715,970 acres as of the end of 2010).

<sup>8</sup> See *What is the NCED*, NAT'L CONSERVATION EASEMENT DATABASE, <http://nced.conservationregistry.org/> (last visited June 9, 2013) (describing the NCED's database as the "first national database of conservation easement information, compiling records from land trusts and public agencies throughout the United States").

States.<sup>9</sup> The top portion of the bar above 2012 illustrates that, although it is still in the process of gathering data, NCED estimates there are actually approximately 40 million acres currently encumbered by conservation easements in the United States.<sup>10</sup> Collectively, that is an area more than eighteen times the size of Yellowstone National Park.<sup>11</sup>

**Graph 3**

Total Acres Encumbered in US



II. RELEVANT LAWS

A number of laws impact the creation and long-term administration of conservation easements, including the federal laws authorizing tax incentives for charitable donations of conservation easements, the state conservation easement enabling statutes, and the federal and state laws pertaining to charitable

<sup>9</sup> *NCED At A Glance*, NAT'L CONSERVATION EASEMENT DATABASE, <http://nced.conservationregistry.org> (last visited Feb. 4, 2013) (explaining that 95,448 conservation easements encumbered 18,072,520 acres as of September 25, 2012).

<sup>10</sup> *Id.* ("The NCED provides a comprehensive picture of the estimated 40 million acres of conservation easement lands . . .").

<sup>11</sup> *Yellowstone Fact Sheet*, NAT'L PARK SERV., <http://www.nps.gov/yell/planyourvisit/factsheet.htm> (last visited June 9, 2013) (explaining that the world's first national park consists of 2,221,766 acres).

organizations and the assets such organizations and government entities acquire and hold on behalf of the public.

*A. The Federal Charitable Income Tax Deduction*

The primary federal tax incentive available to property owners who make charitable gifts of conservation easements is the charitable income tax deduction under Internal Revenue Code § 170(h), which was enacted in 1980.<sup>12</sup> Although conservation easement donations were deductible before 1980, Congress imposed substantial new limits on the deduction when it enacted § 170(h) in an attempt to minimize abuses and ensure that the easements would provide benefits to the public sufficient to justify the revenue loss from the deduction.<sup>13</sup> Congress also stated that it intended the deduction to be limited to conservation easements that permanently protect “unique or otherwise significant land areas or historic structures.”<sup>14</sup> In other words, the deduction is not intended to apply broadly to the donation of conservation easements encumbering ordinary lands or structures.<sup>15</sup>

To be eligible for the deduction, a conservation easement must be (i) granted in perpetuity,<sup>16</sup> (ii) to a qualified holder (generally a government entity or publicly supported charity or satellite thereof),<sup>17</sup> (iii) exclusively for one or more of the four conservation purposes enumerated in § 170(h),<sup>18</sup> and (iv) the conservation purpose of the easement must be “protected in perpetuity.”<sup>19</sup> The Treasury Regulations

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<sup>12</sup> Tax Treatment Extension Act of 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3204 (1980) (codified as amended at 26 U.S.C. § 170(h) (2006)). The other federal incentives are the charitable gift tax deduction under I.R.C. § 2522(d), the charitable estate tax deduction under I.R.C. § 2055(f), and the additional estate tax exclusion under I.R.C. § 2031(c). A growing number of states also offer state tax incentives to property owners who make charitable gifts of conservation easements encumbering property within their borders. *See infra* note 59 and accompanying text.

<sup>13</sup> *See* S. Rep. No. 96-1007 (1980), 1980 U.S.C.C.A.N. 6736, at 6738–51. *See generally* STEPHEN J. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* (4th ed. 1997) (describing the history of § 170(h)); Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010) (same).

<sup>14</sup> *See* S. Rep. No. 96-1007 (1980), 1980 U.S.C.C.A.N. 6736, at 6745.

<sup>15</sup> *See* I.R.C. § 170(h)(4) (defining the four conservation purposes for which tax-deductible conservation easements may be donated); S. Rep. No. 96-1007, 1980 U.S.C.C.A.N. 6736, at 6745–48 (explaining the four qualifying conservation purposes).

<sup>16</sup> I.R.C. § 170(h)(2)(C).

<sup>17</sup> *Id.* § 170(h)(1)(B), (h)(3).

<sup>18</sup> *Id.* § 170(h)(1)(C), (h)(4) (providing that the qualifying conservation purposes are public recreation or education, habitat protection, open space protection that yields a significant public benefit, and historic preservation).

<sup>19</sup> *Id.* § 170(h)(5)(A).

interpreting § 170(h) contain numerous additional detailed requirements, many of which were drawn directly from the legislative history.<sup>20</sup> The protected in perpetuity requirement requires satisfaction of the eligible donee,<sup>21</sup> restriction on transfer,<sup>22</sup> no inconsistent use,<sup>23</sup> general enforceable in perpetuity,<sup>24</sup> mortgage subordination,<sup>25</sup> mining restrictions,<sup>26</sup> baseline documentation,<sup>27</sup> donee notice,<sup>28</sup> donee access,<sup>29</sup> donee enforcement,<sup>30</sup> extinguishment,<sup>31</sup> and division of proceeds requirements.<sup>32</sup>

The extinguishment and division of proceeds requirements were included in the Treasury Regulations because the Treasury Department recognized that changed conditions might, in some cases, make continued use of the subject property for conservation or historic preservation purposes impossible or impractical.<sup>33</sup> The Treasury Regulations provide that, in such event, the conservation purpose of the easement will nonetheless be treated as “protected in

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<sup>20</sup> See Treas. Reg. § 1.170A-14 (2012); S. Rep. No. 96-1007, 1980 U.S.C.C.A.N. 6736, at 6745–51.

<sup>21</sup> Treas. Reg. § 1.170A-14(c)(1).

<sup>22</sup> *Id.* § 1.170A-14(c)(2).

<sup>23</sup> *Id.* § 1.170A-14(e)(2), (3).

<sup>24</sup> *Id.* § 1.170A-14(g)(1).

<sup>25</sup> *Id.* § 1.170A-14(g)(2).

<sup>26</sup> I.R.C. § 170(h)(5), (6) (2006); Treas. Reg. § 1.170A-14(g)(4).

<sup>27</sup> Treas. Reg. § 1.170A-14(g)(5)(i).

<sup>28</sup> *Id.* § 1.170A-14(g)(5)(ii).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* § 1.170A-14(g)(6)(i).

<sup>32</sup> *Id.* § 1.170A-14(g)(6)(ii). For a detailed discussion of the perpetuity requirements of § 170(h) and the Treasury Regulations, see 4-34A POWELL ON REAL PROPERTY § 34A.04[4][b], [c], and [f].

<sup>33</sup> In his treatise on § 170(h), Stephen J. Small, one of the principal drafters of the regulations, posed the question, “[W]hat can be done when natural or economic conditions change and the once-important conservation interests associated with property subject to an easement no longer exist?” SMALL, *supra* note 13, at § 14.02, 14-3. He answers that question in his explanation of the extinguishment regulation as follows:

[The extinguishment regulation] represents a recognition by the Service that perpetual may not really be perpetual . . . .

[There may be a] subsequent change or destruction of the conservation interests that were the subject of the donation . . . .

[T]his section of the Regulations makes it clear to the donee organization that in such a situation the restrictions can be extinguished by judicial proceedings and the property can be sold or exchanged, as long as the subsequent application of proceeds follows the rules of [the division of proceeds regulation].

*Id.* § 16.03, 16-4.

perpetuity” if the easement is extinguished in a judicial proceeding and the holder is entitled to a minimum proportionate share of the proceeds from the subsequent sale or exchange of the property to be used “in a manner consistent with the conservation purposes of the original contribution” (i.e., to replace lost conservation values).<sup>34</sup>

The first panel of speakers at the conference addressed § 170(h). Theodore S. Sims, Professor of Law at Boston University School of Law, began the panel with a discussion of the Treasury Department’s concerns about the § 170(h) deduction at the time of its enactment in 1980. Professor Sims worked for the Treasury Department in the late 1970s and helped to draft the Treasury Department’s congressional hearing testimony regarding § 170(h). He concluded that the concerns the Treasury Department articulated thirty years ago about the deduction were well founded. He noted that, as predicted, enforcing compliance with § 170(h) has been a very costly, time consuming, and difficult task for the Internal Revenue Service (IRS); ensuring the restrictions are enforced in perpetuity raises a host of difficult issues; and valuation problems are particularly acute.

Karin Gross, Supervisory Attorney in the IRS Office of Chief Counsel who specializes in the charitable contribution deduction, then detailed the IRS’s approach over the last decade to dealing with abuses and trying to establish precedent consistent with congressional intent in the § 170(h) deduction context. Ms. Gross confirmed that it is very labor intensive for the IRS to determine whether deductions claimed for conservation easement donations are proper, but concluded by noting that the IRS is trying to efficiently and fairly enforce the law so that conservation can continue for generations.

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<sup>34</sup> Treas. Reg. § 1.170A-14(g)(6). See *Carpenter v. Comm’r*, 106 T.C.M. (CCH) 215 (2013), *denying reconsideration and supplementing* 103 T.C.M. (CCH) 1001 (2012) (holding that tax-deductible easements must be extinguishable only in accordance with the requirements of Treasury Regulation § 1.170A-14(g)(6)(i)—in a judicial proceeding upon a finding that continued use of the property for conservation purposes has become impossible or impractical); *Mitchell v. Comm’r*, T.C. Memo. 2013-204, *denying reconsideration and supplementing* 138 T.C. 324 (2012) (explaining that the specific provisions of Treasury Regulation § 1.170A-14(g), including paragraph (g)(6), “are mandatory and may not be ignored”); see also *Kaufman v. Comm’r*, 136 T.C. 294, 306–07 (2011), *vacated and remanded in part on other grounds*, *Kaufman v. Comm’r*, 687 F.3d 21 (1st Cir. 2012). In *Kaufman*, the Tax Court explained,

The drafters of section 1.170A-14, Income Tax Regs., undoubtedly understood the difficulties (if not impossibility) under State common or statutory law of making a conservation restriction perpetual . . . . They understood that forever is a long time and provided what appears to be a regulatory version of cy pres to deal with unexpected changes that make the continued use of the property for conservation purposes impossible or impractical.

*Kaufman*, 136 T.C. at 306–07.

Roger Colinvaux, Associate Professor of Law at Catholic University's Columbus School of Law and former counsel to the Joint Committee on Taxation, rounded out the first panel with a discussion of the exceptional history and exceptional enforcement challenges associated with the § 170(h) deduction. He also discussed various proposed reforms, including conversion of the deduction to a tax credit or a direct spending program, changing the method of valuing easements, requiring that all conservation easements be pre-certified or consistent with a governmental conservation policy,<sup>35</sup> and revocation of the tax-exempt status of, or imposition of excise taxes on, donees that fail to properly administer and enforce the easements they hold.

### *B. The State Conservation Easement Enabling Statutes*

Land use restrictions held in gross were generally disfavored under the common law because they reduce the marketability of land.<sup>36</sup> Because most conservation easements are held in gross, state conservation easement “enabling” statutes were deemed necessary to sweep away the common law impediments to the long-term validity of such in gross restrictions.<sup>37</sup> States, however, were generally willing to relax the rules in this context only with respect to conservation easements that are (i) created for designated conservation purposes intended to benefit the public and (ii) granted to entities that are organized and operated to benefit the public (i.e., generally government entities and charitable organizations).<sup>38</sup> In other words, States were willing to relax the rules in this

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<sup>35</sup> Currently, only one of the four conservation purposes for which a tax-deductible conservation easement may be granted—the preservation of open space—requires that the easement be consistent with a governmental conservation policy, and only then if it is not a scenic easement. *See* I.R.C. § 170(h)(4)(iii)(II) (2006).

<sup>36</sup> *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 cmt. a (2000) (noting the rule prohibiting equitable enforcement of restrictive-covenant benefits held in gross, and doubt regarding whether negative easements for previously unrecognized purposes were valid or transferrable); GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 9.15(a), at 378–80 (2d ed. 2004) (discussing various policy concerns associated with enforcement of in gross land use restrictions in the private context).

<sup>37</sup> *See, e.g.*, UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 168 (2007) (noting the Act’s “primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments”); *id.* § 4 (eliminating the potential common law impediments to the validity of easements that comply with the conditions in the Act).

<sup>38</sup> *See id.* at 167–68 (explaining that the Act sweeps away the common law impediments, but only if the conditions of the Act are complied with, including § 1(1), protected transactions serve defined protective purposes, and § 1(2), protected interest must

context because conservation easements, unlike private servitudes, are created to benefit the public.<sup>39</sup>

The second panel of speakers at the conference discussed the state enabling statutes. K. King Burnett began by describing the purpose and provisions of the Uniform Conservation Easement Act (UCEA), which is a model enabling statute that was approved by the Uniform Law Commission in 1981 and has since been adopted in some form in almost half the states and the District of Columbia.<sup>40</sup> Mr. Burnett, who was a member of the drafting committee for the UCEA, discussed the formation and membership of that committee, the relatively narrow purpose of the UCEA, the issues the UCEA specifically does not address, and the state laws the UCEA expressly leaves intact, including the laws governing the enforcement of charitable trusts (in some jurisdictions referred to as restricted charitable gifts) and state attorney general rights to ensure the proper administration of charitable gifts and charitable trusts on behalf of the public.

Michael Allan Wolf, Professor of Law at the University of Florida Levin College of Law and editor of the often-cited *Powell on Real Property* treatise, next discussed the unanticipated and unfortunate problems posed by labeling these hybrids of property, trust, and tax law as “conservation easements.” He noted, for example, that courts may be inclined to apply traditional common law real property rules, such as the doctrine of merger, to extinguish these “easements” even though doing so would be contrary to the public interest. Similarly, courts may be disinclined to apply equitable rules, such as the doctrine of *cy pres*, to allow these “easements” to adapt to changing conditions even though doing so would be in the public interest. He recommended that the perpetual conservation easement be given a new label—“perpetual conservation restriction” (the term used to describe these instruments in federal tax law)—to disentangle these instruments from the potentially confusing and problematic common-law baggage that accompanies traditional easements.

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be in a “holder” that is either a governmental body or a charitable organization having an interest in the subject matter).

<sup>39</sup> See, e.g., *id.* at 168 (“[C]ontrols in the Act and in other state and federal legislation afford further assurance that the Act will serve the public interest.”); CAL. CIV. CODE § 815 (West Supp. 2013) (“The Legislature . . . finds and declares it to be the public policy and in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.”); 32 PA. CONS. STAT. ANN. § 5052 (West Supp. 2012) (“The General Assembly recognizes the importance and significant public and economic benefit of conservation and preservation easements in its ongoing efforts to protect, conserve or manage the use of the natural, historic, agricultural, open space and scenic resources of this Commonwealth.”).

<sup>40</sup> See generally UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. at 168; *Legislative Fact Sheet—Conservation Easement Act*, UNIF. LAW COMM’N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited Nov. 24, 2013).

The second panel concluded with Jeffrey Pidot's discussion of the 2007 reforms to Maine's conservation easement enabling statute. As former (retired) Chief of the Natural Resources Division of the Maine Attorney General's Office, Mr. Pidot played a key role in the enactment of those reforms. He explained that the Maine statute was revised in 2007 to, among other things, (i) mandate that all conservation easements be registered with the state; (ii) require that conservation easement termination, or any amendment that materially detracts from the conservation values intended for protection, be approved by a court in an action in which the attorney general is made a party to represent the public interest; (iii) require that any increase in the value of the landowner's estate caused by an amendment or termination be paid over to the easement holder to be used to protect comparable land; and (iv) expressly grant the State Attorney General direct enforcement rights in certain circumstances.<sup>41</sup> Mr. Pidot also conducted a follow-up survey to assess the reforms and concluded that, while there still is room for improvement, the reforms have been successful and are strongly supported by the state's conservation community.<sup>42</sup>

### *C. Federal and State Laws Pertaining to Charities and Assets Held for the Benefit of the Public*

The federal and state laws pertaining to charitable organizations and the assets such organizations and government entities hold for charitable purposes on behalf of the public also impact the creation and long-term administration of conservation easements. These laws are relevant because land trusts are charitable organizations and land trusts and government entities solicit and hold conservation easements for charitable purposes on behalf of the public. These laws address a fundamental question that is relevant to the charitable sector as a whole: given that charitable organizations and government entities serve as guardians on behalf of the public of charitable assets worth trillions of dollars, who guards the guardians?<sup>43</sup> The third and fourth panels at the conference addressed this question, as well as the subsidiary question, why do the guardians need guarding?

To make these issues less abstract, the author began the third panel by describing situations in which the holder of a perpetual conservation easement

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<sup>41</sup> See ME. REV. STAT. ANN. tit. 33, §§ 476 to 479-C (2007).

<sup>42</sup> See Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROBS. 1, 25–27 (2011).

<sup>43</sup> See, e.g., *Size and Financial Scope of the Nonprofit Sector, 1999–2009*, URBAN INST., <http://www.urban.org/taxandcharities/Size-and-Financial-Scope-of-the-Nonprofit-Sector.cfm> (reporting that nonprofits held assets valued at 4.3 trillion dollars as of 2009) (last visited June 15, 2013); Dana Brakman Reiser & Evelyn Brody, *Who Guards the Guardians?: Monitoring and Enforcement of Charity Governance*, 80 CHI.-KENT L. REV. 543, 557 (2005) (“Politicians, the press, and the public are demanding that charities must not only serve their missions, but also be more accountable—and they are right.”).

agreed to substantially modify or terminate the easement, some member or members of the public objected, and the response of the state attorney general and the courts (i.e., the Myrtle Grove controversy, the *Bjork v. Draper* case, the Wal-Mart controversy, and the *Salzburg v. Dowd* case).<sup>44</sup> She also explained that it is difficult to determine the extent to which conservation easements are being improperly modified or terminated because such activities are not transparent, the data currently gathered on the issue is of limited usefulness,<sup>45</sup> and there is

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<sup>44</sup> See Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2, Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1, 28–30 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1888689](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888689) (discussing the Myrtle Grove controversy, in which the Maryland Attorney General filed suit objecting to a land trust’s proposed amendment of a tax-deductible conservation easement to permit a seven-lot upscale development on the protected property; the suit settled with the easement remaining intact and the parties agreeing, among other things, that subdivision of the property is prohibited, any action contrary to the express terms and stated purposes of the easement is prohibited, and amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the Attorney General is not required for actions permitted under the terms of the easement.); *id.* at 30–31 (discussing *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), in which an Illinois Appellate Court invalidated a “swap” and certain amendments that a land trust holding a conservation easement agreed to at the request of new owners of the protected land, explaining that to allow the changes would render meaningless the provisions in the easement specifying its conservation purpose, prohibiting structures and improvements on the protected grounds, and prohibiting the easement’s termination or extinguishment, in whole or in part, without court approval); *id.* at 36–37 (discussing the Wal-Mart controversy, in which two nonprofit organizations and a private citizen sued the owner of easement-protected land (a development corporation) and the holder of the easement (the city of Chattanooga) because they had permitted construction on the land of a four-lane access road to an adjacent Wal-Mart in violation of the easement’s terms; the case settled with the development corporation agreeing to convey a replacement parcel of land and \$500,000 to the plaintiffs to be used for similar conservation purposes and to pay the plaintiffs’ legal fees); *id.* at 39–42 (discussing *Salzburg v. Dowd*, in which the Wyoming Attorney General filed suit objecting to a Wyoming County’s agreement to terminate a tax-deductible easement at the request of new owners of the land; the suit settled with the termination being declared null and void and the easement remaining intact with minor court-approved amendments).

<sup>45</sup> Since 2006, land trusts have been required to report and explain their transfer, release, modification, or termination activities annually on Schedule D to IRS Form 990. See IRS, DEP’T OF THE TREASURY, SCHEDULE D: IRS FORM 990 (2012), available at <http://www.irs.gov/pub/irs-pdf/f990sd.pdf> (2012); IRS, DEP’T OF THE TREASURY, INSTRUCTIONS FOR SCHEDULE D: FORM 990 (2012), available at <http://www.irs.gov/pub/irs-pdf/i990sd.pdf> (2012) [hereinafter INSTRUCTIONS FOR SCHEDULE D]. Such self-reporting is, however, spotty and uneven. For example, some land trusts leave the questions blank, some report that they engaged in such activities but fail to explain them, and some use confusing terminology (such as “reconfigurations”) that may intentionally or inadvertently

disagreement regarding what constitutes an improper modification or termination.<sup>46</sup> The author concluded by describing two recent cases in which state attorneys general have successfully defended conservation easements held by state agencies.<sup>47</sup> She noted that, collectively, these cases and controversies illustrate that state attorneys general play a key role in defending conservation easements on behalf of the public from violation and improper modification or termination.

Marion R. Fremont-Smith, Senior Research Fellow at the Hauser Center for Nonprofit Organizations of the Kennedy School of Government at Harvard University, then laid the groundwork for understanding the federal and state laws pertaining to charitable organizations and the assets such organizations and government entities hold for charitable purposes on behalf of the public.<sup>48</sup> She discussed the long history of charities, the development of the laws in this area in England and then the United States, and the general roles played by the IRS and state attorneys general in overseeing the operation of charities and their administration of charitable assets in the United States. In her seminal treatise, *Governing Nonprofit Organizations: Federal and State Law and Regulation*,<sup>49</sup> she describes this rich history in more detail, as well as the need, evident from almost the first emergence of charities as legal entities, for the supervision of those entrusted with charitable assets to help prevent negligence, maladministration, and diversion of such assets to purposes contrary to those specified by the donors.

Melanie B. Leslie, Professor of Law at Cardozo Law School and an expert on fiduciary duties in the trust, corporate, and nonprofit contexts, rounded out the third panel. She provided an overview of the fiduciary duties of a charity's board

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obscure the true nature of the activities. Also, techniques such as temporary permitted use agreements, licenses, and discretionary approvals may be used to permit uses or accommodate changes without formally amending an easement, making it even more difficult to determine the extent to which these instruments (or their individual restrictions) are being effectively modified. Moreover, federal, state, and local government entities, which hold thousands of conservation easements, are not required to report on their transfer, release, modification, or termination activities because they do not file Form 990s, and land trusts that file IRS Form 990 EZ are also not required to so report.

<sup>46</sup> See *infra* Part IV.

<sup>47</sup> See *Wooster v. Dept. of Fish & Game*, 211 Cal. App. 4th 1020, 151 Cal. Rptr. 3d 340 (Ct. App. 2012) (holding conservation easement prohibiting hunting valid despite California Department of Fish and Game's failure to post property as specified in easement); *New Jersey v. Quaker Valley Farms*, No. HNT-C-14007-08, 2012 N.J. Super LEXIS 1987 (N.J. Super Ct. Ch. Div. Aug. 8, 2012) (holding landowner liable for destroying at least fourteen acres of farmland in violation of conservation easement and state agricultural preservation laws).

<sup>48</sup> See *Marion R. Fremont-Smith*, PANEL ON THE NONPROFIT SECTOR, [http://www.nonprofitpanel.org/about/participants/eag/fremontsmith\\_marion\\_r/index.html](http://www.nonprofitpanel.org/about/participants/eag/fremontsmith_marion_r/index.html) (last visited June 15, 2013).

<sup>49</sup> MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW REGULATION* (2004).

of directors or board of trustees, and the factors that can cause even well intentioned fiduciaries to stray from a charity's mission.

The fourth panel then addressed the sometimes misunderstood role that state attorney general offices play in both assisting and regulating charities. Mark A. Pacella, Chief Deputy Attorney General in the Charitable Trusts and Organizations Section of the Pennsylvania Office of the Attorney General, began by providing a general overview of the Attorney General's role in supervising charities and protecting charitable assets on behalf of the public.<sup>50</sup> He noted that the attorney general's office performs an important educational and facilitative as well as a regulatory role in the charitable sector; that much of the work of the office with regard to charities is performed outside the litigation context, in large part to protect charities; and that attorney general representatives from the various states work together and exchange information. He also briefly noted the limited interaction between state attorney general offices and the IRS.

Terry M. Knowles, Assistant Director of the Charitable Trusts Unit of the Department of Attorney General of New Hampshire, then described the guidelines regarding conservation easement amendment and termination that the New Hampshire Attorney General's office developed in collaboration with the New Hampshire land trust community.<sup>51</sup> She also described the office's on-the-ground experience working with land trusts in New Hampshire on amendment and termination issues, using specific examples.

Darla Guenzler, Executive Director of the California Council of Land Trusts and leader of the Council's law, policy, communications, education, and research programs, concluded panel four. She discussed the challenges land trusts face in administering conservation easements over the long term, as well as the Council's work with the California Attorney General's Office and others to develop a statewide policy with respect to the amendment and termination of conservation easements.

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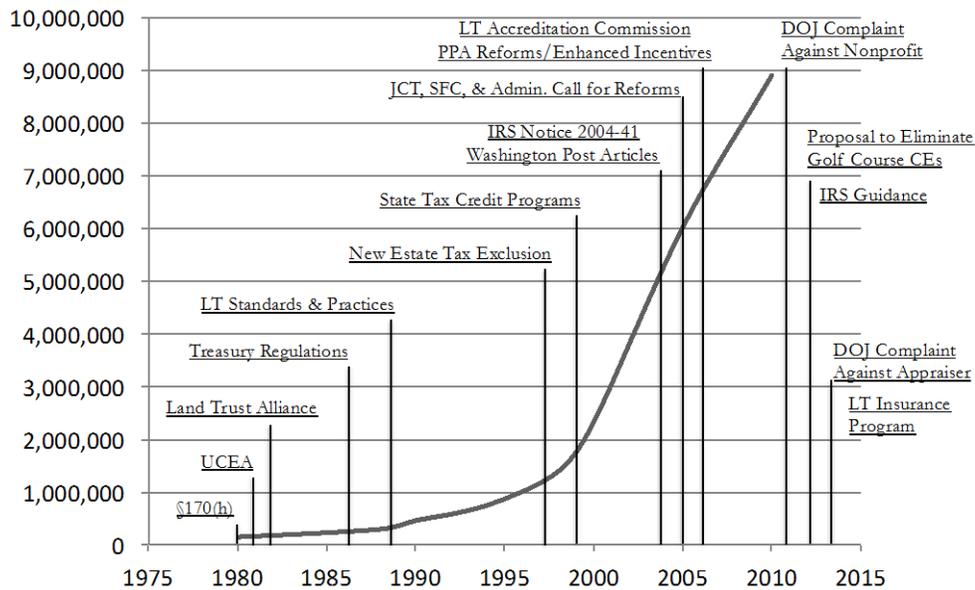
<sup>50</sup> See *Mark A. Pacella*, COLUM. L., <http://web.law.columbia.edu/sites/default/files/microsites/attorneys-general/Bio%20-%20-%20Pacella,%20Mark.pdf> (last visited Mar. 31, 2013). The Charitable Trusts and Organizations Section of the Pennsylvania Office of the Attorney General performs the office's supervisory role over property committed to charitable purposes. Among the office's more notable cases are those involving the Milton Hershey School Trust, the Barnes Foundation, and the Allegheny Health, Education and Research Foundation.

<sup>51</sup> See PAUL DOSCHER ET. AL., CTR. FOR LAND CONSERVATION ASSISTANCE, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS (2010), available at <http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>.

III. TIMELINE OF DEVELOPMENTS

A timeline of developments in the conservation easement context provides a useful summary of some of the historical underpinnings of the tool, the problems that have arisen, and proposals for reform. Graph 4 below depicts some of the more important developments against the backdrop of the growth in the number of acres encumbered by conservation easements held by state and local land trusts.

**Graph 4**  
Acres Encumbered  
State & Local Land Trusts



The bottom left-hand side of the graph above indicates that § 170(h), the provision authorizing a federal charitable income tax deduction for donations of qualifying conservation easements, was enacted in 1980.<sup>52</sup> One year later, in 1981, the Uniform Law Commission approved the Uniform Conservation Easement Act.<sup>53</sup> In 1982, the Land Trust Alliance, then known as the Land Trust Exchange, was created and provided a means by which the then over 400 land trusts in the

<sup>52</sup> See *supra* note 12 and accompanying text.

<sup>53</sup> See *supra* note 40 and accompanying text.

U.S. could organize and share information and expertise.<sup>54</sup> In 1986, the Treasury Department published final regulations interpreting § 170(h).<sup>55</sup> Those regulations, which are based, in large part, on the legislative history of § 170(h), contain many detailed explanations and examples of how to satisfy the requirements of § 170(h).<sup>56</sup>

In 1989, the Land Trust Alliance distributed its first iteration of the *Land Trust Standards & Practices*, which are voluntary ethical and technical guidelines (as opposed to legal requirements) for the responsible operation of a land trust.<sup>57</sup>

In 1997, after lobbying by land trusts, Congress enacted an additional estate tax incentive for the donation of conservation easements—Internal Revenue Code § 2031(c).<sup>58</sup> Two years later, in 1999, Colorado, Virginia, Delaware, and Connecticut enacted state tax credit programs, which provide landowners with additional generous state tax incentives to donate easements.<sup>59</sup>

Everything appeared to be going along swimmingly, with more than 3.6 million acres being encumbered by conservation easements held by state and local land trusts from 1998 through 2003.<sup>60</sup> Then in 2003 and 2004, the *Washington Post* published a series of articles alleging abuses.<sup>61</sup> The articles described, among

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<sup>54</sup> See JEAN HOCKER, LAND TRUST ALLIANCE, *THE LAND TRUST ALLIANCE JOURNEY: 30 YEARS OF CONSERVATION SUCCESS 2* (2012), available at <http://www.landtrustalliance.org/about/who-we-are/full-timeline>.

<sup>55</sup> Treas. Reg. § 1.170A-14 (2013).

<sup>56</sup> See *id.*; S. REP. NO. 96-1007 (1980), 1980 U.S.C.C.A.N. 6736, at 6745–51.

<sup>57</sup> HOCKER, *supra* note 54, at 7. For the current version of the *Land Trust Standards & Practices*, see LAND TRUST ALLIANCE, *LAND TRUST STANDARDS & PRACTICES* (2004), available at <https://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>. The *Land Trust Standards & Practices* reflect the views of the Land Trust Alliance's land trust members and those members do not always agree on best practices or the interpretation of relevant legal requirements.

<sup>58</sup> Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 508, 111 Stat. 787 (1997). The donation of a qualifying conservation easement removes the value of the easement from the landowner's estate for estate tax purposes, and § 2031(c), if applicable, allows for the exclusion of up to an additional 40% of the value of the land subject to the easement from the landowner's estate for estate tax purposes.

<sup>59</sup> See HOCKER, *supra* note 54, at 13; see also Jeffrey O. Sundberg & Chao Yang, *Do Additional Conservation Easement Credits Create Additional Value?*, 66 STATE TAX NOTES, December 3, 2012, 723, 728 (“As of 2011, 15 states offered tax credits as an incentive for easement donations. The programs typically provide taxpayers with credits equivalent to a stated fraction of the fair market value of the easement.”).

<sup>60</sup> LAND TRUST ALLIANCE, *supra* note 3 (“Acreage protected by conservation easements has increased 266 percent since 1998, from 1,385,000 acres to 5,067,929 acres in 2003.”) (emphasis omitted).

<sup>61</sup> See David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST, May 4, 2003, at A1; Joe Stephens, *Tax Break Turns Into Big Business*, WASH. POST, Dec. 13, 2004, at A1; Joe Stephens, *For Owners of Upscale Homes, Loophole Pays; Pledging to Retain the Facade Affords a Charitable Deduction*, WASH.

other things, transactions involving “wildly exaggerated” easement appraisals and property owners who received “shocking” tax deductions for donating conservation easements encumbering golf course fairways, undevelopable lands, and buildings already subject to local historic preservation restrictions. The articles raised the ire of Congress, and the Senate Finance Committee launched an investigation of the Nature Conservancy, the nation’s largest land trust.<sup>62</sup> The articles also got the attention of the IRS, which in 2004 issued a Notice stating that it was aware of abuses and intended to disallow deductions, impose penalties, and revoke the tax exempt status of nonprofit organizations when appropriate.<sup>63</sup> The IRS also formed a cross-functional team “to attack all aspects of the problem of conservation easements,” began to substantially increase its audit and litigation activity, and revised certain of its forms to gather more information on conservation easement donations and the land trusts that accept them.<sup>64</sup>

In 2005, the Joint Committee on Taxation, the Senate Finance Committee, and the Bush Administration proposed a variety of reforms, including (i)

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POST, Dec. 12, 2004, at A1; Joe Stephens, *Local Laws Already Bar Alterations; Intervention by Trusts Is Rare for Preservation*, WASH. POST, Dec. 12, 2004, at A15; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST, Dec. 21, 2003, at A1; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, WASH. POST, May 5, 2003, at A1.

<sup>62</sup> See STAFF OF S. COMM. ON FIN., 109TH CONG., REP. OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY (VOLUME I), at intro. (Comm. Print 2005), available at <http://www.finance.senate.gov/imo/media/doc/tnccontents.pdf> (“Senator Charles Grassley (R-IA) and Senator Max Baucus (D-MT), Chairman and Ranking Member of the Senate Committee on Finance . . . , wrote to The Nature Conservancy [on July 16, 2003], beginning an investigation by the Staff of the Senate Finance Committee [of the organization].”).

<sup>63</sup> IRS Notice 2004-41, 2004-28 C.B. 31 (2004).

<sup>64</sup> See *Hearing on the Tax Code and Land Conservation Before the S. Comm. on Finance*, 110th Cong. (2005) (testimony of Steven T. Miller, Comm’r, Tax-Exempt and Gov’t Entities Div., Internal Revenue Serv.), available at <http://www.irs.gov/pub/irs-tege/smtest060805.pdf>; see also, e.g., IRS, DEP’T OF TREASURY, INSTRUCTIONS FOR FORM 8283 (2012), available at <http://www.irs.gov/pub/irs-pdf/i8283.pdf> (explaining that conservation easement donor must attach a statement that (i) identifies the conservation purposes furthered by the donation; (ii) shows, if before and after valuation is used, the fair market value of the underlying property before and after the gift; (iii) states whether the donor made the donation to get a permit or other approval from a local or other governing authority and whether the donation was required by a contract; and (iv) describes any interest the donor or a related person has in other property nearby); INSTRUCTIONS FOR SCHEDULE D, *supra* note 45 (land trusts must report, among other things, the total number of conservation easements held at the end of the tax year, the acreage restricted by such easements, and the number of conservation easements released, modified, transferred, or extinguished during the tax year, along with an explanation of the changes).

eliminating the § 170(h) deduction with respect to easements encumbering property on which the donor maintains a personal residence, (ii) limiting the deduction for certain small easement donations, (iii) implementation of an accreditation program for land trusts, (iv) IRS issuance of guidance regarding how a conservation organization can establish that it is appropriately monitoring the easements it holds, and (v) imposition of significant penalties on a charity that removes, fails to enforce, or inappropriately modifies or transfers a conservation easement without ensuring that the conservation purposes will be protected in perpetuity.<sup>65</sup>

One year later, Congress enacted the Pension Protection Act of 2006, which imposed new requirements on the § 170(h) deduction as it relates to façade easement donations, provided statutory definitions of the terms “qualified appraiser” and “qualified appraisal,” and lowered the thresholds for accuracy-related penalties.<sup>66</sup> The Pension Protection Act also temporarily increased the tax benefits offered to conservation easement donors by making the percentage limitations on the resulting charitable deductions more favorable.<sup>67</sup> The enhanced incentives, which, among other things, allow farmers and ranchers to potentially eliminate their income tax liability for a period of up to sixteen years, have been repeatedly temporarily extended, most recently as part of the American Taxpayer Relief Act of 2012.<sup>68</sup>

Also in 2006, as part of its efforts to respond to reports of abuse, the Land Trust Alliance created the Land Trust Accreditation Commission, which is a supporting organization of the Alliance that consists of several staff members and a board of volunteer commissioners from the conservation community who assess whether land trusts are carrying out certain practices from the *Land Trust Standards & Practices*.<sup>69</sup> As of February 2013, the Commission reported that 201 land trusts (or approximately 12% of the 1,723 land trusts extant as of 2010) had

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<sup>65</sup> See *Options to Improve Tax Compliance and Reform Tax Expenditures*, JOINT COMM. ON TAXATION 281 (Jan. 27, 2005), available at <http://www.jct.gov/publications.html?func=showdown&id=1524> (click on “Download” to retrieve file); STAFF OF S. COMM. ON FIN, *supra* note 62, at executive summary, 10–11; JOINT COMM. OF TAXATION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2006 BUDGET PROPOSAL 239–41 (2005), available at <https://www.jct.gov/publications.html?func=startdown&id=1523>.

<sup>66</sup> Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 1213, 1219, 120 Stat. 780 (2006).

<sup>67</sup> *Id.* § 1206. For an explanation of these changes, see *Technical Explanation Of H.R. 4, The “Pension Protection Act of 2006,”* JOINT COMM. ON TAXATION (Aug. 3, 2006), available at <https://www.jct.gov/publications.html?func=showdown&id=1483>.

<sup>68</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 206, 126 Stat. 2313 (2013).

<sup>69</sup> See *FAQs About the Commission*, LAND TRUST ACCREDITATION COMM’N, <http://www.landtrustaccreditation.org/why-accreditation-matters/faqs?start=2> (last visited Oct. 16, 2013).

been accredited.<sup>70</sup> However, the Commission is a self-regulatory body, with the standards that must be met being set by the regulated industry itself.<sup>71</sup>

In June of 2011, the Department of Justice filed a complaint in a United States district court against the Trust for Architectural Easements (TAE) alleging abusive practices relating to the solicitation, acceptance, and administration of façade easement donations.<sup>72</sup> Although TAE did not admit the allegations in the complaint, in July of 2011, the court issued a permanent injunction against TAE settling the case.<sup>73</sup> TAE was also ordered to pay an independent monitor for two years to ensure that it complies with the injunction.<sup>74</sup>

In 2012, the Administration proposed to eliminate the deduction for contributions of conservation easements on property that is, or is intended to be, used as a golf course.<sup>75</sup> The Joint Committee on Taxation explained that recent court decisions have upheld large deductions for contributions of easements preserving recreational amenities, including golf courses, surrounded by upscale,

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<sup>70</sup> See *Twenty-One Additional Land Trusts Achieve Accreditation*, LAND TRUST ACCREDITATION COMM'N (Feb. 19, 2013), <http://www.landtrustaccreditation.org/newsroom/press-releases/351-twenty-one-additional-land-trusts-achieve-accreditation>; see also CHANG, *supra* note 3, at 8 (reporting 1,669 state and local and 24 national land trusts extant in 2010).

<sup>71</sup> See *supra* note 57.

<sup>72</sup> Complaint for Permanent Injunction and Other Relief, *United States v. McClain*, No. 11-1087 (D.D.C. June 14, 2011). In *McClain*, the complaint alleged, among other things, that TAE made false and fraudulent statements to prospective donors about the available tax benefits, steered donors to appraisers who had been coached by TAE to go along with its questionable practices, helped donors to claim deductions before donations were final, and allowed donors to terminate easements already granted. See Janet Novack, *Feds Sue Trust Over Historic Easement Tax Breaks*, FORBES (June 16, 2011), <http://www.forbes.com/sites/janetnovack/2011/06/16/feds-sue-trust-over-historic-easement-tax-breaks/>.

<sup>73</sup> *United States v. McClain*, No. 11-1087 (D.D.C. July 15, 2011) (issuing stipulated order of permanent injunction). The injunction permanently prohibits TAE from, among other things, representing to prospective donors and others that the IRS has established a “safe harbor” for the value of a donated façade easement, participating in the appraisal process for a conservation easement in any regard, and accepting easements that lack a conservation purpose or do not satisfy the protected-in-perpetuity requirement of § 170(h). *Id.* See also Joe Stephens, *Judge Bars D.C. Charity From Promoting ‘Façade Easement’ Tax Deductions*, WASH. POST (July 19, 2011), [http://articles.washingtonpost.com/2011-07-19/local/35266819\\_1\\_tax-deductions-property-owners-tax-exempt-status](http://articles.washingtonpost.com/2011-07-19/local/35266819_1_tax-deductions-property-owners-tax-exempt-status).

<sup>74</sup> *McClain*, No. 11-1087; see also Press Release, Dep’t of Justice, D.C. Federal Court Bars Company from Promoting Alleged Tax Scheme Involving Improper Easements on Historic Buildings (July 18, 2011), available at <http://www.justice.gov/opa/pr/2011/July/11-tax-933.html>.

<sup>75</sup> See DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2013 REVENUE PROPOSALS 140 (2012), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf>.

private home sites, and that these contributions raise significant concerns about inflated deductions and lack of benefit to the public.<sup>76</sup> The committee also noted that it is difficult and costly for the IRS to challenge inflated golf course easement deductions because of the difficulty determining both the value of the easement and the value of the return benefits provided to the donor—including indirect benefits, such as the increase in the value of the home sites surrounding the golf course.<sup>77</sup>

The IRS also issued guidance in 2012 regarding the swapping or extinguishment of tax-deductible easements. In an Information Letter dated March 5, 2012, the IRS advised that the contribution of a conservation easement that authorizes swaps other than in accordance with the Treasury Regulations' extinguishment and proceeds requirements will not be eligible for a federal charitable income tax deduction under § 170(h).<sup>78</sup> In another Information Letter dated September 18, 2012, the IRS advised that, while state law may provide a means for extinguishing a conservation easement for state law purposes, the requirements of § 170(h) and the extinguishment and proceeds regulations must nevertheless be satisfied for a contribution to be deductible for federal income tax purposes.<sup>79</sup> In addition, the Instructions to Schedule D for the Form 990, which require nonprofits to annually report and explain any conservation easement transfer, modification, or termination activities, were revised to clarify that an easement is released, extinguished, or terminated "when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property," regardless of the term used to describe the activity (e.g., "swap").<sup>80</sup>

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<sup>76</sup> *Id.* Although no particular case was mentioned, the Joint Committee on Taxation was no doubt referring, in part, to *Kiva Dunes v. Comm'r*, 97 T.C.M. (CCH) 1818 (2009), in which the Tax Court upheld a \$28.6 million charitable income tax deduction for the donation of a conservation easement on a golf course that is part of a gated 163-lot residential resort community located on the Gulf of Mexico in Baldwin County, Alabama.

<sup>77</sup> *Id.*

<sup>78</sup> Information Letter from Karin Goldsmith Gross, Senior Technician Reviewer, IRS (Mar. 5, 2012), available at <http://www.irs.gov/pub/irs-wd/12-0017.pdf>. For case law supporting the IRS's position, see *B.V. Belk v. Comm'r*, 140 T.C. 1 (2013), *reconsideration denied and opinion supplemented in* 105 T.C.M. (CCH) 1878 (2013) (finding that a conservation easement that permits the parties to agree to swaps (referred to as "substitutions"), even though subject to certain limitations, was not eligible for a deduction).

<sup>79</sup> Information Letter from Karin Goldsmith Gross, Senior Technician Reviewer, IRS (Sept. 18, 2012), available at [http://f.datasrvr.com/fr1/513/49712/2013-0014\\_Qualified\\_Conservation\\_Contribution\\_.pdf](http://f.datasrvr.com/fr1/513/49712/2013-0014_Qualified_Conservation_Contribution_.pdf). For case law confirming the IRS's position, see *supra* note 34.

<sup>80</sup> See INSTRUCTIONS FOR SCHEDULE D, *supra* note 45, at 2.

In January 2013, the Department of Justice filed another complaint in a United States district court, this time alleging that an appraiser repeatedly and continually made material and substantive errors, distorted data, and provided misinformation and unsupported personal opinions in his appraisals of façade easements to significantly inflate the value of the easements for federal deduction purposes.<sup>81</sup> The complaint stated that “[t]his sort of abuse of a high-dollar charitable contribution deduction inspires contempt for the system of honest, voluntary income tax reporting.”<sup>82</sup> Although the appraiser, like TAE, did not admit the allegations in the complaint, in February 2013 the court issued an Agreed Order of Permanent Injunction settling the dispute.<sup>83</sup> Among other things, the injunction (i) bars the appraiser and his company from preparing any kind of appraisal report or otherwise participating in the appraisal process for any property relating to federal taxes and (ii) orders the appraiser and his company to provide a list of all clients for whom they prepared appraisal reports for tax purposes on or since November 1, 2009, to United States’ counsel.<sup>84</sup>

In March 2013, the Land Trust Alliance announced the launching of its conservation defense insurance program, Terrafirma.<sup>85</sup> Terrafirma is intended to assist land trusts in defending their conservation easements against violation by property owners and third party trespassers and other challenges.

The IRS’s increased audit activity in the conservation easement context following the *Washington Post* articles also led to a significant increase in the number of cases involving challenges to federal deductions claimed with regard to conservation easement donations. As of February 2013, there were a total of sixty-one such cases. Given that § 170(h) and the Treasury Regulations are effective only for transfers made after December 17, 1980,<sup>86</sup> the sixty-one cases, which are

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<sup>81</sup> Complaint for Permanent Injunction and Other Equitable Relief at 11–24, *United States v. Ehrmann*, No. 1:13-cv-214 (N.D. Ohio Jan. 30, 2013).

<sup>82</sup> *Id.* at 25.

<sup>83</sup> Agreed Order of Permanent Injunction at 1, *United States v. Ehrmann*, No. 1:13-cv-00214-DAP (N.D. Ohio Feb. 12, 2013); *see also* Press Release, Dep’t of Justice, Ohio Fed. Court Bars Appraiser of Historic-Pres. Easements (Feb. 13, 2013), *available at* <http://www.justice.gov/opa/pr/2013/February/13-tax-192.html>.

<sup>84</sup> Agreed Order of Permanent Injunction at 2–4, *United States v. Ehrmann*, No. 1:13-cv-214 (N.D. Ohio Feb. 12, 2013).

<sup>85</sup> *See Welcome to Terrafirma*, TERRAFIRMA, <http://terrafirma.org> (last visited Mar. 31, 2013).

<sup>86</sup> Tax Treatment Extension Act of 1980, Pub. L. 96-541, § 6(d), 94 Stat. 3206 (1980); Treas. Reg. § 1.170A-14(j) (2012). The mortgage subordination, division of proceeds, baseline documentation, and donee notification, access, and enforcement rights requirements apply only to donations made after February 13, 1986. *See* Treas. Reg. § 1.170A-14(g)(2), -14(g)(6)(ii), -14(g)(5)(i), -14(g)(5)(ii). The provision requiring a reduction in amount of the donor’s deduction for any increase in the value of certain property owned by the donor or a related person as a result of the donation applies only to donations made after January 14, 1986. *See id.* § 1.170A-14(h)(3)(i).

listed in Appendix A in order of the date of the donation, are separated into two groups: (i) those involving donations made before the effective date of § 170(h) (the pre-§ 170(h) cases), of which there are eleven; and (ii) those involving donations made after the effective date of § 170(h) (the post-§ 170(h) cases), of which there are fifty.<sup>87</sup> Because substantial changes were made to the deduction provision with the enactment of § 170(h) in 1980, the law in effect on the date of the donation is an important factor to consider in analyzing the relevance or irrelevance of an older case to a current controversy.<sup>88</sup>

Graph 5 below similarly organizes the cases based on the date of the donation involved. As Graph 5 illustrates, just over half of the sixty-one cases (thirty-one) involve donations made from 2000 to 2004, with twenty-five of those cases involving donations made in 2003 and 2004 alone (which, perhaps not coincidentally, are the years in which the *Washington Post* articles were published).<sup>89</sup> The IRS also informally indicated that, as of February 2013, there were approximately 200 additional cases in the litigation pipeline.

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<sup>87</sup> From March 2013 through October 15, 2013, the date on which this Article was finalized for publication, an additional seven cases were decided: *Mountanos v. Comm'r*, 105 T.C.M. (CCH) 1818 (2013); *B.V. Belk v. Comm'r*, 105 T.C.M. (CCH) 1878 (2013), denying reconsideration of and supplementing 140 T.C. 1; *Graev v. Comm'r*, 140 T.C. No. 17; *Pesky v. United States*, No. CIV. 1:101-186, 2013 WL 3457691 (D. Idaho 2013); *Carpenter v. Comm'r*, 106 T.C.M. (CCH) 62 (2013), denying reconsideration of and supplementing 103 T.C.M. (CCH) 1001 (2012); *Mitchell v. Comm'r*, 108 T.C.M. (CCH) 215 (2013), denying reconsideration and supplementing 138 T.C. 24 (2012); *Friedberg v. Comm'r*, 106 T.C.M. (CCH) 360 (2013), supplementing 102 T.C.M. (CCH) 356 (2011). With the exception of the *B.V. Belk*, *Carpenter*, and *Mitchell* supplemental decisions, which are referenced herein in the discussions of the perpetuity requirements, these additional cases are not discussed in this Article.

<sup>88</sup> For example, cases involving interpretation of the pre-§ 170(h) deduction provisions should not be relied upon in interpreting § 170(h)'s new requirements, such as the "protected in perpetuity" requirement and the Treasury Regulation provisions interpreting that requirement, because the new requirements were not at issue in those early cases and some of the new requirements appear to have been adopted specifically to address issues involved in those early cases. In *Commissioner v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011), the D.C. Circuit mistakenly relied on *Stotler v. Commissioner*, 53 T.C.M. (CCH) 973 (1987), in which the Tax Court interpreted the 1979 version of the deduction provision, to interpret § 170(h)'s new "protected in perpetuity" requirement, which was not in effect in 1979 and thus not at issue in *Stotler*. On the other hand, some of the general rules governing valuation discussed in the older cases are still relevant to current controversies.

<sup>89</sup> See *infra* Appendix A.

**Graph 5**

**Charitable Deduction Case Law**

(cases categorized by date of donation)

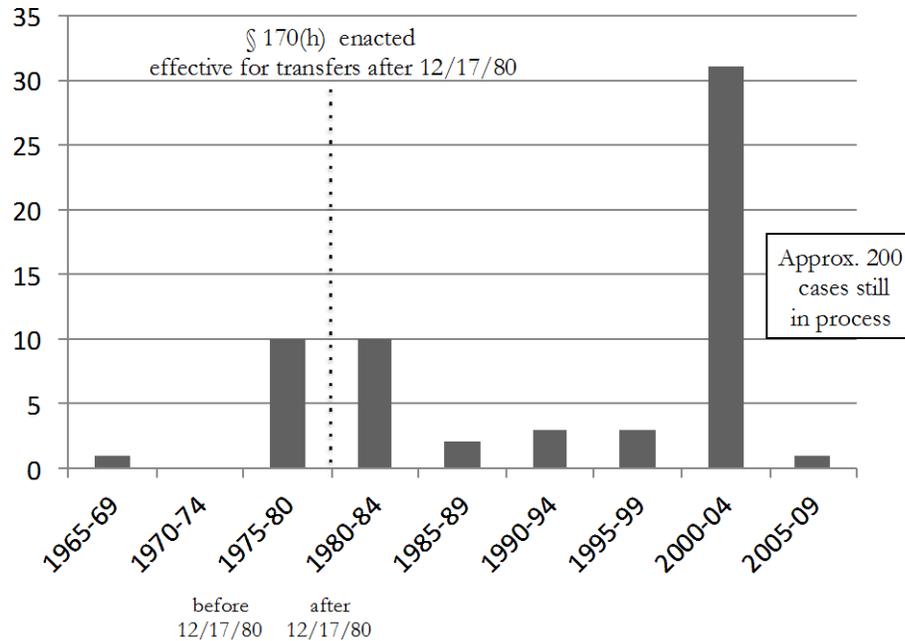


Table 1 below, which lists the thirty-six deduction cases handed down from 2006 through February 2013 in order of the date of the opinion, may provide a better sense of the enormous expenditure of judicial, administrative, and taxpayer resources in this context in recent years.

**Table 1**

<b>Deduction Cases From 2006 Through February 2013 Listed in Order of Date of Opinion</b>	<b>Easement Type</b>
1) <i>Turner v. Commissioner</i> , 126 T.C. 299 (2006)	Land
2) <i>Ney v. Commissioner</i> , T.C. Summ. Op. 2006-154 (2006)	Land
3) <i>Glass v. Commissioner</i> , 471 F.3d 698 (6th Cir. 2006), <i>aff'g</i> , 124 T.C. 258 (2005)	Land
4) <i>Goldsby v. Commissioner</i> , 92 T.C.M. (CCH) 529 (2006)	Land
5) <i>Bruzewicz v. United States</i> , 604 F. Supp. 2d 1197 (N.D. Ill. 2009)	Façade
6) <i>Hughes v. Commissioner</i> , 97 T.C.M. (CCH) 1488 (2009)	Land
7) <i>Kiva Dunes Conservation, LLC v. Commissioner</i> , 97 T.C.M. (CCH) 1818 (2009)	Land
8) <i>Herman v. Commissioner</i> , 98 T.C.M. (CCH) 197 (2009)	Façade

9) <i>Lord v. Commissioner</i> , 100 T.C.M. (CCH) 201 (2010)	Land
10) <i>Evans v. Commissioner</i> , 100 T.C.M. (CCH) 275 (2010)	Façade
11) <i>Schrimsher v. Commissioner</i> , 101 T.C.M. (CCH) 1329 (2011)	Façade
12) <i>Boltar, LLC v. Commissioner</i> , 136 T.C. 326 (2011)	Land
13) <i>1982 East, LLC v. Commissioner</i> , 101 T.C.M. (CCH) 1380 (2011)	Façade
14) <i>Commissioner v. Simmons</i> , 646 F.3d 6 (D.C. Cir. 2011), <i>aff'g Simmons v. Commissioner</i> , 98 T.C.M. (CCH) 57934 (2009)	Façade
15) <i>DiDonato v. Commissioner</i> , 101 T.C.M. (CCH) 1739 (2011)	Land
16) <i>Friedberg v. Commissioner</i> , 102 T.C.M. (CCH) 356 (2011)	Façade
17) Order, <i>Herman v. Commissioner</i> , No. 14005-07 (T.C. Sept. 22, 2011, Bench Op.)	Façade
18) <i>Carpenter v. Commissioner</i> , 103 T.C.M. (CCH) 1001 (2012)	Land
19) <i>Esgar Corp. v. Commissioner</i> , 103 T.C.M. (CCH) 1185 (2012)	Land
20) <i>Butler v. Commissioner</i> , 103 T.C.M. (CCH) 1359 (2012)	Land
21) <i>Mitchell v. Commissioner</i> , 138 T.C. 324 (2012)	Land
22) <i>Dunlap v. Commissioner</i> , 103 T.C.M. (CCH) 1689 (2012)	Façade
23) <i>Wall v. Commissioner</i> , 103 T.C.M. (CCH) 1906 (2012)	Façade
24) <i>Averyt v. Commissioner</i> , 104 T.C.M. (CCH) 65 (2012)	Land
25) <i>Kaufman v. Commissioner</i> , 687 F.3d 21 (1st Cir. 2012), <i>vacating and remanding in part</i> , 136 T.C. 294 (2011), and 134 T.C. 182 (2010)	Façade
26) <i>Rothman v. Commissioner</i> , 104 T.C.M. (CCH) 126 (2012), <i>vacating in part</i> , 103 T.C.M. (CCH) 1864	Façade
27) <i>Trout Ranch, LLC v. Commissioner</i> , 493 F. App'x 944, (10th Cir. 2012) (unpublished table decision), <i>aff'g</i> , 100 T.C.M. (CCH) 581 (2010)	Land
28) <i>Foster v. Commissioner</i> , T.C. Summ. Op. 2012-90 (2012)	Façade
29) <i>RP Golf, LLC v. Commissioner</i> , 104 T.C.M. (CCH) 413 (2012)	Land
30) <i>Whitehouse Hotel, LP v. Commissioner</i> , 139 T.C. 304 (2012), <i>on remand from</i> 615 F.3d 321 (5th Cir. 2010), <i>vacating and remanding</i> , 131 T.C. 112 (2008)	Façade
31) <i>Irby v. Commissioner</i> , 139 T.C. 371 (2012)	Land
32) <i>Minnick v. Commissioner</i> , 104 T.C.M. (CCH) 755 (2012)	Land
33) <i>Pesky v. United States</i> , No. CIV. 1:10-186, 2013 WL 97752 (D. Idaho Jan. 7, 2013)	Land
34) <i>Scheidelman v. Commissioner</i> , 105 T.C.M. (CCH) 1117 (2013), <i>on remand from</i> 682 F.3d 189 (2d Cir. 2012), <i>vacating and remanding</i> 100 T.C.M. (CCH) 24 (2010)	Façade
35) <i>B. V. Belk v. Commissioner</i> , 140 T.C. 1 (2013)	Land
36) <i>Pollard v. Commissioner</i> , 105 T.C.M. (CCH) 1249 (2013)	Land

As for the general substance of this recent case law, in close to 40% of the thirty-six cases, the IRS attempted to disallow the deduction in its entirety based on the taxpayer's failure to properly substantiate the deduction.<sup>90</sup> Although that can

<sup>90</sup> See *Kaufman v. Comm'r*, 687 F.3d 21 (1st Cir. 2012); *Bruzewicz v. United States*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009); *Scheidelman v. Comm'r*, 105 T.C.M. (CCH) 1117 (2013), *on remand from* 682 F.3d 189 (2d Cir. 2012); *Averyt v. Comm'r*, 104 T.C.M. (CCH) 65 (2012); *Dunlap v. Comm'r*, 103 T.C.M. (CCH) 1689 (2012); *Irby v. Comm'r*, 139 T.C. 371 (2012); *Rothman v. Comm'r*, 104 T.C.M. (CCH) 126 (2012); *RP Golf, LLC*

be a very efficient “silver bullet” approach for the IRS, it has met with mixed results in the courts.<sup>91</sup>

In over 30% of the thirty-six cases, valuation was an issue, and in each of those cases the courts determined that the taxpayer had overstated the value of the easement, often by a significant percentage.<sup>92</sup> Over 40% of the cases involved interpretation of the provisions of § 170(h) and the Treasury Regulations, including satisfaction of the conservation purposes, granted in perpetuity, mortgage subordination, extinguishment, and division of proceeds requirements.<sup>93</sup> Two of the more recent cases involved *quid pro quo* transactions, where the conveyance was not (or allegedly was not) a deductible charitable gift because the conservation

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v. Comm’r, 104 T.C.M. (CCH) 413 (2012); *Didonato v. Comm’r*, 101 T.C.M. (CCH) 1739 (2011); *Friedberg v. Comm’r*, 102 T.C.M. (CCH) 356 (2011); *Schrimsher v. Comm’r*, 101 T.C.M. (CCH) 1329 (2011); *Lord v. Comm’r*, 100 T.C.M. (CCH) 201 (2010); *Simmons*, 646 F.3d at 6, *aff’g*, *Simmons v. Comm’r*, 98 T.C.M. (CCH) 211 (2009); *Ney v. Comm’r*, T.C. Summ. Op. 2006-154 (2006).

<sup>91</sup> *Compare Schrimsher*, 101 T.C.M. (CCH) 1329 (denying deduction because conservation easement deed could not serve as a contemporaneous written acknowledgement), *with Averyt*, 104 T.C.M. (CCH) 65 (allowing deduction because conservation easement deed could serve as a contemporaneous written acknowledgement); *compare Kaufman*, 687 F.3d at 29 (chastising the IRS for “attempt[ing] to convert an inherently factual issue [valuation] into a set of violations of the procedural requirements” of Treasury Regulation § 1.170A-13), *with* TREASURY INSPECTOR GEN. FOR TAX ADMIN., MANY TAXPAYERS ARE STILL NOT COMPLYING WITH NONCASH CHARITABLE CONTRIBUTION REPORTING REQUIREMENTS (2012), *available at* <http://www.treasury.gov/tigta/auditreports/2013reports/201340009fr.pdf> (reporting that many taxpayers are not complying with the noncash charitable contribution reporting requirements and recommending that the IRS expand its procedures to identify those taxpayers).

<sup>92</sup> *See Trout Ranch, LLC v. Comm’r*, 493 F. App’x 944 (10th Cir. 2012) (unpublished table decision); *Simmons*, 646 F.3d at 6; *Scheidelman*, 105 T.C.M. (CCH) at 1117; *Butler v. Comm’r*, 103 T.C.M. (CCH) 1359 (2012); *Dunlap*, 103 T.C.M. (CCH) at 1689; *Esgar Corp. v. Comm’r*, 103 T.C.M. (CCH) 1185 (2012); *Foster v. Comm’r*, T.C. Summ. Op. 2012-90 (2012); *Whitehouse Hotel, LP v. Comm’r*, 139 T.C. 304 (2012), *on remand from* 615 F.3d 321 (5th Cir. 2010); *Boltar v. Comm’r*, 136 T.C. 326 (2011); *Evans v. Comm’r*, 100 T.C.M. (CCH) 275 (2010); *Hughes v. Comm’r*, 97 T.C.M. (CCH) 1488 (2009); *Kiva Dunes v. Comm’r*, 97 T.C.M. (CCH) 1818 (2009).

<sup>93</sup> *See Glass v. Comm’r*, 471 F.3d 698 (6th Cir. 2006); *Simmons*, 646 F.3d 6; *Kaufman*, 687 F.3d 21; *B. V. Belk v. Comm’r*, 140 T.C. 1 (2013); *Butler*, 103 T.C.M. (CCH) at 1359; *Carpenter v. Comm’r*, 103 T.C.M. (CCH) 1001 (2012); *Mitchell v. Comm’r*, 138 T.C. 324 (2012); *Irby*, 139 T.C. at 371; *Minnick v. Comm’r*, 104 T.C.M. (CCH) 755 (2012); *RP Golf*, 104 T.C.M. (CCH) at 413; *Wall v. Comm’r*, 103 T.C.M. (CCH) 1906 (2012); *Whitehouse*, 139 T.C. at 304; *1982 East LLC v. Comm’r*, 101 T.C.M. (CCH) 1380 (2011); *Friedberg v. Comm’r*, 102 T.C.M. (CCH) 356 (2011); *Herman v. Comm’r*, 98 T.C.M. (CCH) 197 (2009); *Turner v. Comm’r*, 126 T.C. 299 (2006). After February 2013, supplemental opinions were issued in *B.V. Belk*, *Carpenter*, *Mitchell*, and *Friedberg*. *See supra* note 87.

easement was conveyed in exchange for subdivision approval or some other form of compensation.<sup>94</sup>

In addition to the significant expenditure of judicial, administrative, and taxpayer resources with regard to these cases, there are substantive concerns with attempts to use litigation to establish clear rules consistent with congressional intent in this context. First, litigation is designed to resolve disputes between particular parties by applying the law to a specific set of facts. The extent to which holdings in fact-specific opinions should be applied more broadly is often unclear, and in the easement donation deduction context this problem is exacerbated by the significant differences between façade easements and conservation easements encumbering land, as well as the significant differences in the terms of individual easements.<sup>95</sup> For example, the holding in *Simmons*, subsequently approved in *Kaufman*, that it is permissible to grant the holder of a façade easement a seemingly unqualified right to consent to changes should not be applied to conservation easements encumbering land for outdoor recreation or education, open space, or habitat protection purposes because the holding was based, in part, on (i) a Treasury Regulation applicable only to historic preservation easements;<sup>96</sup> (ii) the presence of “appropriate” federal, state, and local historic preservation laws; and (iii) the specific provisions of the deeds at issue, which (consistent with the Treasury Regulation) require that any work done on the properties has to comply with applicable federal, state, and local historic preservation laws, whether the holder consents or not.<sup>97</sup>

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<sup>94</sup> See *Pesky v. United States*, No. CIV. 1:10-186, 2013 WL 97752 (D. Idaho 2013); *Pollard v. Comm’r*, 105 T.C.M. (CCH) 1249 (2013).

<sup>95</sup> Fifteen of the thirty-six cases listed in Table 1 (41%) involved façade easement donations.

<sup>96</sup> Treas. Reg. § 1.170A-14(d)(5)(i) (2012) (“When restrictions to preserve a building or land area within a registered historic district permit future development on the site, a deduction will be allowed . . . only if the terms of the restrictions require that such development conform with appropriate local, state, or Federal standards for construction or rehabilitation within the district.”).

<sup>97</sup> See *Simmons v. Comm’r*, 98 T.C.M. (CCH) 211 (2009); Pres. Restriction Agreement Between Lorna E. Kaufman and the Nat’l Architectural Trust, Inc., at 3 (Dec. 22, 2003) (on file with author). As the Tax Court in *Simmons* explained, although the easements at issue grant the holder the right to consent to changes, they also require that any rehabilitative work or new construction on the façades comply with the requirements of all applicable federal, state, and local government laws and regulations, and Treasury Regulation § 1.170A-14(d)(5)(i) specifically allows a donation to satisfy the conservation purposes test even if future development is allowed, as long as that development is subject to appropriate local, state, and federal laws and regulations. *Simmons*, 98 T.C.M. (CCH) at 211. In affirming the Tax Court’s decision in *Simmons*, the U.S. Court of Appeals for D.C. Circuit explained, in part, that “any change in the façade to which [the holder] might consent would have to comply with all applicable laws and regulations, including the District’s historic preservation laws” and thus “the donated easements will prevent in

Also, the IRS has lost five of the six cases that have been appealed to the circuit courts,<sup>98</sup> and the circuit courts have indicated impatience with the IRS's attempts to use litigation to confirm the agency's interpretation of Internal Revenue Code and regulatory requirements without having provided taxpayers with fair warning regarding that interpretation.<sup>99</sup> Revisions to § 170(h) or the Treasury Regulations, or other forms of formal guidance that apply prospectively only, would arguably be a more efficient, effective, and equitable way to establish clear rules consistent with congressional intent in this context. Indeed, the circuit

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perpetuity any changes to the properties inconsistent with conservation purposes.” *Simmons*, 646 F.3d at 11. The backstop of “appropriate local, state, or Federal standards” for development is generally not present in the context of conservation easements encumbering land donated for outdoor recreation or education, open space, or habitat protection conservation purposes because such easements typically do not merely duplicate or supplement federal, state, or local zoning or other laws. Moreover, the regulations interpreting the outdoor recreation or education, open space, and habitat conservation purposes do not similarly provide that a deduction will be allowed provided the terms of the easement require that future development conform with appropriate local, state, or federal standards. *See also* Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217, 285 (2012) (noting the fairly standard practice within the land trust community to address the need to be able to respond to changing conditions—and at the same time comply with the perpetuity requirements of § 170(h)—by granting the holder the limited right to agree to amendments that are consistent with the purpose of the easement).

<sup>98</sup> *See Glass*, 471 F.3d at 698 (affirming Tax Court's holding that taxpayer was entitled to deductions claimed with respect to two conservation easement donations); *Simmons*, 646 F.3d at 6 (affirming Tax Court's holding that taxpayer was entitled to deductions claimed with respect to two façade easement donations); *Kaufman*, 687 F.3d at 21 (vacating Tax Court's holding that taxpayers failed to satisfy division of proceeds requirement in the Treasury Regulations and remanding on the issue of valuation); *Scheidelman v. Comm'r*, 682 F.3d 189 (2d Cir. 2012) (vacating Tax Court's holding that taxpayer failed to satisfy qualified appraisal requirement and remanding on the issue of valuation); *Whitehouse Hotel, LP v. Comm'r*, 615 F.3d 321 (5th Cir. 2010) (vacating Tax Court's holding substantially reducing the value of the deduction claimed with regard to a façade easement donation and remanding for reconsideration of the easement's value). On remand, the Tax Court determined that the preponderance of the evidence supported the IRS's position that the easement at issue in *Scheidelman* had no value. *See Scheidelman v. Comm'r*, 105 T.C.M. (CCH) 1117 (2013). On remand, the Tax Court determined that the easement at issue in *Whitehouse* had a value only slightly larger than the Tax Court had determined in its first opinion in the case. *See Whitehouse Hotel*, 139 T.C. 304 (2012).

<sup>99</sup> *See, e.g., Kaufman*, 687 F.3d at 32 (rejecting the IRS's “impromptu reading” and “overly aggressive . . . interpretation” of the Treasury Regulations and noting that “[f]orward looking regulations . . . serve to give fair warning to taxpayers”).

courts have specifically encouraged the IRS to consider issuing “forward looking” regulations.<sup>100</sup>

One might ask why the IRS is channeling so much of its resources into auditing and litigating deduction claims for conservation easement donations. Congressional interest following the *Washington Post* articles and other reports of abuse is surely one reason.<sup>101</sup> Another reason may be that the deductions claimed under § 170(h) are large. Table 2 below indicates the number of donations of façade easements and conservation easements encumbering land in the year designated and the average amount claimed per donation.<sup>102</sup> As Table 2 illustrates, these charitable contributions, on average, typically generate six-figure deductions.<sup>103</sup>

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<sup>100</sup> See *id.*; *Scheidelman*, 682 F.3d 189 at 198 (“[T]he Treasury Department can use the broad regulatory authority granted to it by the Internal Revenue Code to set stricter requirements for a qualified appraisal.”).

<sup>101</sup> See sources cited *supra* note 61; see also McLaughlin, *supra* note 97, at 218 n.1; *Conservation Easements*, IRS, <http://www.irs.gov/Charities-&-Non-Profits/Conservation-Easements> (last updated Apr. 28, 2013).

<sup>102</sup> Statistics on façade easements and conservation easements encumbering land were combined for 2003 and 2004. See Janette Wilson & Michael Strudler, *Individual Noncash Contributions, 2004*, STAT. OF INCOME BULL., SPRING 2007, at 78, 80; Janette Wilson & Michael Strudler, *Individual Noncash Contributions, 2003*, STAT. OF INCOME BULL., Spring 2006, at 59, 60.

<sup>103</sup> See Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2009*, STAT. OF INCOME BULL., Spring 2012, at 63 (“The highest average [charitable income tax] deduction per return was for easements.”); Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2008*, STAT. OF INCOME BULL., Winter 2011, at 76, 77 (explaining that the second highest average deduction per return for the 2008 tax year was for conservation easement donations); Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2006*, STAT. OF INCOME BULL. Summer 2009, at 68; Pearson Liddell & Janette Wilson, *Individual Noncash Contributions, 2007*, STAT. OF INCOME BULL., Spring 2010, at 53; Janette Wilson, *Individual Noncash Contributions, 2005*, STAT. OF INCOME BULL., Spring 2008, at 68, 69 (“Conservation easement donations . . . increased substantially in terms of the amount deducted.”); Janette Wilson & Michael Strudler, *Individual Noncash Contributions, 2004*, STAT. OF INCOME BULL., Spring 2007, at 78, 80 (“The highest average donation was easements.”); Janette Wilson & Michael Strudler, *Individual Noncash Contributions, 2003*, STAT. OF INCOME BULL., Spring 2006, at 59, 60 (“Easements . . . were the largest category when measured in terms of average donation per return and average amount per donation.”); *SOI Bulletin Articles: Index by Topic*, IRS, <http://www.irs.gov/uac/SOI-Tax-Stats-SOI-Bulletin-Articles-Index-by-Topic> (last updated Mar. 13, 2013).

**Table 2**

<b><u>Facade Easements and Conservation Easements Encumbering Land</u></b>		
<u>Year</u>	<u>Number of Donations</u>	<u>Average Amount Claimed Per Donation</u>
2003	2,407	\$619,727
2004	3,365	\$430,716
<b><u>Conservation Easements Encumbering Land</u></b>		
<u>Year</u>	<u>Number of Donations</u>	<u>Average Amount Claimed Per Donation</u>
2005	2,307	\$787,062
2006	3,529	\$422,092
2007	2,405	\$812,369
2008	3,158	\$372,925
2009	2,102	\$463,073
<b><u>Facade Easements</u></b>		
<u>Year</u>	<u>Number of Donations</u>	<u>Average Amount Claimed Per Donation</u>
2005	1,132	\$271,629
2006	1,145	\$231,167
2007	242	\$918,392
2008	1,396	\$27,423
2009	103	\$434,815

Moreover, federal taxpayers are investing billions of dollars in conservation easements in the form of revenue foregone as a result of the deduction under § 170(h). One commentator estimated a total revenue loss of \$3.6 billion from the deduction provided to individual donors in just the six-year period from 2003 through 2008, and that figure would be larger if it included corporate donations.<sup>104</sup> Of course, calculating the total expenditure of public resources on conservation easements would require taking into account all of the federal tax incentives, not just § 170(h), as well as the state tax incentives; appropriations to federal, state, and local easement purchase programs; the tax-exempt status of nonprofit holders; and the federal and state judicial and administrative resources devoted to compliance and enforcement.

<sup>104</sup> Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 9 n.26, 9–10 (2012).

## IV. THE ELEPHANT IN THE ROOM

With more than three decades of experience, continued investment of billions of dollars of public funds, and an estimated 40 million acres encumbered, it is somewhat surprising that we still do not know (and are quite vigorously debating in some circles) what it actually means to protect land “in perpetuity” or “forever” with a conservation easement. The most fundamental of questions remain controversial and unresolved. Under what circumstances can perpetual conservation easements be modified or terminated? Who should have the authority to make such decisions and what standards should apply? How is the public interest and investment in these instruments and the conservation values they are supposed to preserve in perpetuity protected under federal and state law? And what deference should be accorded to the intent of easement grantors, many of whom agreed to make a charitable gift of an easement, often at great personal economic sacrifice, in part in exchange for the promise of permanent protection of their particular land?

Some believe that government entities and land trusts, which hold perpetual conservation easements on behalf of the public, are obligated as fiduciaries to administer those easements consistent with their conservation purposes, and that there should be a very high threshold for termination—i.e., termination should occur only through condemnation or if it can be established to the satisfaction of a court that continuing to carry out the conservation purpose of the easement is no longer feasible or has become impossible or impractical.<sup>105</sup> This position is

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<sup>105</sup> See, e.g., ME. REV. STAT. ANN. tit. 33, § 477-A (2)(B) (2012) (requiring court approval and that the Attorney General be named as a party to terminate a conservation easement); R.I. GEN. LAWS § 34-39-5(c) (2012) (same); see also UNIF. TRUST CODE § 414 cmt., 7C U.L.A. 362 (2010) (stating that because of the fiduciary obligation imposed, the termination or substantial modification of an easement by the holder could constitute a breach of trust); UNIF. CONSERVATION EASEMENT ACT, *supra* note 37 § 3 cmt.; 12 U.L.A. 185 (2007) (leaving intact the existing case and statutory law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts, and noting that, independently of the Act, the Attorney General could have standing to bring an action affecting a conservation easement in his capacity as supervisor of charitable trusts); RESTATEMENT (THIRD) OF PROP.: SERVIDITUDES § 7.11 cmt. a (2000) (recommending the modification and termination of perpetual conservation easements be governed by a special set of rules modeled on the charitable trust doctrine of *cy pres* and explaining that “[b]ecause of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes . . . .”); *supra* note 51 and accompanying text (describing the New Hampshire Attorney General’s guidelines for amending and terminating conservation easements). For law review commentary, see, e.g., Alexander R. Arpad, Note, *Private Transactions, Public Benefits, and Perpetual Control Over the Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 91 (2002); Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187 (1989); K.

consistent with (i) the requirements for the federal charitable income tax deduction under § 170(h),<sup>106</sup> (ii) the representations made to easement grantors, funders, and the public regarding what it means to protect land in perpetuity with a conservation easement—for example, the holder has the “obligation to enforce the terms of the easement in perpetuity” and “the restrictions of the easement stay with the land forever,”<sup>107</sup> and (iii) the fiduciary obligations government entities and charitable organizations assume when they solicit and accept charitable assets to be used for specific charitable purposes.<sup>108</sup> This position also gives holders substantial flexibility to modify or amend conservation easements in manners consistent with their conservation purposes to respond to changing conditions.<sup>109</sup> Moreover, interpreting perpetual conservation easements as subject to a high termination threshold does not preclude the creation of less permanent conservation easements in appropriate circumstances, such as those that expire after a specified term of years or are terminable upon the satisfaction of certain conditions, such as the holding of a public hearing or approval of a public official (but to avoid confusion, these other easements should not bear the moniker “perpetual”).

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King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 33 UTAH ENVTL. L. REV. 87 (2013); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006); Nancy A. McLaughlin & W. William Weeks, *Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73, 73 (2010); Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 DUKE J.L. & CONTEMP. PROBS. 1 (2011); Matthew J. Richardson, Note, *Conservation Easements as Charitable Trusts in Kansas: Striking the Appropriate Balance Among the Grantor’s Intent, the Public’s Interest, and the Need for Flexibility*, 49 WASHBURN L.J. 175, 178 (2009); Jeffrey Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 287–89 (2002). See also William P. O’Connor, *Amending Conservation Easements: Legal and Policy Considerations*, EXCHANGE, Spring 1999, at 8.

<sup>106</sup> See *supra* notes 33, 34, 78, 79 and accompanying text.

<sup>107</sup> See *supra* note 2.

<sup>108</sup> See *Carpenter v. Comm’r*, 103 T.C.M. (CCH) 1001, 2012 WL 10798, at \*6 (2012), reconsideration denied and opinion supplemented in 106 T.C.M. (CCH) 62 (2013) (explaining that tax-deductible conservation easements at issue were “restricted [charitable] gifts,” or “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations”); *supra* Part II.C and note 105.

<sup>109</sup> See, e.g., *infra* note 115 (discussing amendment provisions included in conservation easement deeds); Terry M. Knowles, *Amending or Terminating Conservation Easements: The New Hampshire Experience*, 2013 UTAH L. REV. 871, 33 UTAH ENVTL. L. REV. 185 (2013) (discussing the New Hampshire amendment and termination guidelines and their application in specific circumstances); ME. REV. STAT. ANN. tit. 33, § 477-A (2)(A) (2012) (requiring conservation easements to include a statement of the holder’s power to agree to amendments in a manner consistent with the limitations set forth in the statute).

Others argue that perpetual conservation easements should be treated as private arrangements between the owner of the land and the holder of the easement, similar to a right-of-way easement between neighbors, and that the parties should therefore be free (as soon as the statute of limitations has run on the donor's federal deduction) to modify or terminate the easements as they may see fit, provided only that the holder comply with whatever general rules apply to government entities or charitable organizations dealing with their general assets.<sup>110</sup> This would give government and nonprofit holders the freedom to sell, trade, swap, release, or otherwise dispose of perpetual conservation easements as they might see fit from time to time, provided they received adequate compensation, but would be contrary to (i) federal tax law perpetuity requirements; (ii) the representations made to easement grantors, funders, and the public regarding what it means to protect land in perpetuity or forever with a conservation easement; and (iii) the fiduciary obligations government entities and charitable organizations assume when they solicit and accept charitable assets to be used for specific charitable purposes. Moreover, conservation easements are not "private" arrangements. They are validated under state law only if they are created for purposes that benefit the public and held by entities that are organized and operated to benefit the public. Their acquisition is heavily subsidized by the public through, among other things, tax incentive and easement purchase programs. And conservation easements have a significant impact on the communities in which they are located and the individuals who live in those communities. Accordingly, the state attorney general, pursuant to his or her *parens patriae* power, should have the right to ensure that such assets are properly administered on behalf of the public.<sup>111</sup>

Still others argue that individual states or even coalitions of holders should be permitted to devise their own varied procedures for substantially modifying or terminating perpetual conservation easements, and that such procedures should be applied retroactively to existing easements regardless of how the easements were acquired or their terms.<sup>112</sup> This, too, would be contrary to (i) federal tax law

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<sup>110</sup> See generally C. Timothy Lindstrom, Hicks v. Dowd: *The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008), critiqued in Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009).

<sup>111</sup> See, e.g., CONN. GEN. STAT. ANN. § 47-42c (2012) ("The Attorney General may bring an action in the Superior Court to enforce the public interest in [conservation] restrictions."). See also David Villar Patton, *The Queen, The Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131 (2000).

<sup>112</sup> See generally Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012), critiqued in Ann Taylor Schwing, *Perpetuity Is*

perpetuity requirements, (ii) the representations made regarding what it means to protect land in perpetuity or forever with a conservation easement, and (iii) the fiduciary obligations government entities and charitable organizations assume when they solicit and accept charitable assets to be used for specific charitable purposes. It also would mean that protecting land “in perpetuity” with a conservation easement would have a different meaning from state to state and even program to program, and because state laws and voluntarily adopted procedures are subject to change at any time, that meaning would vary over time as economic, political, and development pressures and priorities change.<sup>113</sup> Moreover, retroactive application of such varying modification and termination procedures to existing perpetual conservation easements might be found unconstitutional on a number of grounds, including violation of the constitutional prohibition on impairment of contracts.<sup>114</sup>

One thing most parties would likely agree on is the need for reasonable rules regarding the amendment of perpetual conservation easements—rules that ensure sufficient flexibility to revise poorly written provisions, clarify ambiguities, and adapt to changing circumstances, while at the same time protecting the integrity of the easements. In many cases, consistent with best practices recommended by the Land Trust Alliance, conservation easements include a limited “amendment clause” that expressly grants the holder the right to agree to amendments that are consistent with the purpose of the easement.<sup>115</sup> While this type of clause grants

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*Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217 (2013).

<sup>113</sup> See McLaughlin, *supra* note 97 (discussing the reasons underlying the federal tax law perpetuity requirements and the significant efficacy, equity, and valuation issues that would arise if property owners claiming large federal deductions for the donation of ostensibly perpetual conservation easements could more easily escape those restrictions in some jurisdictions than in others).

<sup>114</sup> See McLaughlin & Weeks, *supra* note 110, at 88–91 (discussing this issue and relevant authorities).

<sup>115</sup> LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 1, 17 (2007), available at [http://learningcenter.lta.org/attached-files/0/65/6534/Amendment\\_Report\\_Final\\_web.pdf](http://learningcenter.lta.org/attached-files/0/65/6534/Amendment_Report_Final_web.pdf) (“Easement holders should include an amendment clause to allow amendments consistent with the easement’s overall purposes, subject to applicable laws.”); see also ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 377 (2d ed. 2005) (“Amendment provisions are becoming more common to assure and limit the Holder’s power to modify.”). A typical amendment clause generally provides as follows:

*Amendment.* If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or

holders fairly broad discretion to agree to amendments, determining when an amendment furthers or is consistent with the conservation purpose of an easement, or adversely impacts or changes that purpose, can be difficult and is an issue on which reasonable people can disagree. The potential for private benefit or private inurement and loss of the federal investment is also present, particularly with regard to “trade-off” amendments, which both negatively impact and further the conservation purpose of the easement, but the net effect of which is arguably consistent with or enhances the purpose.<sup>116</sup> Thoughtful consideration of these issues that takes into account the interests of all of the various stakeholders—including the easement grantors, individual and institutional funders, federal and state taxpayers, members of the communities in which the protected lands are located, landowners living with the perpetual restrictions, nonprofit and government entities administering the easements, and federal and state regulators—is needed.

Colleges and universities faced a somewhat similar situation in the 1960s with regard to their investment and management of endowment funds, and their experience can serve as a useful example of how these issues might be resolved.<sup>117</sup> The Ford Foundation commissioned a study of the challenges faced by colleges and universities, and the study’s recommendations led to the Uniform Management of Institutional Funds Act, which was approved by the Uniform Law Commission in 1972 and adopted in forty-seven states and the District of Columbia (and the principles of which have been adopted almost universally).<sup>118</sup> In 2006, the Uniform Law Commission approved the revised and updated Uniform Prudent Management of Institutional Funds Act, which has since been adopted in forty-nine states and the District of Columbia.<sup>119</sup> These acts provide colleges and universities with

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Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of \_\_\_\_\_ County, [state].

See CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 164 (Janet Diehl & Thomas S. Barrett eds., 1988).

<sup>116</sup> See STAFF OF S. COMM. ON FIN, *supra* note 62, pt. II, at 5 (expressing concerns about amendments, particularly trade-off amendments, because of the difficulties associated with the weighing of increases and decreases in conservation benefits, and noting that “the private benefit prohibition aspect of the [amendment] procedure can be a subjective inquiry, with no bright lines available to make the determination”).

<sup>117</sup> See Susan Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1284 (2007).

<sup>118</sup> *Id.* at 1284, 1288.

<sup>119</sup> *Id.* at 1288–89; *Legislative Fact Sheet: Prudent Management of Institutional Funds Act*, UNIF. LAW COMM’N, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Pr>

statutory authority to apply modern investment and management techniques to endowment funds and to modify donor-imposed restrictions in certain circumstances, while at the same time emphasizing the importance of respecting donor intent and acknowledging the constitutional limitations on retroactive laws.<sup>120</sup>

A similar study of the challenges associated with protecting land in perpetuity with a conservation easement could help to chart a way forward for statutory and regulatory reforms. To be credible, the study would need to be conducted by researchers independent of any particular interest group and entail consultation with, and consideration of, the interests of all relevant stakeholders. The study would also need to take into account (i) the different purposes for which easements are created (e.g., protection of habitat, open space, scenic vistas, historic lands and structures, and working farms and ranches), (ii) the different circumstances in which easements are created (e.g., purchase, exaction, mitigation, charitable donation, and bargain sale), (iii) the different durations of easements (e.g., perpetual, term of years, or terminable upon satisfaction of certain conditions short of frustration of the easement's conservation purpose), (iv) the different holders of easements (e.g., local, state, and federal governmental entities and local, state, regional, and national land trusts), and (v) the various federal and state laws that impact the creation and administration of the easements and the operations of their government and nonprofit holders.

Although not an easy task, a comprehensive assessment of the challenges associated with the long-term administration of perpetual conservation easements, the interests of the various stakeholders, and the relevant legal principles (including constitutional limitations on retroactive laws), would help to ensure that statutory and regulatory reforms provide the flexibility needed to respond to changing conditions, and at the same time protect the integrity of the easements and the public interest. There would be no need to start from scratch with regard to these issues, as certain pioneering states, including Maine, New Hampshire, Rhode Island, and California, have already responded or are currently responding to these challenges and provide valuable examples of how the varying interests can be appropriately balanced within the constraints of the law.

## V. CONCLUSION

The current state of confusion, uncertainty, and disagreement about what it means to protect land in perpetuity with a conservation easement, coupled with the inevitable pressures that will be brought to bear to develop protected lands, makes the widespread use of perpetual conservation easements a grand and hopeful experiment, but one that ultimately could prove to be unsuccessful. It may be that

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udent%20Management%20of%20Institutional%20Funds%20Act (last visited Dec. 1, 2013).

<sup>120</sup> See generally Gary, *supra* note 117.

these instruments will not stand the test of time, and the conservation values they are intended to protect for the benefit of future generations will be lost incrementally over time, along with the significant investment of public funds—the proverbial death by a thousand cuts as easements are amended, released, and terminated in whole or in part to, among other things, accommodate the requests of new landowners, resolve violations, or accommodate local development requests. Which brings us back to the purpose of the conference: to take stock, consider where we are, what we have learned, and where we should go from here, with the goal of minimizing abuses and ensuring that perpetual conservation easements will actually provide the promised conservation benefits to the public over the long term.

The conference concluded with extraordinarily moving remarks from Wendy Fisher, who is Executive Director of Utah Open Lands and has been with the organization since its inception more than twenty years ago.<sup>121</sup> Ms. Fisher transcended the detail, the developments, and the often abstract legal and policy principles discussed by the other speakers. She related the struggles, challenges, doubts, and triumphs that she and Utah Open Lands experience in their quest to honor the promise of perpetual protection made to easement grantors and the public in the face of inevitable pressures and an uncertain legal landscape.

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<sup>121</sup> *Land Conservation Accomplishments*, UTAH OPEN LANDS, [http://www.utahopenlands.org/index\\_files/Page3265.htm](http://www.utahopenlands.org/index_files/Page3265.htm) (last visited Dec. 1, 2013) (explaining that Utah Open Lands is a state-wide land trust and has protected over 56,000 acres throughout the state).

## APPENDIX A

<b><u>Deduction Cases through February 2013</u></b> <b><u>Listed in Order of Date of Donation</u></b>	<b><u>Date of</u></b> <b><u>Donation</u></b>	<b><u>Easement</u></b> <b><u>Type</u></b>
<b>Pre-§ 170(h) Deduction Cases</b>		
<i>Thayer v. Commissioner</i> , 36 T.C.M. (CCH) 1504 (1977)	1969	Land
<i>Stanley Works v. Commissioner</i> , 87 T.C. 389 (1986)	1977	Land
<i>Akers v. Commissioner</i> , 799 F.2d 243 (6th Cir. 1986), <i>aff'g</i> , 48 T.C.M. (CCH) 1113 (1984)	1977	Land
<i>Fannon v. Commissioner</i> , 56 T.C.M. (CCH) 1587 (1989)	1978	Land
<i>Todd v. United States</i> , 617 F. Supp. 253 (W.D. Pa. 1985)	1979	Land
<i>Hilborn v. Commissioner</i> , 85 T.C. 677 (1985)	1979	Façade
<i>Symington v. Commissioner</i> , 87 T.C. 892 (1986)	1979	Land
<i>Stotler v. Commissioner</i> , 53 T.C.M. (CCH) 973 (1987)	1979	Land
<i>Fannon v. Commissioner</i> , 842 F.2d 1290 (4th Cir. 1988) (unpublished table decision), <i>modifying</i> 52 T.C.M. (CCH) 1113 (1986)	1979	Land
<i>Dennis v. United States</i> , 70 A.F.T.R. 2d 92-5946 (E.D. Va. 1992)	11/10/1980	Land
<i>McLennan v. United States</i> , 994 F.2d 839 (Fed. Cir. 1993), <i>aff'g</i> , 24 Cl. Ct. 102 (1991), and 23 Cl. Ct. 99	11/10/1980	Land
<b>Post-§ 170(h) Deduction Cases</b> <b>(§ 170(h) is effective for contributions made after December 17, 1980)</b>		
<i>Losch v. Commissioner</i> , 55 T.C.M. (CCH) 909 (1988)	12/24/1980	Façade
<i>Richmond v. United States</i> , 699 F. Supp. 578 (E.D. La. 1988)	12/29/1980	Façade
<i>Nicoladis v. Commissioner</i> , 55 T.C.M. (CCH) 624 (1988)	1981	Façade
<i>Higgins v. Commissioner</i> , 58 T.C.M. (CCH) 1536 (1990)	1981	Land
<i>Dorsey v. Commissioner</i> , 59 T.C.M. (CCH) 592 (1990)	1981	Façade
<i>Griffin v. Commissioner</i> , 911 F.2d 1124 (5th Cir. 1990), <i>aff'g</i> , 56 T.C.M. (CCH) 1560 (Mar. 29, 1989)	1981	Façade
<i>Schapiro v. Commissioner</i> , 61 T.C.M. (CCH) 2215 (1991)	1981, 1984	Land
<i>Great Northern Nekoosa v. United States</i> , 38 Fed. Cl. 645 (1997)	1981	Land
<i>Clemens v. Commissioner</i> , 64 T.C.M. (CCH) 351 (1992)	1982	Land
<i>Schwab v. Commissioner</i> , 67 T.C.M. (CCH) 3004 (1994)	1983	Land
<i>Satullo v. Commissioner</i> , 67 F.3d 314, 76 A.F.T.R.2d 6536 (11th Cir. 1995) (unpublished table decision), <i>aff'g</i> , 66 T.C.M. (CCH) 1697 (1993)	1985	Façade
<i>Johnston v. Commissioner</i> , 74 T.C.M. (CCH) 968 (1997)	1989	Land
<i>Browning v. Commissioner</i> , 109 T.C. 303 (1997)	1990	Land
<i>Glass v. Comm'r</i> , 471 F.3d 698 (6th Cir. 2006), <i>aff'g</i> , 124 T.C. 258 (2005)	1991, 1992	Land
<i>Strasburg v. Commissioner</i> , 79 T.C.M. (CCH) 1697 (2000)	1993, 1994	Land
<i>Whitehouse Hotel, LP v. Commissioner</i> , 139 T.C. 304 (2012), <i>on remand from</i> 615 F.3d 321 (5th Cir. 2010), <i>vacating and remanding</i> 131 T.C. 112 (2008)	1997	Façade
<i>Turner v. Commissioner</i> , 126 T.C. 299 (2006)	1999	Land

<i>Lord v. Commissioner</i> , 100 T.C.M. (CCH) 201 (2010)	1999	Land
<i>Goldsby v. Commissioner</i> , 92 T.C.M. (CCH) 529 (2006)	2000	Land
<i>Hughes v. Commissioner</i> , 97 T.C.M. (CCH) 1488 (2009)	2000	Land
<i>Ney v. Commissioner</i> , T.C. Summ. Op. 2006-154 (2006)	2001	Land
<i>Bruzewicz v. United States</i> , 604 F. Supp. 2d 1197 (N.D. Ill. 2009)	2002	Façade
<i>Kiva Dunes v. Commissioner</i> , 97 T.C.M. (CCH) 1818 (2009)	2002	Land
<i>Pesky v. United States</i> , No. CIV. 1:10-186, 2013 WL 97752 (D. Idaho Jan. 7, 2013)	2002	Land
<i>Herman v. Commissioner</i> , 98 T.C.M. (CCH) 197 (2009)	2003	Façade
<i>Boltar v. Commissioner</i> , 136 T.C. 326 (2011)	2003	Land
<i>Friedberg v. Commissioner</i> , 102 T.C.M. (CCH) 356 (2011)	2003	Façade
Order, <i>Herman v. Commissioner</i> , No. 14005-07 (T.C. Sept. 22, 2011)	2003	Façade
<i>Carpenter v. Commissioner</i> , 103 T.C.M. (CCH) 1001 (2012)	2003	Land
<i>Mitchell v. Commissioner</i> , 138 T.C. 324 (2012)	2003	Land
<i>Dunlap v. Commissioner</i> , 103 T.C.M. (CCH) 1689 (2012)	2003	Façade
<i>Wall v. Commissioner</i> , 103 T.C.M. (CCH) 1906 (2012)	2003	Façade
<i>Kaufman v. Commissioner</i> , 687 F.3d 21 (1st Cir. 2012), vacating and remanding in part, 136 T.C. 294 (2011), and 134 T.C. 182 (2010)	2003	Façade
<i>Trout Ranch v. Commissioner</i> , 493 F. App'x 944 (10th Cir. 2012) (unpublished table decision), <i>aff'g</i> , 100 T.C.M. (CCH) 581 (2010)	2003	Land
<i>Foster v. Commissioner</i> , T.C. Summ. Op. 2012-90 (2012)	2003	Façade
<i>RP Golf, LLC v. Commissioner</i> , 104 T.C.M. (CCH) 413 (2012)	2003	Land
<i>Pollard v. Commissioner</i> , 105 T.C.M. (CCH) 1249 (2013)	2003	Land
<i>Commissioner v. Simmons</i> , 646 F.3d 6 (D.C. Cir. 2011), <i>aff'g</i> , <i>Simmons v. Commissioner</i> , 98 T.C.M. (CCH) 211 (2009)	2003, 2004	Façade
<i>Butler v. Commissioner</i> , 103 T.C.M. (CCH) 1359 (2012)	2003, 2004	Land
<i>Irby v. Commissioner</i> , 139 T.C. 371 (2012)	2003, 2004	Land
<i>Evans v. Commissioner</i> , 100 T.C.M. (CCH) 275 (2010)	2004	Façade
<i>Schrimsher v. Commissioner</i> , 101 T.C.M. (CCH) 1329 (2011)	2004	Façade
<i>1982 East LLC v. Commissioner</i> , 101 T.C.M. (CCH) 1380 (2011)	2004	Façade
<i>Didonato v. Commissioner</i> , 101 T.C.M. (CCH) 1739 (2011)	2004	Land
<i>Esgar Corp. v. Commissioner</i> , 103 T.C.M. (CCH) 1185 (2012)	2004	Land
<i>Averyt v. Commissioner</i> , 104 T.C.M. (CCH) 65 (2012)	2004	Land
<i>Rothman v. Commissioner</i> , 104 T.C.M. (CCH) 126 (2012), vacating in part, 103 T.C.M. (CCH) 1864 (2012)	2004	Façade
<i>Scheidelman v. Commissioner</i> , 105 T.C.M. (CCH) 1117 (2013), on remand from 682 F.3d 189 (2d Cir. 2012), vacating and remanding, 100 T.C.M. (CCH) 24 (2010)	2004	Façade
<i>B.V. Belk v. Commissioner</i> , 140 T.C. 1 (2013)	2004	Land
<i>Minnick v. Commissioner</i> , 104 T.C.M. (CCH) 755 (2012)	2006	Land