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Conservation Options: Conservation Easements, Flexibility, and the "In Perpetuity" Requirement of IRC § 170(h)

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NOTES

Conservation Options: Conservation Easements, Flexibility, and the “In Perpetuity” Requirement of IRC § 170(h)

Conservation easements have been closely tied to tax incentives since the 1970s, when Congress passed legislation to encourage land preservation. In an attempt to balance the desire to conserve more land with the desire to prevent tax abuses, Congress later passed § 170(h) of the Internal Revenue Code, which requires that conservation easements be donated “in perpetuity” to be eligible for the federal tax deduction.

As climate change increases global temperatures, shifts migratory patterns, and causes sea levels to rise, conservation easements’ ability to adapt to changing circumstances must also become part of Congress’s balancing equation. This Note evaluates the “in perpetuity” requirement and proposed alternatives as avenues for promoting the preservation of land for conservation purposes in light of climate change. Ultimately, this Note argues that by extending the Internal Revenue Code to provide a tax deduction for donors who gift an option to purchase a conservation easement coterminous with a fixed-term conservation easement, Congress can promote meaningful land conservation in the face of a rapidly changing world.

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INTRODUCTION

In the face of climate change, the preservation of natural spaces is touted as an essential mitigation measure.¹ For instance, the Land Trust Alliance—a nonprofit organization that acts as “the voice of the

1. See Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021) (requesting the Secretary of the Interior to submit a report outlining steps to help “achieve the goal of conserving at least 30 percent of [U.S.] lands and waters by 2030”).

land trust community”²—encourages land donations by promoting the idea that preserved land can help absorb carbon in the atmosphere, act as a buffer against fires and storms, and ensure access to sustainable foods.³ In 2020 alone, sixty-one million acres of land were voluntarily conserved in the United States.⁴

Conservation easements represent one mechanism land preservationists use to protect natural, scenic, and open-space lands, maintaining them for future generations of people and wildlife.⁵ Congress specifically incentivized conservation easement donations by passing § 170(h) of the Internal Revenue Code (“IRC”), which permits conservation easement donors to file for a federal tax deduction for their gifts.⁶ Since the 1970s, however, donors have been required to tender easements “in perpetuity” to qualify for this tax deduction.⁷

As one court noted, “forever is a long time.”⁸ In the past two decades, legal battles have arisen as donors attempt to craft conservation easement terms that preserve flexibility, but still satisfy the “in perpetuity” requirement of the tax code.⁹ As courts debate these amendment provisions, scholars have begun to question the necessity of the in perpetuity requirement due to climate change.¹⁰ Taking into account the effects climate change will have on land use and property boundaries, this Note examines the efficacy of § 170(h)’s in perpetuity requirement, as well as proposed alternatives.

Part I of this Note describes the evolution of the law surrounding conservation easements, including the role of IRC § 170(h)’s tax deduction and the modern challenges the court faces with respect to evaluating its in perpetuity requirement. Part II evaluates the strengths and weaknesses of fixed-term conservation easements, perpetual conservation easements, and options to purchase conservation easements in light of climate change. Specifically, Part II

2. *About Us*, LAND TR. ALL., <https://www.landtrustalliance.org/about-us#:~:text=The%20Alliance%20is%20the%20voice,now%20and%20for%20future%20generations> (last visited July 25, 2022) [<https://perma.cc/3UTG-L7ZN>].

3. *61 Million Acres Voluntarily Conserved in America, 2020 National Land Trust Census Report Reveals*, LAND TR. ALL. (Dec. 8, 2021), <https://www.landtrustalliance.org/61-million-acres-voluntarily-conserved-america-2020-national-land-trust-census-report-reveals> [<https://perma.cc/VW6L-KT3Z>].

4. *Id.*

5. *Conservation Easement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

6. 26 U.S.C. § 170(h).

7. 123 CONG. REC. 13909 (1977).

8. *Kaufman v. Comm’r*, 136 T.C. 294, 307 (2011).

9. *See, e.g.*, *Belk v. Comm’r (Belk III)*, 774 F.3d 221, 225 (4th Cir. 2014); *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 552–54 (5th Cir. 2017).

10. *See, e.g.*, Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002).

looks at the efficacy of these types of conservation easements in furthering modern conservation goals, ensuring enforceability, and preserving flexibility. Finally, Part III proposes a legislative solution: extending the IRC to allow tax deductions for fixed-term conservation easements that are coterminous with an option to purchase the conservation easement.

I. BACKGROUND

Conservation easements are a critical tool in the preservation of United States land. Today, conservation easements are one of the “most common uses of negative easements in modern law.”¹¹ A negative easement restricts the permissible uses of land on the servient estate.¹² In the context of conservation easements, encumbered land is limited to uses consistent with “conservation” or “preservation purposes.”¹³ These “purposes,” however, encompass a vast array of reasons, such as protecting the natural or scenic value of land, assuring the availability of land for various open-space uses, protecting natural resources, maintaining or enhancing air or water quality, and preserving historical or cultural value.¹⁴ Thus, a conservation easement allows property owners to retain a fee interest in the land, subject to any one of a wide variety of conservation encumbrances.¹⁵ As of 2020, over twenty million acres of land were subject to a conservation easement in the United States.¹⁶

11. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (AM. L. INST. 2000) (noting that negative easements are functionally equivalent to restrictive covenants).

12. *Id.* § 1.3.

13. *Id.* § 1.6.

14. *Id.*; see 26 U.S.C. § 170(h)(4)(A) (defining “conservation purpose”).

15. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (AM. L. INST. 2000). A “fee” interest in land is “[a] heritable interest in land” and “implies the characteristic of potentially infinite duration when used to describe an interest in land today.” *Fee*, BLACK’S LAW DICTIONARY (11th ed. 2019) (quoting Thomas F. Bergin & Paul G. Haskell, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 11 (2d ed. 1984)).

16. *Gaining Ground: Land Protected*, LAND TR. ALL., <https://findalandtrust.org/land-trusts/gaining-ground/united-states#land-protected> (last visited July 11, 2022) [perma.cc/YGV3-7HRN] (reporting that the number of acres subject to a conservation easement nearly doubled between 2010 and 2020).

A. History

1. The Origin of Conservation Easements

The modern conservation easement movement grew out of the environmental movement more generally.¹⁷ Conservation easements were not, however, an invention of the environmental movement.¹⁸ The National Park Services popularized the use of scenic conservation easements in the 1930s during the construction of the Blue Ridge Parkway, Natchez Trace Parkway, and parkways in Washington, D.C.¹⁹ Although easements as a preservation tool largely fell into disuse in the mid-twentieth century, a few states still utilized easements to protect scenic roads and wildlife habitats.²⁰

The modern conservation easement movement was first popularized in 1959 by William Whyte, a land use planner, who emphasized that, while fee simple land ownership is ideal for preservation, conservation easements are valuable because they provide present public benefits and leave future options open for undeveloped land.²¹ Whyte advocated using conservation easements as a tool to protect the aesthetic value of land, contribute to watershed protection, maintain the availability of prime agricultural land, and control urban sprawl.²² Whyte further argued that while “relatively few landowners are wealthy enough or public spirited enough, to give their land outright,” promotion of conservation easements would lead to more donations because “a rather sizable group . . . [can] afford to give easement[s], and would be willing to.”²³ In the face of expanding urban sprawl and a growing U.S. population, Whyte pushed conservation easements as key to ensuring the public continued to benefit from the availability of open space and environmentally protected land.²⁴

17. Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . and Should It Be?*, 52 UIC J. MARSHALL L. REV. 677, 679 (2019).

18. See Molly Shaffer Van Houweling, *Cultural Environmentalism and the Constructed Commons*, 70 LAW & CONTEMP. PROBS. 23, 28 (2007) (noting that conservation easements have existed in the United States since the late nineteenth century).

19. Roddewig, *supra* note 17, at 680.

20. *Id.* (noting in the 1950s and 60s the Wisconsin State Highway Department utilized protective easements along scenic roads, Minnesota and the Dakotas utilized conservation easements to protect waterfowl flyways, and New York utilized fishing easements to protect trout).

21. William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECH. BULL. 1, 18 (1959).

22. *Id.* at 16–18.

23. *Id.* at 36.

24. *Id.* at 10–11.

Importantly, conservation easements' flexibility also encourages land protection.²⁵ Because conservation easements can be highly specific, for example prohibiting "only the cutting of virgin forests," there may be little interference with a landowner's current use of the land.²⁶ A landowner could continue to live and hunt on the land, as well as farm areas cleared prior to the donation. Nevertheless, the easement may simultaneously advance a conservation purpose, such as forest protection and the reduction of CO₂ in the atmosphere.²⁷ Thus, through conservation easements, forests can be preserved without requiring private property holders to relinquish their land entirely or abandon their land for other useful purposes. The popularity of such conservation easements grew with the rise of the environmental movement in the 1970s.²⁸

2. Tax Deductions and the Role of the Internal Revenue Code

The Tax Reform Act of 1976 catalyzed conservation easement donations.²⁹ The Act created the first "income tax deduction for the charitable donation of a less-than-fee interest in real estate."³⁰ Private parties were given an economic incentive to donate conservation easements. Suddenly, a landowner unwilling or unable to donate a *full* interest in the land, who nonetheless wanted to preserve a species' habitat or guard against future development, could donate a conservation easement to achieve the same ends and receive a tax deduction commensurate with the easement's value.³¹

Although the original Act allowed charitable deductions for conservation easements of at least thirty years, the tax code was amended in 1977 to require that donations be "in perpetuity" in order to qualify as a charitable donation eligible for a tax deduction.³² To be

25. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV'T L.J. 2, 11 (1989).

26. *Id.*

27. *See id.*

28. Roddewig, *supra* note 17, at 679 ("The environmental movement not only led to the creation of federal and state environmental protection agencies, but also to awareness that many of the policies needed to protect the environment required growth management and improved stewardship of critical land and cultural resources," including protecting land through conservation easements).

29. *Id.* at 681.

30. *Id.* at 682.

31. Dana & Ramsey, *supra* note 25, at 10; Roddewig, *supra* note 17, at 684 (discussing how, for some rancher and farmers, conservation easements provided a mechanism for maintaining family farms by decreasing the value of the encumbered property and thereby decreasing the onerous inheritance taxes on the land, which had previously forced many families to sell, as it passed from one generation to the next).

32. 123 CONG. REC. 13909 (1977).

donated “in perpetuity,” the transfer of an interest in the land must be permanent, thereby restricting the use of the property indefinitely.³³ Congress’s efforts to increase long-term land preservation are evident through this amendment coupled with the increase in the Land and Water Conservation Fund’s budget.³⁴ The budget increase allowed federal agencies to conserve more land through the purchase of both fee simple titles and conservation easements.³⁵

When Congress later enacted the Tax Treatment Extension Act of 1980, it added § 170(h) to the Internal Revenue Code (IRC).³⁶ Section 170(h) delineates the specific requirements donors must satisfy when seeking a tax exemption for partial interests in real property donated “exclusively for conservation purposes.”³⁷ For instance, under § 170(h)(2)(C), a conservation easement must be “a restriction (granted in perpetuity) on the use which may be made of the real property.”³⁸ Additionally, § 170(h)(5)(A) requires that the donation’s “conservation purpose is protected in perpetuity” to qualify as a conservation easement.³⁹ Thus, to comply with § 170(h), a donation must both perpetually restrict the use of the land *and* perpetually protect the conservation purpose.

Moreover, a conservation easement is only eligible for tax deduction if it is donated to a 501(c)(3) nonprofit or government entity.⁴⁰ To satisfy this requirement, landowners often gift conservation easements to nonprofit land conservation organizations known as land trusts.⁴¹ Together, these sections of the IRC set the threshold qualifications for donors seeking tax deductions for the donation of a partial interest in real estate.⁴²

33. ALVIN ARNOLD & MYRON KOVE, *MODERN REAL ESTATE PRACTICE FORMS* § 1:59 (2021).

34. Roddewig, *supra* note 17, at 682.

35. *Id.* (“As a result [of the budget increase], the US Forest Service, the Bureau of Land Management, and the National Park Service protected more properties each year, sometimes through cooperative efforts with units of state and local government and sometimes with conservation easements rather than fee simple acquisitions.”).

36. *Id.* at 683.

37. *Id.*; 26 U.S.C. § 170(h)(1)(C).

38. 26 U.S.C. § 170(h)(2)(C).

39. 26 U.S.C. § 170(h)(5)(A).

40. 26 U.S.C. § 170(h)(3), (b)(1)(a)(v)-(vi); 26 U.S.C. § 501(c)(3) (exempting organizations “operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals”).

41. See Federico Cheever & Jessica Owley, *Enhancing Conservation Options: An Argument for Statutory Recognition of Options to Purchase Conservation Easements (OPCEs)*, 40 HARV. ENV’T L. REV. 1, 2 (2016) (explaining that land conservation transactions “often involve nonprofit land conservation organizations known as land trusts,” which are trusts that “buy and accept donations of land and conservation easements encumbering land”).

42. See 26 U.S.C. § 170(h)(2)(C), (h)(5)(A), (h)(3), (b)(1)(a)(v)-(vi).

In 1986, the Treasury Department added additional details regarding the requirements for donating a qualifying conservation easement through the promulgation of § 1.170A-14 of the Federal Register.⁴³ The regulation embraced an inclusive definition of conservation easements, including “easement[s] or other interest[s] in real property that under state law ha[ve] attributes similar to an easement (e.g., a restrictive covenant or equitable servitude).”⁴⁴ The regulation also clarified how to evaluate a conservation easement for tax deduction purposes.⁴⁵ Ultimately, the Treasury aimed to create an “efficient” tax deduction robust enough to incentivize donors, beyond those who would have donated their land interest regardless of the tax break, to gift conservation easements to land trusts.⁴⁶ Today, that tax deduction is equivalent to the fair market value of the qualifying conservation easement at the time of donation.⁴⁷

3. Enabling Statutes

States similarly indicated an increased interest in land conservation in the second half of the twentieth century. State legislatures stepped in to supplant common law rules disfavoring negative easements in gross, thereby clearing a final hurdle for the conservation easement movement.⁴⁸

When land is subject to an easement in gross, the benefits or burdens of the easement are not tied to the ownership of land, as compared to land subject to an easement appurtenant, where the benefits or burdens are tied to ownership.⁴⁹ Because a conservation easement is a burden—a restriction on use—that runs with the land, affecting the donating landowner and her successors, it is a negative easement in gross.⁵⁰ At common law, there was doubt surrounding the

43. Treas. Reg. § 1.170A-14.

44. Treas. Reg. § 1.170A-14(b)(2).

45. Treas. Reg. § 1.170A-14(h)(3).

46. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donation: A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 18 (2004):

In [a] 1987 [r]eport [to Congress], the Treasury noted that the desirability of providing tax incentives to stimulate the donation of easements depends, in part, on the effectiveness of those incentives in actually stimulating donations. . . . [I]f the tax incentives do not stimulate the donation of any easements, and all of the donations that are made would be made even in the absence of the incentives, the only impact of providing the incentives would be foregone tax revenue.

47. Treas. Reg. § 1.170A-14(h)(3)(i); Walter E. Beard, Jr., *A Proposal for Greater Accessibility to Charitable Deductions for Conservation Easement Donations*, 19 *HOUS. BUS. & TAX L.J.* 143, 146 (2019).

48. Van Houweling, *supra* note 18, at 28–29.

49. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.5 (AM. L. INST. 2000).

50. Van Houweling, *supra* note 18, at 27–29.

validity of easements in gross, especially those that did not relate to a commercial purpose.⁵¹

Starting in the 1950s, however, state legislatures began enacting legislation designed to circumvent these common law rules and protect the validity of conservation easements.⁵² Today, state legislatures in every state in the country have enacted legislation authorizing conservation easements—either by enacting the Uniform Conservation Easement Act (UCEA), originally promulgated in 1981, or similar easement-enabling legislation.⁵³

Through conservation-easement-enabling legislation, state legislatures sanctioned the enforcement of charitable conservation easement donations, giving teeth to the conservation easement movement.⁵⁴ Following the enactment of these authorizing statutes, the number of conservation easements in the United States skyrocketed.⁵⁵

4. Modern Conservation Goals

The modern conservation movement is made up of over 2,000 land trusts, many of which are highly localized.⁵⁶ Land trusts often cite the preservation of natural land for future generations as a key goal.⁵⁷ Additionally, modern land trusts continue to espouse goals consistent with those that inspired the conservation easement movement—including preserving access to outdoor recreation, sensitive ecological sites, scenic spaces, and agricultural land.⁵⁸

In addition to protecting natural and open space land for human enjoyment, land conservation has become a critical tool in combating the effects of climate change. As global temperatures continue to warm,

51. Dana & Ramsey, *supra* note 25, at 3; *see also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.6 (AM. L. INST. 2000).

52. Van Houweling, *supra* note 18, at 29.

53. *Id.*

54. *See* Dana & Ramsey, *supra* note 25, at 17–21 (discussing the issues surrounding the enforceability of conservation easements at common law and state statutory attempts to cure those issues).

55. Van Houweling, *supra* note 18, at 28 (noting that according to the Land Trust Alliance's 2005 census “over six million acres of land in the United States were covered by conservation easements—almost 1.5 times the acreage protected just five years earlier”).

56. *See, e.g., About OLT, OZARK LAND TR.*, <https://ozarklandtrust.org/about-olt/> (last visited June 9, 2022) [<https://perma.cc/9LZB-RCJ8>]; *Forever Tennessee: Conserving the Places We Call Home*, LAND TR. FOR TENN. 1 (2019), https://www.landtrusttn.org/our-impact/forever-tennessee/#dflip-df_2113/3/ [<https://perma.cc/M5VA-7MSN>].

57. *See, e.g., N. AM. LAND TR.*, <https://northamericanlandtrust.org/> (last visited June 10, 2022) [<https://perma.cc/F798-KKTW>]; LAND TR. FOR TENN., *supra* note 56, at 3 (“Mission: to conserve the unique character of Tennessee’s natural and historic landscapes and sites for future generations”).

58. *See* Whyte, *supra* note 21, at 24; *see, e.g., LAND TR. FOR TENN.*, *supra* note 56, at 2.

there will be increases in weather extremes (heatwaves, floods, droughts, and wildfires) and continued sea level rise.⁵⁹ In North America, these effects will cause shifts in seasonal migratory patterns and plant life cycles, changes in ecosystem structures, flood-induced damage to coastal and inland cities, and human displacement.⁶⁰ By preserving land, many land trusts aim to “protect[] and restor[e] the ability of our local ecosystems to respond and adapt to warming temperatures” by reducing the anthropogenic impact on land, thereby “maintain[ing] ecosystem resilience in the face of climate change.”⁶¹

Protected forests, grasslands, and wetlands can help to mitigate these climate change effects because they act as carbon sinks, removing carbon from the atmosphere.⁶² Additionally, by preserving habitat linkages (connections between isolated habitats), land trusts enable plants and animals to adjust location in response to warming temperatures.⁶³ “[N]atural lands play a key role in tempering the effects of climate change,”⁶⁴ and land trusts utilize conservation easements, in addition to land held in fee simple absolute, to ensure there is sufficient preserved natural land in the United States.⁶⁵

President Biden’s Executive Order 14008 expresses a renewed commitment to increasing land preservation in the face of climate change.⁶⁶ The executive order, entitled *Tackling the Climate Crisis at Home and Abroad*, lays out a national goal to conserve thirty percent of the lands and waters in the United States by 2030.⁶⁷ Section 216 proposes utilizing a broad coalition that includes “[s]tate, local, Tribal,

59. Hans-Otto Pörtner et al., Intergovernmental Panel on Climate Change, *2022: Summary for Policy Makers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 3, 9–11 (Hans-Otto Pörtner et al. eds., 2022), https://www.ipcc.ch/report/ar6/wgl1/downloads/report/IPCC_AR6_WGI_SPM.pdf [<https://perma.cc/Z8JH-YUEQ>].

60. *See id.* at 9 (noting these effects can be attributed to climate change with a high or very high confidence level).

61. *See, e.g., Climate Change and the Land Trust*, LAND TR. OF NAPA CNTY., <https://napalandtrust.org/climate-change-and-the-land-trust/> (lasted visited July 23, 2022) [<https://perma.cc/PLD3-EZFG>].

62. *See, e.g., Kelley Beamer, Conservation Is Climate Action*, COAL. OF OR. LAND TRS. (May 4, 2020), <https://oregonlandtrusts.org/conservation-is-climate-action/> [<https://perma.cc/8WBM-P3MU>]; *Climate Change Initiative*, NW. ARK. LAND TR., <https://www.nwalandtrust.org/climate-change-initiative> (last visited June 10, 2022) [<https://perma.cc/8TGS-TAK7>].

63. *See* LAND TR. OF NAPA CNTY., *supra* note 61.

64. *Climate and Science*, COAL. OF OR. LAND TRS., <https://oregonlandtrusts.org/our-work/climate-and-science/> (last visited July 23, 2022) [<https://perma.cc/953X-KH9J>].

65. *See* Jessica Owley, Federico Cheever, Adena R. Rissman, M. Rebecca Shaw, Barton H. Thompson, Jr. & W. William Weeks, *Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools*, 95 DENV. L. REV. 727, 730 (2018) (“In the realm of land conservation, public and private entities have long heavily relied on perpetual conservation easements.”).

66. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021).

67. *Id.*

and territorial governments,” as well as “agricultural and forest landowners, fishermen, and other key stakeholders” in order to achieve increased conservation throughout the United States, with the understanding that land conservation is key to protecting resources vulnerable to climate change.⁶⁸ Although not explicitly mentioned, conservation easements represent one such avenue for the government as it endeavors to increase the amount of protected land within the United States.⁶⁹

B. Enforcement

The Internal Revenue Service (IRS) took on the enforcement role for determining the validity of conservation easement donations.⁷⁰ Initially, the IRS focused its efforts on identifying procedural errors in easement donations.⁷¹ Later, the IRS began pursuing more substantive challenges to donations by attacking the perpetual nature of the use restriction or the protection of the conservation purpose.⁷²

1. Procedural Enforcement

Throughout the 1990s, the IRS focused its enforcement efforts on a donor’s valuation and procedural errors made at filing.⁷³ Thus, most challenges to conservation easements “surround[ed] substantiation of the conservation transaction itself.”⁷⁴ The IRS often sought to reduce the valuation of an easement to “zero value,” thereby disallowing any tax deduction.⁷⁵ Additionally, the IRS invalidated easement donations on technical errors, such as the failure to receive a gift acknowledgment letter.⁷⁶ When successful, these challenges could result in the “complete denial and disallowance of a tax deduction” for the donated conservation easement.⁷⁷

68. *Id.*

69. *See id.*

70. Jessica E. Jay, *Down the Rabbit Hole with the IRS’ Challenge to Perpetual Conservation Easements, Part One*, 51 ENV’T L. REP. (ELI) 10136, 10137–38 (2021).

71. *Id.*

72. *See infra* notes 80–86 and accompanying text.

73. Jay, *supra* note 70, at 10137–38.

74. *Id.*

75. *Id.*

76. *Id.* (discussing technical procedural errors the IRS used to challenge conservation easement tax deductions, including “the misdating of appraisals substantiating value, the untimeliness of mortgage subordination agreements, and the improper execution of Form 8283,” as well as untimely recording).

77. *Id.* at 10138.

In recent years, however, there has been decreased IRS enforcement—particularly in valuation cases, which frequently require significant IRS resources due to their fact intensive nature.⁷⁸ Nevertheless, enforcement may soon increase. In January 2022, the IRS Office of Chief Counsel announced that they plan “to hire up to 200 additional attorneys to assist with litigation efforts,” particularly concerning tax abuses surrounding conservation easements.⁷⁹

2. Substantive Enforcement

The IRS also levied more substantive challenges to conservation easement donations. Initially, these attacks were grounded in challenges to the charitable nature of the conservation easement—focusing on lack of donative intent, preexisting conservation protection, improper balance of conservation protection to landowner uses, and allegations of quid pro quo donations.⁸⁰ The IRS also began making substantive challenges to the perpetual nature of conservation easement donations.⁸¹

Section 170(h)(5)(A) of the IRC requires that the “conservation purpose is protected in perpetuity.”⁸² In 2011, the IRS challenged a tax deduction for a conservation easement placed on a historic building on the basis that the donation was not “given exclusively for a ‘conservation purpose.’”⁸³ Although the recipient in the case, *Commissioner v. Simmons*, retained the right to make changes to the donated building’s façade and abandon its right to the easement, the D.C. Circuit held that the donation still qualified as a conservation easement under § 170(h)(5)(A) for tax deduction purposes.⁸⁴ The court

78. Andrew R. Roberson, Kevin Spencer & Jenny L. Johnson Ware, *IRS Chief Counsel Signals Increased Tax Enforcement*, TAX CONTROVERSY 360 (Jan. 27, 2022), <https://www.taxcontroversy360.com/2022/01/irs-chief-counsel-signals-increased-tax-enforcement/> [perma.cc/ES3K-KHDJ].

79. *Id.*; *IRS Chief Counsel Looking For 200 Experienced Attorneys to Focus on Abusive Tax Deals; Job Openings Posted*, IRS (Jan. 21, 2022), <https://www.irs.gov/newsroom/irs-chief-counsel-looking-for-200-experienced-attorneys-to-focus-on-abusive-tax-deals-job-openings-posted> [https://perma.cc/Z9TA-UX44] (“Abusive syndicated conservation easement deals remain a major focus for the IRS. These transactions generally use inflated appraisals of undeveloped land and partnerships devoid of legitimate business purpose designed to generate inflated and unwarranted tax deductions.”).

80. Jay, *supra* note 70, at 10138–40.

81. *Id.* at 10141; see *Conservation Easement Audit Technique Guide*, IRS, at 25, <https://www.irs.gov/pub/irs-pdf/p5464.pdf> (last updated Jan. 21, 2021) [https://perma.cc/DY6U-N4ZW] (“An easement deed may fail the perpetuity requirements of IRC § 170(h)(2)(C) and (h)(5)(A) if it allows any amendment or modification that could adversely affect the perpetual duration of the deed restriction.”).

82. See *Comm’r v. Simmons*, 646 F.3d 6, 9–10 (D.C. Cir. 2011); 26 U.S.C. § 170(h)(5)(A).

83. *Simmons*, 646 F.3d at 9–10.

84. *Id.* at 10.

in *Simmons* recognized that the overall “conservation purpose[]” of the easement—historic preservation—was protected in perpetuity, despite the deed allowing minor future changes to the building.⁸⁵

In 2013, the battleground regarding the scope of tax-deductible conservation easements shifted from § 170(h)(5)(A) to § 170(h)(2)(C) of the IRC.⁸⁶ In *Belk v. Commissioner (Belk I)*, a landowner donated a conservation easement over land that included a golf course to a land trust.⁸⁷ The deed also included an amendment clause allowing the landowner to substitute land within the easement with unencumbered land “of the same or better ecological stability.”⁸⁸

Adhering to a plain meaning approach to statutory interpretation, the *Belk I* court held that the “floating easement[s]” created by the amendment clause did not satisfy the in perpetuity requirement in § 170(h)(2)(C).⁸⁹ In reaching its decision, the tax court noted that the donors did not donate an interest in real property subject to a use restriction in perpetuity “because the conservation easement agreement permits [the donors] to change what property is subject to the conservation easement.”⁹⁰ The court relied on a narrow reading of § 170(h)(2)(C)’s in perpetuity requirement, limiting the range of qualifying conservation easements.

The donors subsequently filed a motion for reconsideration and argued that the court “focused too much on ‘the real property’ and ignored the fact that petitioners donated a use restriction granted in perpetuity.”⁹¹ The lower court reiterated its objection to “floating easements” in *Belk v. Commissioner (Belk II)*, asserting that § 170(h)(2)(C) “requires that taxpayers donate an interest in an *identifiable, specific piece of real property*.”⁹² Then, in *Belk v. Commissioner (Belk III)*, the Fourth Circuit affirmed the lower tax court’s interpretation and emphasized the word “the” in the phrase “the real property” to support its holding that, under § 170(h)(2)(C), a conservation easement must relate to “a defined parcel of real property rather than simply *some* or *any* (or interchangeable parcels of) real property.”⁹³

85. *See id.*

86. *Belk v. Comm’r (Belk I)*, 140 T.C. 1 (2013), *aff’d*, 774 F.3d 221 (4th Cir. 2014).

87. *Id.* at 2–3.

88. *Id.* at 3–4.

89. *Id.* at 10–11.

90. *Id.* at 10.

91. *Belk v. Comm’r (Belk II)*, 105 T.C.M. (CCH) 1878, at *3 (2013).

92. *Id.* (emphasis added).

93. *Belk v. Comm’r (Belk III)*, 774 F.3d 221, 225 (4th Cir. 2014).

Using the reasoning from *Belk III*, in *Balsam Mountain Investments, LLC v. Commissioner*, the tax court found that a donation did not qualify as a conservation easement for tax deduction purposes when the donor retained the ability to make substitutions for five percent of the land within the first five years of the easement.⁹⁴ The court held that the easement was not a “qualified real property interest” because the donor could make alterations to “boundaries of the ‘Conservation Area’ burdened by the easement.”⁹⁵

Two years later, in *BC Ranch II, L.P. v. Commissioner*, the tax court held that two clauses, both which allowed for boundary adjustments of “Homesite Parcels” *within* an easement, disqualified the donation from tax exempt status as a conservation easement.⁹⁶ The Fifth Circuit reversed, distinguishing this case from *Belk III* by emphasizing that the external boundaries of the easement remained unchanged despite the ability to relocate the forty-seven-acre Homesite Parcels within the easement.⁹⁷ The Fifth Circuit emphasized “[t]he need for flexibility” and reasoned that the ability “to address changing or unforeseen conditions on or under property subject to a conservation easement clearly benefits all parties, and ultimately the flora and fauna that are their true beneficiaries.”⁹⁸

The Fifth Circuit’s holding reflects a more inclusive view regarding the scope of conservation easements that is more in line with the original enactment and regulations promulgated in the 1980s.⁹⁹ In *BC Ranch*, the Fifth Circuit asserted that “the usual strict construction of intentionally adopted tax loopholes is not applicable to grants of conservation easements made pursuant to § 170(h).”¹⁰⁰ The court emphasized that much of the land protected under conservation easements would never have been protected if landowners “were limited to the traditional method of conveyance.”¹⁰¹

Subsequently, in *Pine Mountain Preserve, LLLP v. Commissioner*, the Eleventh Circuit applied the more inclusive reasoning from *BC Ranch* and held that “[a]n easement granted in perpetuity over a defined conservation area clears § 170(h)(2)(C)’s relatively low threshold, even if it reserves targeted development rights

94. 109 T.C.M. (CCH) 1214, at *3 (2015).

95. *Id.* at *8.

96. *BC Ranch II, L.P. v. Comm’r*, 110 T.C.M. (CCH) 48 (2015), *vacated & remanded sub nom. BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547 (5th Cir. 2017).

97. *BC Ranch II*, 867 F.3d at 552–54.

98. *Id.* at 553.

99. *See supra* Section I.A.1–2.

100. *BC Ranch II*, 867 F.3d at 554.

101. *Id.*

for homesite construction.”¹⁰² Like the *BC Ranch* court, the court in *Pine Mountain* distinguished the relevant easements from that in *Belk III* by emphasizing that the easement at issue only allowed for movement “within the fixed boundaries of the easement” as opposed to “outside-territory swapping.”¹⁰³ Both *BC Ranch* and *Pine Mountain*, however, represent a broader construction of the in perpetuity requirement in § 170(h)(2)(C) of the IRC.¹⁰⁴

Although both the Fifth Circuit and Eleventh Circuit distinguished *BC Ranch* and *Pine Mountain* from *Belk III*, the reasoning in these cases reveals a divide between the Fourth Circuit and the Fifth and Eleventh Circuits regarding the function of § 170(h)(2)(C)’s in perpetuity requirement and the permissibility of amendment provisions.¹⁰⁵ The courts’ differing interpretations fuel an academic debate between those who believe “in perpetuity” prevents conservationists from being able to respond flexibly to the demands of climate change and those who believe conservation “in perpetuity” is necessary for future generations to benefit from the natural world.¹⁰⁶

II. CONSERVATION EASEMENTS IN PRACTICE

In its initial design of the conservation easement tax deduction, Congress focused on two factors: (1) encouraging land preservation, and (2) preventing tax abuses.¹⁰⁷ The current scheme needs to prioritize a third factor due to climate change: flexibility. Climate change adds a layer of uncertainty for land conservationists¹⁰⁸ because the ultimate effects will vary in degree depending on the amount the global temperature rises above preindustrial levels.¹⁰⁹ Nevertheless, climate change is already causing rises in regional temperatures, rises in sea levels, increased natural disasters, and shifts in migratory patterns.¹¹⁰ These effects may impact the utility of conservation easements, as

102. *Pine Mountain Pres., LLLP v. Comm’r*, 978 F.3d 1200, 1208 (11th Cir. 2020).

103. *Id.*

104. *See id.*; *BC Ranch II*, 867 F.3d at 552–54.

105. *Compare* *Belk v. Comm’r (Belk III)*, 774 F.3d 221, 225 (4th Cir. 2014) (narrowly construing the in perpetuity requirement), *with Pine Mountain*, 978 F.3d at 1208, *and BC Ranch II*, 867 F.3d at 552–54 (broadly construing the in perpetuity requirement).

106. Mahoney, *supra* note 10, at 740–46; *See What You Can Do: How It Works*, LAND TR. ALL., <https://www.landtrustalliance.org/what-you-can-do> (last visited June 11, 2022) [<https://perma.cc/3T7B-HALH>] (“When a land trust protects a special place, it makes a promise that the land will always be there – for us, for our children, for their children, forever.”).

107. Beard, *supra* note 47, at 158; 123 CONG. REC. 13909–10 (1977).

108. *See* Owley et al., *supra* note 65, at 735, 755.

109. MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE 42 (2017).

110. Pörtner et al., *supra* note 59, at 9–11.

easements are permanently tied to particular parcels of land.¹¹¹ Thus, the tax benefits enshrined in § 170(h) must be reexamined and updated to reflect a conservation strategy that allows for flexibility in light of changing circumstances. This Part surveys three types of conservation easement interests: (1) fixed-term conservation easements, (2) perpetual conservation easements, and (3) options to purchase conservation easements. It then assesses the degree to which each allows flexibility, ensures enforceability, and encourages donations consistent with conservation goals.

A. Fixed-Term Conservation Easements

Critics of the in perpetuity requirement point out that it can impede conservation.¹¹² Instead, some scholars advocate for tax deductions for fixed-term conservation easements that automatically expire after a predetermined time period.¹¹³ The varying interpretations of § 170(h)'s in perpetuity requirement contribute to this viewpoint, as complex and lengthy legal battles over statutory interpretation can discourage donation.¹¹⁴ Moreover, the in perpetuity requirement categorically excludes donors from exemption in states with statutory limits on an easement's term of years.¹¹⁵ Finally, by fixing conservation easements in perpetuity, conservationists today limit the possible uses of land in the future, when the timeline and magnitude of climate change's effects will become more apparent.¹¹⁶

Providing a tax deduction for fixed term easements of at least forty years presents an appealing solution to these issues.¹¹⁷ Under a forty-year fixed term easement, a donor would be prevented from "benefitting financially from land development for a major portion of his or her life"; however, the duration of the easement "is short enough to allow future owners the ability to construct new agreements or adjust the original easement to more efficiently serve the current ecological

111. Mahoney, *supra* note 10, at 753–57.

112. *Id.* at 780; Beard, *supra* note 47, at 157; Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENV'T L.J. 121, 163–65 (2011).

113. Mahoney, *supra* note 10, at 780; Beard, *supra* note 47, at 157; Owley, *supra* note 112, at 163–65.

114. *See* Beard, *supra* note 47, at 157–58; *Belk v. Comm'r (Belk III)*, 774 F.3d 221, 225 (4th Cir. 2014).

115. Beard, *supra* note 47, at 157–58.

116. Mahoney, *supra* note 10, at 780–87.

117. *See* Beard, *supra* note 47, at 149.

needs.”¹¹⁸ Nevertheless, fixed-term easements may result in greater enforceability challenges for the courts.¹¹⁹

1. Fixed-Term Conservation Easement Donations

A government or land trust’s interest in a fixed-term easement reverts to the landowner after termination. By offering a tax incentive to donate fixed-term easements, Congress may incentivize increased short-term conservation, as landowners would not be required to subject their land to indefinite servitudes.¹²⁰ Additionally, a statutorily mandated minimum term of years will decrease the litigation costs currently associated with proving an easement donation is perpetual.¹²¹ Such an IRC tax deduction would also be available to landowners in all fifty states, which may increase donations since the same cannot be said for the current perpetual conservation easement scheme.¹²²

a. Decreased Litigation Costs Resulting from Fixed-Term Conservation Easements

Because the perpetuity requirement “make[s] it more difficult for landowners to successfully claim a § 170(h) deduction,” it may curtail the number of conservation easement donations.¹²³ A landowner otherwise inclined to make a conservation easement donation might refrain from doing so if they perceive a high likelihood of disallowance or of protracted litigation with the IRS.¹²⁴ This deterrent is compounded by the fact that tax courts have rejected landowner attempts to condition conservation easement donations on the IRS’s grant of a tax deduction.¹²⁵ In *Graev v. Commissioner*, the tax court found that such a condition violated the in perpetuity requirement because the chance that the IRS Commissioner would deny the tax deduction was not “so remote as to be negligible.”¹²⁶ Thus, landowners are prevented from taking legally enforceable steps to ensure they receive tax benefits for donated conservation easements.¹²⁷

118. *See id.* at 159.

119. *See infra* Part II.A.3.

120. *See* Beard, *supra* note 47, at 156.

121. *See id.* at 157.

122. *See id.* at 152.

123. *Id.* at 157.

124. *Id.*

125. *Id.* at 151.

126. 140 T.C. 377, 409 (2013).

127. Beard, *supra* note 47, at 157–58.

Walter Beard argues that by removing the in perpetuity requirement altogether, Congress could “bring an end to the paradoxical rule denying deductions to conservation easements conditioned on the landowner receiving a § 170(h) deduction.”¹²⁸ Similarly, a clear statutory minimum term of years for tax deductible conservation easements would circumvent the court’s current complex in perpetuity analysis, thereby decreasing overall litigation costs and possibly increasing donations.¹²⁹

b. Eradication of Categorical Exclusions from § 170(h) Deductions

Where state laws regarding easements conflict with the requirements of § 170(h), landowners are excluded from receiving tax benefits.¹³⁰ For instance, state restrictions on the term of years for which an easement can be conveyed can disqualify property owners from donation deductions throughout an entire state.¹³¹ In North Dakota, state law restricts easements to a term of ninety-nine years.¹³² The tax court in *Wachter v. Commissioner* held that the donation of such a ninety-nine year conservation easement did not qualify for a tax deduction because “the possibility that the charity may be divested of its interest in the easement [was] not so remote as to be negligible,” thereby failing the in perpetuity requirement of § 170(h).¹³³

While North Dakota’s ban on perpetual easements is particularly stringent, other states, including Kansas, Alabama, Montana, and West Virginia, similarly do not make perpetual easements the default standard at law, leaving donations vulnerable to disqualification from federal tax benefits.¹³⁴ By excluding landowners from tax deduction based on the particularities of state law, the in perpetuity requirement of § 170(h) acts as a barrier to land conservation efforts.¹³⁵ A conservation easement deduction based on a fixed term would be more inclusive, and thereby more likely to conserve increased land in all states.¹³⁶

128. *Id.* at 160.

129. *Id.* at 161.

130. *Id.* at 151.

131. *Id.* at 151–52.

132. *Id.*

133. 142 T.C. 140, 148–49 (2014) (citing *Graev v. Comm’r*, 140 T.C. 377, 393 (2013)).

134. *Owley*, *supra* note 112, at 164.

135. *See* Beard, *supra* note 47, at 152. Another example occurs where state recording laws have the ability to nullify an unrecorded easement; in such instances, tax courts have found that a conservation easement does not qualify for a tax deduction. *Id.* at 152–53.

136. *Id.* at 160–61.

2. Flexibility for Future Generations

Scholars point out that conservation easements fixed in perpetuity “may create ecological, legal, and institutional problems for later generations.”¹³⁷ Because climate change has the ability to change property boundaries swiftly due to sea level rise, some suggest that perpetual conservation easements are not an efficient means of protecting the environment in the long term.¹³⁸ While many conservationists espouse to preserve land in the name of future generations, certain critics retort that there is no real way to predict their wants and needs.¹³⁹

For instance, in New York City, twenty million people will be placed at risk due to sea level rise by 2050.¹⁴⁰ Although the City has developed adaptation plans, it is unclear whether any action has actually been taken to implement these plans.¹⁴¹ Suppose a landowner in upstate New York donates a thirty-year, fixed-term conservation easement in 2022 to conserve open fields as a breeding area for the Bobolink, a species of bird in the blackbird and oriole family.¹⁴² A rise in the global average temperature of two degrees Celsius, which may occur as early as 2050, will shift the Bobolink’s breeding range almost entirely out of New York state.¹⁴³ If few Bobolink continue to use the land pledged in the conservation easement by 2050, the landowner may choose not to renew the easement in 2052 and instead sell the land to a developer to build housing for individuals displaced from New York City. If the Bobolink maintains its breeding ground, however, the current (or any future) landowner would still be entitled to sell the property to a developer at the extinguishment for the fixed-term

137. Mahoney, *supra* note 10, at 786–87; see Dana Joel Gattuso, *Conservation Easements: The Good, the Bad, and the Ugly*, NAT’L CTR. FOR PUB. POL’Y RSCH. (May 1, 2008), <https://nationalcenter.org/ncppr/2008/05/01/conservation-easements-the-good-the-bad-and-the-ugly-by-dana-joel-gattuso/> [<https://perma.cc/V2WP-BH22>] (stating that the in perpetuity requirement “fails to recognize that conservation needs—as well as definitions of scenic, aesthetic and cultural—change over time, and that the easement may eventually lose any ecological benefit or even become a detriment”).

138. See Cheever & Owley, *supra* note 41, at 4.

139. Mahoney, *supra* note 10, at 780–87; see Gattuso, *supra* note 137 (noting that the in perpetuity requirement may “prove to be detrimental to the public over the long-term as economic and ecological factors change our definitions of what should be preserved and why”).

140. See WORKING GROUP II, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY 1966 tbl.14.4.1 (2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FullReport.pdf.

141. *Id.*

142. See *Guide to North American Birds: Bobolink*, AUDUBON, <https://www.audubon.org/field-guide/bird/bobolink#bird-climate-vulnerability> (last visited July 24, 2022) [perma.cc/89F7-8JSF] (set the first warming scenario to +two degrees Celsius).

143. *Id.*

easement. Critically, a fixed-term easement provides a clear date on which the landowner can reconsider the use of the land devoted to a conservation easement considering developing information.

Scholars, such as Julia Mahoney, argue that encumbering land with perpetual easements restricts future generations from exercising their ability to design land use designations in the ways most efficient to their society, such as the example of the New York landowner.¹⁴⁴ By contrast, fixed-term easements may allow future generations to reevaluate if land set aside for a conservation purpose is still best suited for that use.¹⁴⁵

3. Enforcement Challenges

Congress intentionally shifted from providing tax deductions for fixed-term conservation easements of a minimum term of thirty years to perpetual conservation easements in 1977.¹⁴⁶ When making this shift, Congress attempted to balance the need to incentivize easement donations with the need to protect federal tax benefits from misuse and abuse.¹⁴⁷ In its 1977 Conference Agreement, Congress reported,

While it is intended that the term “conservation purposes” be liberally construed with regard to the types of property with respect to which deductible conservation easements or remainder interests may be granted, it is also intended that contributions of perpetual easements . . . qualify for the deduction only in situations where the conservation purposes of protecting or preserving the property will in practice be carried out.¹⁴⁸

Allowing fixed-term easements to qualify for federal tax deductions may disrupt this careful balance, increasing abuse by those seeking to find loopholes in the federal tax code.¹⁴⁹

The sizable tax deductions landowners receive after donating a conservation easement have spurred less scrupulous donors to use § 170(h) as a tax shelter.¹⁵⁰ Thus, the IRS’s push for a narrow construction of “in perpetuity,” consistent with the Fourth Circuit’s

144. See, e.g., Mahoney, *supra* note 10, at 780–87; Dana & Ramsey, *supra* note 25, at 11 (“Perpetual conservation easements do unequivocally restrict the choices that future generations are able to make concerning resource use.”).

145. Mahoney, *supra* note 10, at 780–87; *What You Can Do*, *supra* note 106.

146. See 123 CONG. REC. 13909 (1977).

147. See *id.*

148. *Id.* at 13909–10.

149. See *id.*; *Tax Shelter Legislation*, LAND TR. ALL., <https://www.landtrustalliance.org/tax-shelter-legislation> (last visited July 24, 2022) [<https://perma.cc/F5NX-C84F>].

150. *Tax Shelter Legislation*, *supra* note 149 (“[A] few bad actors are promoting conservation easement donations as a way for investors to make a fast profit by gaining access to very large federal tax deductions,” costing taxpayers billions of dollars).

approach in *Belk III*, serves as a sword and a shield.¹⁵¹ The IRS can use the in perpetuity provision to offensively attack those attempting to circumvent federal taxation through sham conservation easements, while simultaneously preserving the benefit for deserving conservation easement donors.¹⁵²

In recent years, in response to the threat of abuse, some land trusts have called for legislation to reform and tighten the § 170(h) donation requirements so as to ensure that individuals taking advantage of the current system do not thwart conservationists' preservation goals.¹⁵³ As the Land Trust Alliance noted, over twenty billion dollars in federal tax revenue was lost in the past five years due to unwarranted charitable deductions for conservation easements.¹⁵⁴ The inclusion of fixed-term conservation easements may make it easier for crafty tax evaders to qualify for the tax benefit without actually donating an easement with a valid conservation purpose. If this occurs, the IRS may push Congress to revoke the conservation easement tax benefit altogether, realizing the fears of many land trust organizations.¹⁵⁵

B. Perpetual Conservation Easements

Conservation easements “are intended to preserve . . . lands as natural oases in the midst of development.”¹⁵⁶ In fact, some individuals choose to donate conservation easements specifically because they expect their gift to protect the undeveloped, natural state of their land forever.¹⁵⁷ While some scholars argue that the in perpetuity requirement will rob future generations of determining the best use of land,¹⁵⁸ without conservation easements, future generations may similarly be robbed of a viable choice.¹⁵⁹ Moreover, conservation

151. See Roddewig, *supra* note 17, at 709; *Belk v. Comm’r (Belk III)*, 774 F.3d 221, 225 (4th Cir. 2014).

152. See Roddewig, *supra* note 17, at 709.

153. *Tax Shelter Legislation*, *supra* note 149; see Charitable Conservation Easement Program Integrity Act, H.R. 4164, 117th Cong. (2021) (proposing “[a] contribution by a partnership . . . shall not be treated as a qualified conservation contribution for purposes of this section if the amount of such contribution exceeds 2.5 times the sum of each partner’s relevant basis in such partnership”).

154. *Tax Shelter Legislation*, *supra* note 149.

155. *Id.*

156. Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENV’T L. REV. 217, 244 (2013).

157. *Id.* at 238 nn. 115–19.

158. See, e.g., Mahoney, *supra* note 10, at 780–87.

159. See James L. Olmsted, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENV’T L. & LITIG. 451, 480 (2008) (“Should we allow preservation-worthy lands to be developed

easements do retain flexibility through amendment and termination, even though they are donated “in perpetuity.”¹⁶⁰ Perpetual conservation can ensure that future generations—of people and of wildlife—will have access to natural land. The ambiguities in the current tax code, however, both create flexibility and invite complex litigation.

1. Perpetual Conservation Easement Donations

The in perpetuity requirement often incentivizes donors who are motivated to give by the prospect of protecting “the specific land they love” forever.¹⁶¹ Although perpetual conservation easements might foreclose future generations from certain land uses on protected land, they do preserve privately held open spaces—a lack of perpetually conserved land may similarly end in foreclosed land uses (due to development), without the benefit of preserved open spaces.¹⁶² “Natural land, once altered, can never regain its natural state.”¹⁶³ If fixed-term conservation easements become the norm, landowners located in desirable locations are likely to feel development pressure as the easement term draws to a close.¹⁶⁴ Moreover, nonprofit land trusts with finite resources may be unable to outbid developers if they are forced to purchase land at market rate at the time a conservation easement expires.¹⁶⁵ Thus, conservation easements donated in perpetuity ensure that the landowners’ donative intent is preserved beyond their life span or ownership.

For this reason, some view conservation easement donations as a form of deadhand control of land—allowing a landowner to restrict the use of their property beyond their natural life—which is disfavored at common law.¹⁶⁶ Donations to charitable organizations, however,

and such development is later deemed to have been a mistake, it will be impossible to turn back the ecological clock and re-create the natural attributes of the land and of the unique history that goes with it.”).

160. Dana & Ramsey, *supra* note 25, at 29–30.

161. Schwing, *supra* note 156, at 237–38.

162. Olmsted, *supra* note 159, at 469–70.

163. *Id.* at 470.

164. *See id.* at 472 (“If conservation easements were not perpetual, they would be terminated at the first cycle of increase in land values.”); Schwing, *supra* note 156, at 243 (“Development opportunities may arise after the easement is recorded that were not contemplated before. Perpetuity means that it does not matter how valuable the land would be or may become without the easement’s restrictions.”).

165. *See* Olmsted, *supra* note 159, at 472 (noting the potential impacts of increased land value on non-perpetual easements); Dana & Ramsey, *supra* note 25, at 29 (discussing land trusts’ limited budgets).

166. Dana & Ramsey, *supra* note 25, at 27–28. Deadhand control generally refers to the “convergence of various legal doctrines that allow a decedent’s control of wealth to influence the conduct of a living beneficiary.” *Deadhand Control*, BLACK’S LAW DICTIONARY (11th ed. 2019).

typically fall under an exception to this general rule against restraints on free alienation.¹⁶⁷ The law permits perpetual charitable gifts because charitable donations “produce public benefits . . . [that] outweigh the costs of restricting the property.”¹⁶⁸ The approval of conservation easements through modern state legislation bolsters the continuation of this common law carve-out for charitable organizations.¹⁶⁹

In light of Congress’s intentional shift away from incentivizing fixed-term easements, § 170(h) tax deductions received by private donors can be viewed as a public investment in *perpetually* conserved lands.¹⁷⁰ The in perpetuity requirement operates as an assurance to both land donors and the public that the conservation easement tax deductions, annually amounting to billions of dollars, represent an appropriate exchange.¹⁷¹

2. Flexibility & Enforceability Under the Current Statutory Regime

Although the in perpetuity requirement of § 170(h) requires that conservation easements be donated indefinitely to qualify for a tax deduction, easements can be amended.¹⁷² The appellate courts in *BC Ranch* and *Pine Mountain* both held that modifications to conservation easements after donation are permissible in certain circumstances.¹⁷³ Additionally, if the conservation purpose for which the easement was donated ceases to exist, a conservation easement might be extinguished.¹⁷⁴ Perpetual conservation easements may therefore

167. *Id.*

168. *Id.* at 28–29 (discussing the common law exception from the rule against perpetuities for charitable gifts).

169. *Id.* (“The common law’s acknowledgment of the special status of charities is reinforced by the action of state legislatures: most have voted to ‘tip the scales’ in favor of restricting the choices of future generations by allowing preservation of resources through conservation easements.”).

170. See 123 CONG. REC. 13909 (1977); Schwing, *supra* note 156, at 239.

171. See Schwing, *supra* note 156, at 238–39 (explaining how “donors are motivated to protect their own specific land,” while the “[t]ax deductions and corresponding losses to the federal Treasury can be justified only if deductions ‘buy’ permanent land protection through perpetual easements”); see also Dana & Ramsey, *supra* note 25, at 30–31:

Both because conservation easements *must* provide public benefits to qualify as deductible charitable contributions and because most easements are given to take advantage of these tax breaks, members of a community who enjoy the benefits are likely to support . . . [taking measures to] protect the open spaces, recreational opportunities, and environmental resources that are preserved by conservation easements.

172. See Dana & Ramsey, *supra* note 25, at 34 (“One technique that land trusts have used to forestall legal disputes is to include amendment clauses in conservation easements to handle unforeseen changes and altered party goals.”).

173. *Pine Mountain Pres., LLLP v. Comm’r*, 978 F.3d 1200, 1208 (11th Cir. 2020); *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 552–54 (5th Cir. 2017).

174. Treas. Reg. § 1.170A-14(g)(6)(i).

retain sufficient flexibility to respond to climate change despite their indefinite term. Nevertheless, the judicial uncertainty regarding the permissibility of amendments—as revealed in the different opinions in *Belk III*, *BC Ranch*, and *Pine Mountain*—may continue to create uncertainty and foster enforceability challenges.¹⁷⁵

a. Amendment

Conservation easements usually contain clauses that permit amendments.¹⁷⁶ Amendments allow landowners and land trusts to modify the terms of the conservation easement in response to unforeseen changes to ensure the easement continually serves its purpose over time.¹⁷⁷ This flexibility may prove crucial as climate change modifies species' habitats and property boundaries.¹⁷⁸

There is, however, an active debate regarding whether amendment is permissible under § 170(h) of the IRC.¹⁷⁹ Section 170(h) neither expressly permits nor expressly prohibits amendments—and it appears Congress did not contemplate the possibility of amendment at the time the tax deduction was enacted.¹⁸⁰ Some scholars view this statutory silence as implicit permission to amend easements as long as the perpetual nature and conservation purpose are not impacted,¹⁸¹ while others view the silence as proof that amendments are not permitted.¹⁸²

The IRS, however, strictly construes the statutory silence to indicate that *any* amendment capable of affecting the perpetual nature of the easement is reason to deny a § 170(h) tax deduction.¹⁸³ In 2018,

175. See *supra* notes 93–105 and accompanying text.

176. *Pine Mountain Pres., LLLP v. Comm'r*, 151 T.C. 247, 280 n.7 (2018) (“According to the Land Trust Alliance, Inc., land trusts in the United States held more than 40,000 conservation easements in 2015, and amendment provisions substantially similar to article 6.7 are ‘widely used’ in these documents.”).

177. *Dana & Ramsey*, *supra* note 25, at 34.

178. See *Climate Change and the Land Trust*, *supra* note 61.

179. *Roddewig*, *supra* note 17, at 697–701.

180. *Id.*

181. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T L. REV. 421, 444 (2005):

Without running afoul of the requirements for the charitable income tax deduction, an easement donor may include a provision in the deed of conveyance expressly granting the holder the discretion to agree to amendments that are consistent with (or neutral with respect to) the stated purpose of the easement, thereby eliminating the need for the holder to seek judicial approval for such amendments under the doctrine of administrative deviation.

182. *Schwing*, *supra* note 156, at 239.

183. *Conservation Easement Audit Technique Guide*, *supra* note 81, at 25 (“An easement deed may fail the perpetuity requirements of IRC § 170(h)(2)(C) and (h)(5)(A) if it allows any

the *Pine Mountain* court rejected the IRS's proposition that general clauses permitting amendments but requiring said amendments to preserve the easement's conservation purpose are cause for disallowance under § 170(h).¹⁸⁴ Nevertheless, the IRS continues to pursue complex litigation with respect to particular amendment clauses—specifically those that deal with land substitutions and boundary changes—that it believes threaten the perpetual nature of conservation easements.¹⁸⁵ Conversely, where landowners and land trusts are strictly held to their initial agreement, without amendments, the IRS's inquiry and the court's inquiry is simplified by completely avoiding the complicated “in perpetuity” analysis that amendment clauses require.¹⁸⁶

Moreover, there is a concern that allowing amendments would undermine the whole purpose of conservation easements: to “remain binding despite changes in circumstances.”¹⁸⁷ For instance, Ann Schwing, former Commissioner of the Land Trust Accreditation Commission, argues that any challenges arising from climate change and other changed circumstances can, and should, be appropriately managed through careful drafting, avoiding the need for amendment later.¹⁸⁸

Ultimately, the statutory silence regarding amendments may create necessary flexibility for courts as they evaluate the functionality of conservation easements over time. Returning to the Bobolink example, if, in 2022, the New York landowner donates a conservation easement over her entire property, subject to specific areas carved out for development,¹⁸⁹ she may seek to amend the conservation easement in 2052 after observing the amount global temperatures rise and the degree to which the Bobolink shifts its breeding range.¹⁹⁰ Through

amendment or modification that could adversely affect the perpetual duration of the deed restriction.”).

184. *Pine Mountain Pres., LLLP v. Comm'r*, 151 T.C. 247, 281 (2018), *aff'd in relevant part*, 978 F.3d 1200, 1202 (11th Cir. 2020) (rejecting the IRS's contention that due to a general amendment clause an easement “should be deemed ‘nonperpetual’ at the outset because of the risk that the qualified organization might be unfaithful to the charitable purposes on which its exemption rests”).

185. *See supra* notes 93–105 and accompanying text.

186. *Id.*

187. Schwing, *supra* note 156, at 243.

188. *See, e.g., id.* at 242 (observing that “[c]areful drafters address not only current land and conditions but also foreseeable future changes that may occur,” including expanding urban development, climate change, and changes in technology).

189. Like the areas within conservation easements carved out for “Homesite Parcels” and targeted development rights, which the Fifth and Eleventh Circuits held to be permissible in *Bosque Cannon* and *Pine Mountain*, respectively. *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547, 552–54 (5th Cir. 2017); *Pine Mountain Pres., LLLP v. Comm'r*, 978 F.3d 1200, 1208 (11th Cir. 2020).

190. *See AUDUBON, supra* note 142.

amendment, the landowner may choose to shift the development carve-out southward so the easement better serves the Bobolink as it shifts its breeding range northward.¹⁹¹ Even where courts disallow formal amendment, land trusts may continue to agree to such modifications to appease landowners and avoid costly legal battles.¹⁹² Thus, § 170(h), as currently enacted, may allow future courts to sanction amendments made by the parties in light of shifting circumstances, such as the effects of climate change.

b. Extinguishment

As sea level rise alters property boundaries, species' migration patterns shift, and ecosystems adapt to climate change (frustrating the donative purposes behind conservation easements), judicial extinguishment may provide a way to flexibly respond and adapt. The uncertainty surrounding termination proceedings, however, might create additional enforcement challenges for the IRS.

Where an “unexpected change” in “conditions” makes it “impossible or impractical” to preserve the original conservation purpose, a conservation easement can be extinguished.¹⁹³ In such instances, all proceeds from the sale of the property previously protected by the easement must be used “in a manner consistent with the conservation purposes of the original contribution.”¹⁹⁴ As the court in *Kaufman v. Commissioner* noted, the Treasury Department “undoubtedly understood the difficulties (if not impossibility) . . . of making a conservation restriction perpetual,” thus “[t]hey defused the risk presented by potentially defeasing events of remote and negligible possibility” through judicial extinguishment.¹⁹⁵ Extinguishment, therefore, allows encumbered land to be released from a conservation easement so that it can be put to a more productive use in the unlikely event that the easement ceases to serve the conservation function for which it was intended.¹⁹⁶

191. *See id.*

192. Dana & Ramsey, *supra* note 25, at 27–29:

Because land trusts typically operate on severely limited budgets, they wish to avoid costly conflicts when possible. Chances are good, therefore, that unless subsequent landowners wish to destroy entirely the conservation value of the property, a land trust would be willing to modify the easement to accommodate the needs of future owners.

193. Treas. Reg. § 1.170A-14(g)(6)(i).

194. *Id.*

195. 136 T.C. 294, 306–07 (2011).

196. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (AM. L. INST. 2000).

Some scholars argue that the precise procedure required to terminate conservation easements remains uncertain.¹⁹⁷ Although the Treasury Regulation explicitly discusses “extinguish[ment] by judicial proceeding,” the regulation does not include modifiers such as “only” or “solely.”¹⁹⁸ To some, the lack of modifiers indicates that judicial extinguishment merely represents one (Treasury Department sanctioned) way to terminate a conservation easement, leaving the door open to other processes including those developed by state law.¹⁹⁹ Tax courts, however, characterize the regulation as requiring judicial proceedings.²⁰⁰ Courts have found that, while a conservation easement may not include a clause permitting extinguishment by mutual consent and still qualify for a tax deduction,²⁰¹ conservation easements can include provisions allowing for extinguishment based on “changed conditions.”²⁰²

Scholars differ over whether “changed conditions” should be interpreted as a high or low burden on those wishing to extinguish conservation easements.²⁰³ Ann Taylor Schwing argues “changed conditions” in the termination context requires much more than the “common use” of the term implies.²⁰⁴ The Restatement Third of Property advocates a strict test whereby termination can only occur “[i]f it becomes impossible to accomplish the purpose of a conservation servitude.”²⁰⁵ In most instances where “changed conditions” arise, the Restatement proposes amending conservation easements by substituting another conservation purpose in order to “safeguard the public interest.”²⁰⁶ On the other hand, some support a lower standard,

197. Owley, *supra* note 112, at 160 (“The [legal] ability of land trusts to alter or release conservation easements is unsettled because few courts have considered the issue.”).

198. Treas. Reg. § 1.170A-14(g)(6)(i); Roddewig, *supra* note 17, at 679.

199. See Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENV'T L. REV. 1, 11 (2012) (noting that to some the regulation’s language “suggest[s] that there may be other processes available for termination”).

200. *Carpenter v. Comm’r*, 106 T.C.M. (CCH) 62, 67 (2013) (explicitly stating that “extinguishment by judicial proceeding is mandatory”); *Mitchell v. Comm’r*, 106 T.C.M. (CCH) 215, 218 (2013), *aff’d*, 775 F.3d 1243 (10th Cir. 2015) (characterizing § 1.170A-14(g)(6)(i) as including a “judicial proceeding requirement”).

201. *Carpenter*, 106 T.C.M. (CCH) at 67.

202. *Kaufman v. Comm’r*, 136 T.C. 294, 306–07 (2011).

203. Schwing, *supra* note 156, at 243–44 (arguing changed circumstances is a high burden); Dana & Ramsey, *supra* note 25, at 29–30, 39 (advancing a relatively lower burden).

204. Schwing, *supra* note 156, at 244 (“Casual or common use of changed circumstances to justify amendment or termination of conservation easements is a repudiation of the very concept of perpetuity.”).

205. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (AM. L. INST. 2000).

206. *Id.* The Restatement imports “the cy pres doctrine of charitable-trust law,” further interpreting “the grantor’s intent [to be] broad enough to encompass a more general conservation

arguing “changed conditions” are triggered simply when “the flow of public benefits from the easement becomes relatively minor and the land trust no longer finds maintenance of the easement valuable.”²⁰⁷

Nevertheless, in cases of judicial extinguishment, it is up to the courts to determine when such “changed conditions” have been met. There is a dearth of caselaw, however, examining the precise conditions under which an easement can be terminated.²⁰⁸ If courts choose to follow the Restatement’s approach to changed conditions, conservation easements will be repurposed to suit another conservation goal when they cease to serve their original purpose.²⁰⁹ In the Bobolink example, the landowner would not be free to sell her land to a housing developer after the Bobolink abandoned its breeding ground. Instead, the easement would be converted to fit another conservation purpose—perhaps as a scenic easement—providing the local community, including any displaced New York City residents, with the benefit of open space land.

Alternatively, state courts may choose to adopt a lower standard for changed conditions, in which case the court may view a species, such as the Bobolink, abandoning its breeding grounds as cause for extinguishment if it determines that the lingering “public benefits [are] relatively minor.”²¹⁰ In the event of extinguishment, a landowner would be free to dispose of her land in the same manner as a landowner who regains her development rights after the expiration of a fixed-term easement. Absent sufficient binding caselaw to analogize to, it is impossible to know exactly how the courts will interpret changed conditions during conservation easement termination proceedings in the face of climate change.

Without empirical research and time, the conjectures surrounding the ultimate effects of perpetual conservation easements remain hypothetical.²¹¹ In the future, if a conservation easement ceases to serve its conservation purpose, the parties may amend the easement or a court may extinguish it and release the land for more productive

or preservation purpose than the particular use specified in the instrument will ordinarily be justified absent a contrary provision in the document creating the servitude.” *Id.*

207. Dana & Ramsey, *supra* note 25, at 29–30, 39–42.

208. The current case law surrounding judicial extinguishment primarily relates to the issue of how the easement terms are written with regard to the division of the proceeds from the property post extinguishment, as it can act as a barrier to the donor receiving a tax credit. *See, e.g.,* Hewitt v. Comm’r, 21 F.4th 1336 (11th Cir. 2021). Nevertheless, the court in *Carroll v. Commissioner* approved the Petitioners’ observation that the Respondent did “not cite to a single instance where a conservation easement actually has been extinguished, nor . . . offered any potential reasons why the Easement donated by [P]etitioners ever would be extinguished.” 146 T.C. 196, 221 (2016).

209. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (AM. L. INST. 2000).

210. Dana & Ramsey, *supra* note 25, at 29–30.

211. *Id.* at 27.

uses, thereby mitigating the effects of perpetual donations.²¹² As long as an easement serves the conservation purpose for which it was donated, the courts are bound to enforce a land trust's obligation to preserve it.²¹³ The ambiguity surrounding the requirements and procedures necessary to amend and extinguish conservation easements makes the flexibility of these encumbrances subject to costly litigation, which may ultimately hinder modern conservation goals.²¹⁴

C. Options to Purchase Conservation Easements

Landowners occasionally sell land trusts “options to purchase conservation easements” (OPCEs) at a later date.²¹⁵ By entering into an OPCE, a landowner becomes contractually obligated to sell a conservation easement over her property if the designated land trust chooses to exercise its option to purchase within the specified time frame;²¹⁶ however, the ultimate decision to purchase the conservation easement is entirely within the land trust's discretion.²¹⁷ Currently, OPCEs are utilized in the short term—typically less than two years—as a means to give land trusts more time to generate the funds necessary to purchase a conservation easement.²¹⁸ However, OPCEs could serve as a tool to provide additional flexibility to land trusts and landowners seeking to promote conservation more efficiently.²¹⁹

1. Flexibility: Additional Time to Consider

OPCEs extend the amount of time a land trust has to deliberate before purchasing a conservation easement.²²⁰ This additional time gives a land trust the ability to consider how the impacts of climate change, including sea level rise, species extinction, and shifting migratory patterns, will ultimately affect an area.²²¹ For example, in light of information that the Bobolink may change its breeding area in response to climate change, a land trust might purchase multiple

212. Schwing, *supra* note 156, at 243–44.

213. *Id.* at 242–43.

214. *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021) (setting a goal to conserve thirty percent of land and water in the United States by 2030); Beard, *supra* note 47, at 157.

215. Cheever & Owley, *supra* note 41, at 5.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See id.* at 5, 8.

220. *Id.*

221. *Id.*

OPCEs over open fields in Maine that would provide suitable breeding grounds in the event the bird abandons upstate New York.²²² The land trust could then choose whether to exercise its purchase options over the Maine properties once the efficacy of global temperature rise mitigation measures, and thus the Bobolinks ultimate breeding range, becomes more apparent.²²³ Land trusts can use OPCEs to retain flexibility by buying time to collect the information requisite for selecting the land most suitable to a permanent encumbrance.²²⁴

2. Purchase v. Donation: OPCE Enforceability and Contribution to the Amount of Land Conserved

Using OPCEs to preserve land trusts' flexibility regarding the land they elect to conserve relies upon landowners' willingness to sell OPCEs with long-term windows,²²⁵ which might be unrealistic. Unlike conservation easement donations, OPCE donations and sales do not provide the relinquishing landowners with tax benefits.²²⁶ Because most donors give conservation easements in anticipation of federal tax break benefits,²²⁷ this lack of preferential tax treatment, when coupled with land trusts' limited resources,²²⁸ means that any increase in the usage of long-term OPCEs will require the cooperation of altruistic landowners.

Moreover, standalone OPCEs—those unattached to a lease or fixed-term conservation easement—cannot prevent destruction of the optioned land prior to purchase.²²⁹ Thus, a landowner could sell her land, subject to the option, to a developer while the conservation option is still open.²³⁰ If a land trust is not vigilant in monitoring the land, a developer may destroy the ecosystem the conservation option was purchased to preserve.²³¹ Even if a land trust is vigilant, such a scenario may force the land trust to preserve land prior to its ultimate determination regarding the utility of the conservation easement.²³²

222. AUDUBON, *supra* note 142; *see* Cheever & Owley, *supra* note 41, at 7.

223. AUDUBON, *supra* note 142; *see* Cheever & Owley, *supra* note 41, at 7.

224. Cheever & Owley, *supra* note 41, at 5.

225. *See id.* at 20 (“OPCEs could allow land trusts to preserve habitat for relatively long periods—perhaps even fifty years—until either scientific modeling or actual climate change impacts made it clear that exercising the OPCE would increase the resiliency of [an area].”).

226. *See id.* at 27 & n.143.

227. *See* Dana & Ramsey, *supra* note 25, at 30–31.

228. *Id.* at 27–29.

229. Cheever & Owley, *supra* note 41, at 26.

230. *See id.*

231. *See id.*

232. *Id.*

For this reason, Federico Cheever and Jessica Owley argue that it may be necessary to couple an OPCE with a lease or fixed-term easement so that a land trust can ensure that land is preserved in the interim.²³³ Donating an OPCE, however, requires a landowner to forgo significant tax deductions if he or she wants to donate an OPCE.²³⁴ Therefore, even where an OPCE is coterminous with a lease or fixed-term easement, this form of conservation easement may not incentivize land conservation beyond those that would have been sold or donated without it.²³⁵

Additionally, while OPCEs do not require the same type of IRS intervention as fixed-term and perpetual conservation easements—because landowners who sell OPCEs do not receive a tax deduction—they do present their own enforceability problems.²³⁶ Options are varyingly treated as contractual and as property interests by courts.²³⁷ Where courts treat OPCEs as property interests, more rigid formalities apply to the option terms—including requirements that details on the parties and land involved, the price, and the place and time of closing be provided.²³⁸ The OPCE will, however, be entitled to equitable remedies.²³⁹ Where treated as a contract, OPCEs simply require mutual consideration, but land trusts will largely be restricted to monetary damages as the remedy for a landowner’s breach.²⁴⁰ In order to ensure the enforceability—a prerequisite to proliferation—of OPCEs, their treatment needs to be standardized across jurisdictions. The lack of tax benefits and codified rules regarding enforcement creates uncertainty around OPCEs which might discourage donors from using them.²⁴¹

III. THE OPCE EXTENSION

As the IRS ramps up enforcement efforts,²⁴² Congress should recommit to the conservation goals enshrined in § 170(h) by extending the IRC to provide a deduction for landowners who donate a fixed-term

233. *Id.* at 24, 27.

234. *See id.* at 27 & n.143.

235. *See* McLaughlin, *supra* note 46, at 18 (noting that § 170(h) was enacted to stimulate easement donation beyond those freely donated). *But see* Cheever & Owley, *supra* note 41, at 27 & n.143 (arguing that OPCEs are still financially attractive because they merely “delay[] accrual of a § 170(h) benefit” until after the option is exercised).

236. *Id.* at 7.

237. *Id.* at 29.

238. *Id.*

239. *Id.* at 28.

240. *Id.* at 28–29.

241. *Cf. id.* 37–44 (arguing an OPCE enabling statute, similar to the UCEA, is necessary to reinforce the validity of OPCEs).

242. IRS, *supra* note 79.

conservation easement coterminous with an OPCE (the “OPCE extension”). Consistent with the original aim of the 1977 amendment, Congress must balance encouraging land preservation and preventing tax abuses.²⁴³ The effects of climate change necessitate an additional consideration—flexibility. The effects of climate change over the next thirty years have become more certain,²⁴⁴ but the timing and magnitude of longer term effects, including global temperature rise, sea level rise, and species adaptation and extinction, will depend on the efficacy of current mitigation measures.²⁴⁵ Climate change effects, in combination with the recent judicial uncertainty surrounding the in perpetuity requirement, necessitate an update to § 170(h) to provide a more flexible conservation option while still ensuring the government promotes lasting land preservation.

A. *Improved Enforceability Through Statutory Guidelines*

Under the OPCE extension, to receive a tax deduction, a landowner would be required to donate a fixed-term conservation easement over her land which, at its expiration (or at any point prior), the land trust or governmental body would have the option to purchase.²⁴⁶ To simplify the judicial analysis, the OPCE extension should include a minimum term of years, a tax credit equivalent to a fixed percentage of the easements value, and a requirement that the OPCE includes predetermined terms of sale.

By setting a minimum fixed term—for example, thirty years—Congress will create a threshold requirement for courts to use when analyzing whether a conservation easement qualifies for a tax deduction. The effects of climate change by 2050 have become more certain.²⁴⁷ Thus, a thirty-year, fixed-term conservation easement requirement will allow present land donors to pledge easements to land trusts with the added certainty that the easement’s functionality will be reevaluated as the efficacy of current mitigation measures on *long-*

243. See 123 CONG. REC. 13909 (1977).

244. For instance, estimates now predict with high confidence that sea levels will rise between ten to twelve inches on average by 2050. *2022 Sea Level Rise Technical Report*, NAT’L OCEAN SERV., <https://oceanservice.noaa.gov/hazards/sealevelrise/sealevelrise-tech-report.html#step1> (last visited July 25, 2022) [<https://perma.cc/TC4F-VJSU>].

245. Brad Plumer & Raymond Zhong, *Climate Change Is Harming the Planet Faster Than We Can Adapt*, *U.N. Warns*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/climate/climate-change-ipcc-report.html> [<https://perma.cc/FPZ6-TTVL>].

246. See Cheevers & Owley, *supra* note 41, at 24, 27 & n.143 (discussing fixed-term conservation easements coterminous with an OPCE and advancing an enabling statute, but “avoid[ing]” the tax implications).

247. See *supra* note 244.

term climate change effects becomes more clear.²⁴⁸ Ultimately, this will create a bright-line rule regarding the minimum term of years without amendments,²⁴⁹ enabling courts to abandon the complex “in perpetuity” analysis currently required.²⁵⁰

Additionally, the OPCE extension should include a provision requiring the OPCE to set out the terms of the sale, or a formula including present valuation and appreciation rate, in advance. This will ensure that courts treat options donated under the OPCE amendment as property interests entitled to equitable remedies.²⁵¹ By requiring the landowner to fix the ultimate terms of sale in advance, Congress can ensure that development pressure does not drive the market price of the conservation easement beyond what the land trust can reasonably afford in the future.²⁵² Similarly, it will deter opportunistic buyers from purchasing encumbered land in anticipation of the easement’s termination.

Finally, the amendment should include a predetermined method for valuing a fixed-term conservation easement for tax credit purposes. Because a fixed-term easement is shorter in duration, the federal government can provide a fractional tax credit as opposed to a credit equivalent to the entire value of the qualifying easement, maintaining a tax deduction for donors while decreasing the incentive for abuse.²⁵³

The extension should require that donated fixed-term easements with an OPCE will be valued by multiplying the present value of the easement by a fixed percentage directly proportional to the number of years the easement was donated. For instance, a fixed-term conservation easement set to terminate after thirty years, would be worth a deduction equivalent to thirty percent of its present value, while an easement donated for fifty-five years would qualify for a deduction worth fifty-five percent of its value. If such a scale is used, the lowest percentage would match the minimum qualifying term of the easement, while the upper limit could be set at any percentage under one hundred percent, representing a policy decision about the

248. Depending on carbon emissions, the average global temperature may rise by two degrees Celsius by 2050. The difference between one and a half and two degrees Celsius increase in average global temperature will dramatically change the Bobolink’s breeding ground. Under the OPCE amendment, a land trust protecting the Bobolink could evaluate the rate of temperature increase in the 2050s or 2060s before deciding whether to permanently encumber land with a conservation easement. See AUDUBON, *supra* note 142.

249. The only exception is in the case of scrivener’s errors.

250. See *supra* notes 93–105 and accompanying text.

251. See Cheevers & Owley, *supra* note 41, at 29.

252. See *supra* note 164 (discussing the challenges development potential and rising land values pose to short-term conservation easements).

253. Treas. Reg. § 1.170A-14(g)(6)(ii); Beard, *supra* note 47, at 146.

maximum term for which Congress will allow an additional deduction. By clearly laying out the valuation requirements for fixed-term conservation easements, Congress has a better chance of reducing the onus of an additional valuation process.²⁵⁴

B. Donations: Ensuring Quantity and Quality

By providing a deduction for fixed-term easements, coterminous with an OPCE, the federal government will likely increase land conservation throughout the United States. If Congress passes laws delineating clear thresholds for donation, donors can pledge conservation easements with greater certainty that they will qualify for a tax deduction.²⁵⁵ The OPCE amendment will also permit donors in all states, including North Dakota, to benefit from the tax deductions.²⁵⁶ By increasing the availability and certainty of receiving a federal tax deduction, the OPCE amendment may increase the number and size of conservation easement donations.²⁵⁷

The OPCE requirement of the extension will entitle land trusts, not landowners, to make the ultimate determination regarding whether a particular easement is best suited for its conservation purpose in the future.²⁵⁸ Thus, the OPCE extension will ensure that the original donor's intent—preservation of land for a specific conservation purpose²⁵⁹—will be preserved regardless of transfer. Because the OPCE extension requires an interim fixed-term conservation easement, a subsequent owner cannot unilaterally destroy the utility of the land for the conservation purpose for which it was donated.²⁶⁰ The quality of conservation easement donations will be safeguarded in the short term, while land trusts gather information about the practicality of long-term encumbrance.²⁶¹

C. Flexibility in the Hands of Conservationists

The OPCE amendment would give land trusts the ability to take the time necessary to discover which parcels ultimately need permanent protection, promoting conservation while simultaneously

254. See Roberson et al., *supra* note 78 (noting that valuation represents an impediment to IRS enforcement).

255. See Beard, *supra* note 47, at 165–66.

256. *Id.* at 152.

257. *Id.* at 165–66.

258. See Cheever & Owley, *supra* note 41, at 5.

259. See Schwing, *supra* note 156, at 237–38.

260. See Cheever & Owley, *supra* note 41, at 26.

261. *Id.* at 16.

decreasing the risk that land will become over encumbered with easements that do not serve the functional purpose for which they were donated.²⁶² At the conclusion of the fixed-term easement, the land trust or government agency entrusted with the easement would have the opportunity to reevaluate the functionality of the easement before purchasing it outright.²⁶³ In this way, future generations retain the flexibility to respond to the changing environment and determine the best use for conserved land. Moreover, where the land trust *does* choose to exercise its option, the trust will be empowered to permanently preserve the land under its protection.

Returning to the Bobolink—the New York landowner, under the OPCE amendment, could gift a thirty-year, fixed-term conservation easement coterminous with an OPCE to a land trust in 2022. The land trust would then be required to monitor the land for the duration of the fixed-term easement—tracking the breeding habits of the Bobolink on the property. The land trust would also have the opportunity, over the life of the fixed-term easement, to gather information about the success (or failures) of current climate mitigation measures. If the Bobolink begins to migrate away from the property prior to 2052, the land trust may choose not to exercise its option.²⁶⁴

Until the expiration of the option, the right to restrict the future use of the property will remain with the land trust. Thus, if some, though fewer, Bobolink continue to utilize the landowner's field for breeding as the fixed-term conservation easement ends, the land trust will be in the position to weigh the costs and benefits of continued conservation. Because the land trust does not stand to benefit financially from developers seeking to purchase the conserved land, it will be in a better position than the landowner to decide in the best interest of the Bobolink. Nevertheless, because the land trust can choose not to exercise the option, it can weigh marginal costs to the Bobolink against human benefits flowing from additional housing development in upstate New York.

As the world continues to face severe weather patterns, rising sea levels, shifting property boundaries, changing migratory patterns, and species extinction, conservation easements remain an important part of the mitigation effort.²⁶⁵ An extension of the IRC permitting a tax deduction for fixed-term conservation easements coterminous with an OPCE will preserve flexibility for future generations, while increasing

262. *See id.*

263. *See id.*

264. *See* AUDUBON, *supra* note 142.

265. Michael P. Vandenbergh & Ben Raker, *Private Governance and the New Private Advocacy*, 32 NAT. RES. & ENV'T 45, 46 (2017).

administrability by the courts and incentivizing donations of land set aside for conservation purposes—ultimately aiding national and global climate change mitigation efforts.

CONCLUSION

Although, as written, § 170(h) of the Internal Revenue Code leaves considerable flexibility for future generations to modify or terminate perpetual conservation easements that do not meet society's evolving needs, there remains a real risk that judicial interpretation may foreclose such flexibility in the future. In response to increased IRS enforcement, Congress needs to clarify the qualifying requirements for donors seeking a tax deduction after donation of a conservation easement. An extension of the IRC permitting a tax deduction for fixed-term conservation easements coterminous with an OPCE will provide clarity and encourage present donations to conserve land, while ensuring flexibility for future generations.

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