

**OPPORTUNITIES FOR REFORM AND REIMAGINING IN  
CONSERVATION EASEMENT AND LAND USE LAW: A TO-  
DO LIST FOR SUSTAINABLE, PERPETUAL LAND  
CONSERVATION**

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#### I. HISTORIC REFORMS AND SUPPORT ACHIEVED THROUGH ADAPTIVE LEGAL REGIMES

Over the last two decades in the mere fifty-year-old field of land conservation law, the land conservation community has instituted crucial supportive mechanisms and implemented new infrastructure to stabilize the perpetual duration of conservation easements and their holders. In reliance on proactive scholarship, the conservation community invoked crucial enforcement and defense mechanisms by creating a land trust community-wide insurance company (Terrafirma)

to protect itself, its land, and conservation easement holdings.<sup>1</sup> It also identified third-party enforcement options to support easement holders in the form of Attorneys General,<sup>2</sup> citizens,<sup>3</sup> and in a very rare instance in only one state—neighbors,<sup>4</sup> while also promoting pathways to third-party trespass enforcement through Terrafirma.<sup>5</sup> Further, the community emboldened language, understanding, recognition, policy, and legislation guiding legal regimes when land use involves amendment and termination of perpetual conservation easements;<sup>6</sup> and applied primacy of laws to the federal and state regimes for disposition

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<sup>1</sup> See Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENV'T LAW 441, 445 (2000) (providing a template, later utilized by Terrafirma Risk Retention Group, LLC for how organizations can support conservation easements to ensure their continuance as mechanisms for land preservation).

<sup>2</sup> See ME. STAT. tit. 33, § 478(1)(D) (2021) (enabling Maine's Attorney General to enforce conservation easement rights under the statute); CONN. GEN. STAT. §§ 47-42a, 47-42c (2021) (granting Connecticut's Attorney General, landowners, and easement holders the express right to enforce violations of encroachment); 34 R.I. GEN. LAWS § 34-39-3(d) (2020) (enabling Rhode Island's Attorney General, pursuant to their inherent authority, to bring an action to enforce the public interest in such easements); Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 760–63 (2005) (discussing the potential for third-parties to enforce conservation easements under the current statutory and common law regimes).

<sup>3</sup> See citizen enforcement of conservation easements in: Massachusetts under MASS. GEN. LAWS ch. 12, § 8 (2020); Tennessee under TENN. CODE ANN. §§ 66-9-303(1)(C), 66-9-307(a)(3) (2021); Wyoming under WYO. STAT. ANN. § 34-1-203 (2021); Hicks v. Dowd, 157 P.3d 914, 919 n.3 (Wyo. 2007) (describing citizen enforcement of conservation easements under Wyoming common law and prior to statutory law); Jay, *Third-Party Enforcement of Conservation Easements*, supra note 2, at 763.

<sup>4</sup> See 765 ILL. COMP. STAT. 120/4(c) (2019) (granting landowners the right to enforce a conservation easement within 500 feet of their real property).

<sup>5</sup> See Jessica E. Jay, *Enforcing Perpetual Conservation Easements Against Third-Party Violators*, 32 UCLA J. ENV'T L. & POL'Y 80, 89 (2014) (describing several approaches for holding third parties responsible for their actions on an easement holder's land).

<sup>6</sup> 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, 43–45 (2012) [hereinafter Jay, *When Perpetual Is Not Forever*].

in cases of perpetual land protection overlap or conflict.<sup>7</sup> Most recently, in the face of extensive abuse, the community has endeavored to bolster the legal framework supporting the federal tax incentive and its enforcement, while pushing back on Internal Revenue Service (IRS) overreach.<sup>8</sup> Standing on the shoulders of these accomplishments, it is imperative to look now to the practical, policy, and ethical impacts of perpetual land conservation, and to identify crucial tasks, goals, and stabilizing factors for the next half-century of protection.

## II. THE TO-DO LIST

From the most urgent and obtainable in the short term to the most sea-changing and aspirational in the long term, presented here is a view of the immediate, ongoing, and future needs for reform or reimagining in land conservation law. These reforms and reimagining include bolstering and expanding conservation incentives in the face of extensive abuse, integrating private land protection within communities, adjusting land monetization and valuation approaches, unbundling land ownership notions, and re-democratizing and restoring land access and use. Such reforms and reimagining are intended to sustain and secure perpetual land conservation as a continuing, dynamic, and flexible source for critical resource management and protection at the local, state, federal, and global levels, while ensuring equitable, inclusive, diverse, and just land protection in the context of past, current, and future generations of land use and users.

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<sup>7</sup> See Jessica E. Jay, *Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and Response to Ann Taylor Schwing*, 37 HARV. ENV'T L. REV. 247, 248, 261 (2013).

<sup>8</sup> See Jessica E. Jay, *Down the Rabbit Hole with the IRS' Challenge to Perpetual Conservation Easements, Part Two*, 51 ENV'T L. REP. 10239, 10258 (2021) [hereinafter Jay, *Part Two*]; Jessica E. Jay, *Down the Rabbit Hole with the IRS' Challenge to Perpetual Conservation Easements, Part One*, 51 ENV'T L. REP. 10136, 10161–62 (2021) [hereinafter Jay, *Part One*].

*A. Immediate, Imminent, and Urgent Needs Within the Existing Legal Framework*

1. Pass the Conservation Integrity Act to Immediately Curtail Abuse of the Conservation Easement Incentive

In June 2021, bipartisan lawmakers introduced the Charitable Conservation Easement Program Integrity Act in both the House and Senate<sup>9</sup> and incorporated its language into the House Ways and Means Committee markup of the \$1.75 trillion budget Reconciliation Bill then being negotiated in both houses.<sup>10</sup> The Bill intends to add a new § 7 to Code 170(h)<sup>11</sup> to catch pass-through entities—usually in the form of limited liability companies (LLCs) or S corporations (S-corps)

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<sup>9</sup> Charitable Conservation Easement Program Integrity Act of 2021, S. 2256, 117th Cong. (2021); Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021).

<sup>10</sup> Amendment to Infrastructure Investment and Jobs Act, H.R. 3684, § 138403(a)–(b) (Sept. 12, 2021) <https://gop-waysandmeans.house.gov/wp-content/uploads/2021/09/AINS-.pdf>.

<sup>11</sup> See Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164 117th Cong. § 2(a)(7) (2021), S. 2256, 117th Cong. (2021) (amending 26 U.S.C. § 170(h)) (emphasis added).

“Limitation on Deduction for Qualified Conservation Contributions made by Pass-through Entities.

(A) In General. A contribution by a partnership (whether directly or as a distributive share of a contribution of another 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.

(B) Relevant Basis. For purposes of this paragraph . . . .

(C) Exception For Contributions Outside 3-Year Holding Period. Subparagraph (A) shall not apply to any contribution which is made at least 3 years after the latest of . . . .

(D) Exception For Family Partnerships. (i) In General. Subparagraph (A) shall not apply with respect to any contribution made by any partnership if substantially all of the partnership interests in such partnership are held, directly or indirectly, by an individual and members of the family of such individual. (ii) Members of the Family. For purposes of this subparagraph, the term “members of the family” means, with respect to any individual—(I) the spouse of such individual, and (II) any individual who bears a relationship to such individual which is described in subparagraphs (A) through (G) of section 152(d)(2).” *Id.*

and excluding family partnerships—that inflate the value of conservation easement contributions by over 2.5 times on land owned for under three years.<sup>12</sup> Such projects have already drained billions of dollars in tax-deduction claims through purported “conservation” gifts, with many future projects in the pipeline threatening further harm absent legislative intervention.

For purposes of this Article, it is important to note that such abuse is enabled by the tax deduction claimant’s corporate structure. The claimants can receive pass-through benefits but also be sheltered by the structure of the S-corp or LLC entities hosting the land purchase by promoters, the investments in the entity in return for land ownership made by investors, and the flow-through of claimed tax deductions to those investors—either from a parent entity or their own individual subsidiary pass-through entity as the syndication. The promoter and investor-beneficiaries of such syndicated structure produce well-

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<sup>12</sup> 26 U.S.C. § 170(h)(7) (2005). *Family* includes, for this rule:

“(A) A child or a descendant of a child.

(B) A brother, sister, stepbrother, or stepsister.

(C) The father or mother, or an ancestor of either.

(D) A stepfather or stepmother.

(E) A son or daughter of a brother or sister of the taxpayer.

(F) A brother or sister of the father or mother of the taxpayer.

(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household.” 26 U.S.C. § 152(d)(2) (2018).

funded efforts to fight the IRS<sup>13</sup> and Department of Justice (DOJ)<sup>14</sup> enforcement actions by taking advantage of the inefficiencies and lack of coordination in IRS audit and DOJ litigation. They also vigorously oppose any proposed legislation intending to curtail abuse, particularly the Integrity Act.

To illustrate the disparity between the values at issue, all one must do is compare a legitimate conservation transaction using reduced values to generate a typical tax deduction, against a syndicated conservation transaction using grossly inflated values to claim an oversized deduction. For example: a non-inflated transaction on 4,000 acres of family-owned land, valued at \$14 million, or \$3,500 per acre at its highest and best use, might understandably create a reduction in value equal to the donated conservation easement's removal of development rights on the family-owned land. The development rights could realistically be valued at half the original land value, thereby creating a \$7 million-valued conservation easement and deduction to be used by the family, even if held in a family limited partnership, to offset any of the partnership's income tax for the year of deduction and 15 following years.

By contrast, a \$14 million "investment" or purchase by promoters of the same 4,000 acres of land at the same \$3,500 per acre

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<sup>13</sup> See *IRS Increases Enforcement Action on Syndicated Conservation Easements*, IRS, <https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements> (last updated Aug. 30, 2021) (announcing increased enforcement by the IRS); *IRS Offers Settlement for Syndicated Conservation Easements; Letters Being Mailed to Certain Taxpayers With Pending Litigation*, IRS (May 25, 2021), <https://www.irs.gov/newsroom/irs-offers-settlement-for-syndicated-conservation-easements-letters-being-mailed-to-certain-taxpayers-with-pending-litigation> (announcing a settlement proposal for conservation easements); Josh Lynsen, *'It Would Help Us Significantly,'* DIRT (June 30, 2020), <https://www.landtrustalliance.org/blog/it-would-help-us-significantly> (stating that IRS legislation would help significantly with enforcement).

<sup>14</sup> See Complaint at 1–2, 12, *United States v. Zak*, (N.D. Ga. Dec. 18, 2018) (No. 1:18-cv-05774-AT), <https://www.justice.gov/opa/press-release/file/1121451/download>; *Atlanta Tax Professionals Plead Guilty to Promoting Syndicated Conservation Easement Tax Scheme Involving More Than \$1.2 Billion in Fraudulent Charitable Deductions*, U.S. DEP'T OF JUST. (Dec. 21, 2020), <https://www.justice.gov/usao-wdnc/pr/atlanta-tax-professionals-plead-guilty-promoting-syndicated-conservation-easement-tax>.

is in a matter of days transformed through the syndication process to exponentially increase in value, now by placing 20 separate tracts of the original land in 20 separate LLCs. From there, promoters sell LLC interests to “investors” at a value of \$80,000 per acre, generating \$320,000,000 of sales value for the promoters. This amount is added back to the value of the property to be conserved, then taken in \$400,000 per acre conservation easement tax deductions by LLCs on the twenty-acre parcels, totaling \$1.4 billion in value of individual conservation easement tax deductions taken on the same property described above. The syndication process is, as the Senate Finance Committee stated, like putting a dollar into a vending machine and receiving two back, paid for courtesy of the United States’ tax system, except in the case of the investors here, receiving six or seven dollars back for every dollar placed in their syndication vending machine.<sup>15</sup>

Because a taxpayer can take an income tax deduction for the *fair market value* of whatever asset they donate to charity, here in the form of a conservation easement, the promoters of syndicated transactions assert their conservation easements are imbued with fair market value that exponentially increases in value from the time of land purchase to the time of claiming conservation tax deductions. As in this example and in real-life instances, the fair market value is six or seven times the value paid for the land, generated within a matter of days from the purchase.<sup>16</sup>

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<sup>15</sup> S. FIN. COMM., 116TH CONG., REP ON SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS, S. PRT. 116-44, at 24, 54, 59 (Comm. Print 2020), <https://www.finance.senate.gov/download/syndicated-conservation-easement-transactions-print-116-44> (including specific examples of high return investor-payoff schemes).

<sup>16</sup> “Using round numbers TOT bought a ‘bundle of rights’ for a million dollars. Eighteen days later it took some of those rights out of the bundle and gave them to a land trust. It claimed for purpose of a charitable deduction that that part of the bundle was worth seven times what it had paid for the whole bundle.” See Peter J. Reilly, *TOT Property Holdings Highlights Fundamental Flaw in Conservation Syndications*, FORBES (June 25, 2021), <https://www.forbes.com/sites/peterjreilly/2021/06/25/tot-property-holdings-highlights-fundamental-flaw-in-conservation-syndications/?sh=5056fd22590a> (describing TOT Prop. Holdings, L.L.C. v. Comm’r of Internal Revenue, WL 11880554, 3, 6 (T.C. Nov. 22, 2019)).



Treasury Regulations (Regulations) define *fair market value* as “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.”<sup>17</sup> In other words, what a willing buyer would pay for an asset (any asset) if it were offered for sale in the marketplace. The Senate Finance Committee Report investigating syndicated easements in 2020<sup>18</sup> concluded that an inflated appraisal of land value before and after a conservation easement is placed is the very “engine of every syndicated conservation-easement transaction.”<sup>19</sup> The business model of the syndicated transaction promoted by the structure of individual S-corps and LLCs hinges on this hyper-inflation of value after the purchase of land and before the grant of a conservation easement.

The motivation behind such overvaluation and resulting inflated tax deductions has proven virtually impossible to curtail between IRS and DOJ enforcement actions. Legislative intervention therefore is required to fix the rate of valuation at no more than 2.5 times the value of the land and ownership by pass-through entities (excluding family partnerships) to at least three years prior to donation of a conservation easement, in order to qualify for a conservation tax deduction. Passing the Integrity Act as a part of budget reconciliation or independently should remove significant motivation for promoters of and investors in syndicated transactions, making its passage paramount to stop abuse of the conservation tax deduction.

## 2. Establish Gatekeeping of the Conservation Easement Incentive Going Forward

As described above, the Integrity Act will greatly reduce the scope and scale of abusive syndicated conservation easement

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<sup>17</sup> Treas. Reg. § 20.2031-1(b) (2019) (defining valuation of property).

<sup>18</sup> S. PRT. 116-44, at I, 46.

<sup>19</sup> Reilly, *supra* note 16; see *TOT Prop. Holdings, L.L.C.*, WL 11880554 at 3–4, 11 (denying a deduction due to failing the perpetuity requirement by excluding after-built improvement from proceeds, and stating that commercial forestry is inconsistent with protection of conservation purposes); Jay, *Part One, supra* note 8, at 10137, 10162; Jay, *Part Two, supra* note 8, at 10257–58.

transactions.<sup>20</sup> If the Integrity Act is not reincorporated into the Budget Reconciliation Act, it should continue to be reintroduced independently or as a part of other bills until Congress passes it into law. Moreover, if the Integrity Act is passed, but abuse continues at the threshold of 2.5 times' increase to value with tacking of holding periods to avoid the three-year ownership requirement, federal, state, or local entities should bolster the conservation deduction by establishing a gatekeeping process to review eligibility of transactions, including easement holders, prior to their receiving conservation tax deductions.

Conservation tax deduction gatekeeping would entail pre-approval and review of a proposed conservation easement transaction for proper donor status, land ownership timeframe, valuation threshold, and easement holder qualification. If examining holder qualification proves too unwieldy a task, government entities could rely instead on the existing Land Trust Accreditation<sup>21</sup> process to ensure holder qualification.

The gatekeeping process could help stop syndication abuse either in the absence of or as a complement to the Integrity Act. Further, by evaluating conservation transactions prior to tax deduction allocation, the gatekeeping process inherently and efficiently redirects focus to the front-end eligibility of a transaction in order to prevent illegitimate deduction claims. Contrast this against the highly inefficient and scattershot process of back-end IRS enforcement after a deduction has already been claimed, in attempt to claw back the illegitimate deduction value. Gatekeeping therefore allows easement donors and holders to stop relying on the IRS to attempt to right wrongs after the fact.

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<sup>20</sup> Investing in a New Vision for the Environment and Surface Transportation in America Act, H.R. 3684, 117th Cong. § 1641 (2021) (a Senate review of the Bill, before enactment, containing aspects of the Integrity Act); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (the enacted statute does not include aspects of the Integrity Act).

<sup>21</sup> LAND TR. ACCREDITATION COMM'N, ACCREDITATION REQUIREMENTS MANUAL 16, 18–21 (2021), [https://www.landtrustaccreditation.org/storage/downloads/2021/requirements/2021\\_requirements\\_manual.pdf](https://www.landtrustaccreditation.org/storage/downloads/2021/requirements/2021_requirements_manual.pdf).

Even in the face of increasingly broad enforcement powers,<sup>22</sup> the IRS remains ill-equipped to oversee pre-qualifying characteristics of every conservation transaction and holder.<sup>23</sup> The pre-review and approval process instead could be undertaken by an administrative arm of an existing federal agency, such as the Treasury Department. Alternatively, it could be placed in an entirely new administrative entity, whose sole responsibility is to review eligibility for tax benefits based on the conservation transaction and its holder qualification. Colorado's newly created Division of Conservation, for example, pre-approves and certifies holders and conservation transactions prior to awarding state conservation tax credits.<sup>24</sup> Such review and pre-approval taken up by an existing or new federal entity could then ensure only legitimate conservation transactions with qualified holders receive federal conservation tax deductions.

Given the breadth of abuse on the national level for federal conservation tax deductions, it would make sense that such a pre-approving, authorizing entity exist at the federal level. However, such pre-approval could at the same time take place at the state or local level, with individual state or local pre-approval processes helping to prevent illegitimate conservation transactions from ever reaching the level of obtaining federal, state, or local tax benefits. Such state or local

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<sup>22</sup> See Jay, *Part One*, *supra* note 8, at 10136–37, 10147, 10150; Jay, *Part Two*, *supra* note 8, at 10243, 10249, 10258.

<sup>23</sup> See Transcript of Oral Argument at 2:50, *Oakbrook Land Holdings v. Comm'r of Internal Revenue*, 154 T.C. 180 (T.C. 2020) (No. 544–13) (noting the 6th Circuit Court of Appeals questioning the IRS about whether preapproval occurs on conservation transactions).

<sup>24</sup> See COLO. REV. STAT. § 24-1-122(2)(a) (2021) (transferring the powers of the Colorado public utilities commission to the department of regulatory agencies); *Id.* § 12-15-102 (2022) (“Creating a Division of Conservation within the Department of Regulatory Agencies will keep a firewall between professional evaluation and professional discipline, while creating a division to ensure this program allows landowners to exercise their private property rights while protecting taxpayers from the fraud and abuse that existed in the program prior to 2009 . . . Establishing the Division of Conservation to administer the conservation easement tax credit program will . . . allow the Division to continue to certify conservation easement holders to identify fraudulent or unqualified organizations and prevent them from holding conservation easements for which tax credits are claimed in the state.”) *Id.* § 12-61-1101(d)–(e)(I).

focus is appropriate given that the legacy of abuse directly impacts that most local level of the ground itself, in the form of orphaned and neglected conservation easements with absentee holders, as shown by Colorado's experience.<sup>25</sup>

Instituting statewide or local municipal review of prospective land conservation transactions and holders that involve public dollars, subsidies, and benefits also makes sense. The states and municipalities are going to have to manage orphaned and neglected conservation easements, rogue land trusts, and resulting harm to public perception of conservation transactions. Integrating state or local pre-approval processes together with federal regulation may be best to stop abusive federal deductions altogether. Without federal regulation, for example, syndicators have avoided Colorado's pre-approval process by not claiming a state tax credit, using an out-of-state holder, and still claiming a federal tax deduction, as recently as 2020<sup>26</sup>

Further, considering the pre-approval processes already in place in Massachusetts, Nebraska, and Colorado as necessary components of perpetual conservation transactions there, these processes will naturally complement that approval which should occur at the federal level.<sup>27</sup> More localized review in addition to federal pre-

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<sup>25</sup> ERIK L. GLENN ET AL., HOUSE BILL 1264 WORKING GROUP FINAL REPORT WITH RECOMMENDATIONS 2 (2019), [https://leg.colorado.gov/sites/default/files/images/hb19\\_1264\\_working\\_group\\_report\\_final\\_11.26.19.pdf](https://leg.colorado.gov/sites/default/files/images/hb19_1264_working_group_report_final_11.26.19.pdf) (describing potential mechanisms to overcome Colorado's conservation easement conflicts while remediating past harms).

<sup>26</sup> See Clerk & Recorder, Eagle Cnty., Colo., Vail Valley Deed to Southern Conservation Trust, Reception #202025493 (Dec. 29, 2020) (on file with author) (recording a conservation easement deed in Eagle County, Colorado in 2020 for a syndicated conservation easement transaction, with the easement going to the Southern Conservation Trust located in Fayetteville, Georgia).

<sup>27</sup> Jay, *When Perpetual Is Not Forever*, supra note 6, at 44; MASS. GEN. LAWS ch. 184, §§ 31–33 (2021) (Massachusetts law requires all proposed conservation easements to be approved by the Massachusetts Executive Office of Energy and Environmental Affairs. Easements proposed to be held by charitable entities are further approved by the local governing body. Municipal and state officials approve every conservation easement before it can be recorded.); NEB. REV. STAT. ANN. § 76-2, 112(3) (LexisNexis 2021) (Nebraska requires government approval of proposed conservation easements prior to their acceptance “in order to minimize conflicts with land-use planning.”); see COLO. REV. STAT. § 12-15-106(2)(a) (2022) (establishing a pre-approval process of easement transactions and easement holders for donors seeking a Colorado gross conservation tax credit).

approval not only better represent the public's interest, it demonstrates public support for specific perpetual land uses incorporated into individual perpetual conservation easements, forever, as discussed under Part B.1.

### 3. Remedy the Imbalance of Power Between the IRS, Conservation Easement-donating Landowners, and Conservation Easement-holding Land Trusts

The IRS occupies a unique position between the branches of government that elicits deference, authority, autonomy, and a lack of accountability.<sup>28</sup> By all but eluding administrative procedures, the IRS imposes its own interpretation of the Code and Regulations and its will over government and citizens, alike.<sup>29</sup> The disparate treatment of the IRS between the U.S. Tax Court and Federal District Court(s) furthers an inequity that must be resolved in favor of fair and equal treatment for all individuals and entities seeking recourse for conservation tax matters, regardless of forum.<sup>30</sup>

The straightforward framework of Internal Revenue Code §§ 170(h)(2)(C) and 170(h)(5)(A) for conservation transactions implemented and enforced by the IRS, however, creates just such a mechanism for fair and equal treatment by perpetuating conservation easements' purposes over time through the actions of easement holders.<sup>31</sup> Although previously distorted by the IRS in the audit and enforcement of legitimate conservation transactions, the Code and Regulations surrounding conservation transactions intend to afford deference to conservation easement holders to make determinations about impacts to protected conservation purposes over perpetuity.<sup>32</sup> This intent should be procedurally implemented to include burden of proof, legislative grace, standard of review, scope of authority, and deference.

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<sup>28</sup> See Jay, *Part Two*, *supra* note 8, at 10249, 10251, 10256.

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

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

<sup>31</sup> 26 U.S.C. §§ 170(h)(2)(C), 170(h)(5)(A) (1980).

<sup>32</sup> See Jay, *Part Two*, *supra* note 8, at 10242, 10245.

Specifically, these procedural tools should be imposed in favor of conservation easement oversight by trusted, vetted easement holders as follows:

- (1) the IRS should bear the burden of proof and not receive legislative grace when disqualifying landowners and easement holders from a tax deduction benefit if they have submitted documentation showing their compliance with the law;
- (2) courts should apply an ordinary rather than strict standard of review when scrutinizing IRS disallowances for conservation tax deductions, given that the conservation tax deduction is the result of public will and activism and not a default or accidental loophole;
- (3) the IRS' scope of authority should be refocused on valuation first and foremost, and compliance with perpetual attributes and qualifying features second, to accomplish its role as envisioned and set out by the Code and Regulations;
- (4) courts should accord deference to the language of the Code and Regulations and not the IRS, given the agency's propensity to misapply the intent, plain language, and letter of the law;
- (5) any deference accorded by reviewing courts to opinions of the Tax Court under *Dobson* should be quashed in light of statutory law abolishing such deference<sup>33</sup>;
- (6) any limitation of precedent to the taxpayer's own circuit under *Golsen* ought to be discarded as unequal and inconsistent treatment under the law from circuit to circuit and between the U.S. Tax Court and Federal District Court(s); and
- (7) if Congress or the Treasury Department were to institute a pre-approval process for taxpayers seeking legitimate conservation tax deductions prior to the issuance of such a deduction, this would free up valuable time and resources for the IRS to pursue syndicated conservation transactions.<sup>34</sup>

Without such reforms, the balance of power, law, and equity will continue to tip decidedly in favor of the IRS—an agency admittedly already overwhelmed, underfunded, and understaffed by

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<sup>33</sup> See *Dobson v. Comm'r of Internal Revenue*, 320 U.S. 489 (1943).

<sup>34</sup> See *Jay, Part Two*, *supra* note 8, at 10242, 10245.

the process of attempting to enforce inflated conservation tax deductions against syndicators, which continue to drain billions of dollars from the Treasury. Such reforms would level the scales for valid conservation transactions and their donors, provide clarity for the public, lawmakers, and the IRS as to distinctions between legitimate and illegitimate transactions, and inspire authentic, future conservation transactions—perhaps even those based on new, emerging conservation purposes.

#### 4. Update and Expand 26 U.S.C. § 170(h) and 26 C.F.R. § 1.170A-14 Definitions of Conservation Purposes to Reflect New Public Benefits

It has been 42 years since the passage of Code § 170(h) in 1980 providing for a conservation contribution tax deduction, and 36 years since the drafting of attendant Treasury Regulation § 1.170A-14 in 1986.<sup>35</sup> Times have changed, public interests have changed, and conservation values and purposes have changed. It would be appropriate to update this powerful tax incentive to reflect new conservation goals and values to approximate the public benefits we, the public, would like to see rewarded, including but not limited to:

- (1) expanding the definition of public recreation and education at Code § 170(h)(4)(A)(i) and Regulation § 1.170A-14(d)(2) to include interconnecting trail corridors, open spaces for recreation, and pocket parks in urban areas for ready access for all to clean air, water, and green spaces for physical and mental health<sup>36</sup>;
- (2) expanding common uses apart from conservation value of recreation and education at Code § 170(h)(4)(A)(i) and Regulation § 1.170A-14(d)(2) to include commons and community gardens, greenhouses, farms, food security, and green burial areas<sup>37</sup>;

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<sup>35</sup> 26 U.S.C. § 170(h); Treas. Regs. § 1.170A-14 (1986).

<sup>36</sup> 26 U.S.C. § 170(h)(4)(A)(i); *see* Treas. Regs. § 1.170A-14(d)(2) (defining *recreation* and *education* for general public).

<sup>37</sup> 26 U.S.C. § 170(h)(4)(A)(i); *see* Treas. Regs. § 1.170A-14(d)(2) (stating conservation purposes would include a hiking trail for public use or preserving water area for public boating or fishing).

- (3) including air quality and water quality as affirmative components of healthy wildlife habitat and healthy human habitat at Code § 170(h)(4)(A)(ii) and Regulation § 1.170A-14(d)(3)<sup>38</sup>;
- (4) recognizing integration with larger landscapes and other private landowner protections at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4) to create a fabric of interconnected protection for human and wildlife habitat, sustainable ecosystems, and climate resiliency<sup>39</sup>;
- (5) affirmatively adding agricultural and forestry working lands as qualifying open space uses beyond the definition that currently includes “farmland and forest land” at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4)<sup>40</sup>;
- (6) integrating renewable energy resources or generation into working landscapes under the open space definition at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4) to end reliance on fossil fuels<sup>41</sup>;
- (7) including elements of climate change, carbon sequestration, roots-down grasslands, and standing forests under the open space definition at Code § 170(h)(4)(A)(iii) and Regulation § 1.170A-14(d)(4)<sup>42</sup>;
- (8) recognizing and defining redevelopment of the already-built environment into a new section of the Code and Regulation to reflect community and public good and use by including essential, human life-sustaining needs such as food, shelter, and health;
- (9) recognizing and defining undevelopment or restoration in a new section of the Code and Regulation so as to return built

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<sup>38</sup> 26 U.S.C. § 170(h)(4)(A)(ii); *see* Treas. Regs. § 1.170A-14(d)(3)(ii) (defining *significant habits or ecosystems*).

<sup>39</sup> 26 U.S.C. § 170(h)(4)(A)(iii); *see* Treas. Regs. § 1.170A-14(d)(4)(i) (defining *preservation of open space*).

<sup>40</sup> 26 U.S.C. § 170(h)(4)(A)(iii); Treas. Regs. § 1.170A-14(d)(4)(i).

<sup>41</sup> 26 U.S.C. § 170(h)(4)(A)(iii); Treas. Regs. § 1.170A-14(d)(4)(i).

<sup>42</sup> Mark Anderson, *Saving the Future for Biodiversity: Finding and Protecting the Most Climate-Resilient Places—and the Paths Species Will Take to Get There*, THE NATURE CONSERVANCY (Oct. 6, 2020), <https://www.nature.org/en-us/what-we-do/our-insights/perspectives/saving-future-stage-biodiversity-mark-anderson/>.



or brownfield environments to habitat or open spaces, clean air, land, and water; and

- (10) recognizing and defining conservation protection, purpose, and value into a new section of the Code and Regulation to enable grants of land or cultural conservation easements back to Indigenous people and to heirs of previously enslaved people.<sup>43</sup>

These expanded and new conservation value and purpose definitions will help to encourage landowners to privately address previously unforeseen or undefined conservation challenges and will also address societal harms by encouraging the return of taken lands and delivering lands promised. Such conservation challenges to be addressed privately by individual landowners if Code § 170(h) conservation values are expanded could include: climate change,

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<sup>43</sup> Unless and until we can ensure land return to Indigenous people through government acts such as the National Bison Range Restoration Act, we can incentivize private landowners to revert land ownership to Indigenous people for a tax deduction. Such acts could be recognized as land conservation if granted as a fee simple transfer or as protected by a conservation easement, with the land transfer as its conservation purpose. The same is true of seeing through the promises of 40 acres and a mule to freed enslaved persons made in General Sherman's proclamation Special Field Orders No. 15, on January 16, 1865. If not by government acts or action, this could be accomplished by incentivizing private landowners to gain a tax deduction for the grant of land to the descendants of formerly enslaved persons as land conservation through fee simple transfer or as protected by a conservation easement, with the transfer as its conservation purpose. Valuation for purposes of a tax deduction might need to be adjusted if no limitations on use are made through the transfer or an alternative valuation used in lieu of traditional Code § 170(h) valuation. See Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 12, 134 Stat. 1182, 3029 (2020) (The National Bison Range Restoration Act—originally drafted by the Confederated Salish and Kootenai Tribes in 2016—was incorporated into the Montana Water Rights Protection Act (S. 3019), introduced in the Senate on December 11, 2019 and amended in December 2020 as the Montana Water Rights Protection Act, which was then incorporated into the Consolidated Appropriations Act of 2021 (H.R. 133), passed by the House and Senate on December 21, 2020, and signed into law on December 27, 2020, becoming Pub. L. 116-260.) *Public Law: Restoring Bison Range to Tribal Ownership*, BISON RANGE RESTORATION, <https://bisonrange.org/public-law/> (last visited May 18, 2022); 2 WILLIAM T. SHERMAN, MEMOIRS OF GEN. W. T. SHERMAN 250–51 (Charles L. Webster & Co. eds., 4th ed. 1981); 26 U.S.C. § 170(h) (1980).

collaborative common uses and connections, food and shelter, and restoration and reversion of the built and unbuilt environment. The same conservation challenges might also be addressed publicly, by tax-exempt, non-profit land trusts, if operations can be expanded and missions deepened under Code § 501(c)(3).<sup>44</sup>

#### 5. Permit Expansion of Land Trust Qualifying Acts and Operation Under Code § 501(c)(3) to Operate to Deepen Mission Within Organized Tax Exemption

In tandem with the expansion of conservation purpose definitions described in Part 4 above, this Article suggests expanding and supporting such purposes as attendant qualifying acts under Code § 501(c)(3) to achieve both human and environmental goals under the mantle of land conservation as a charitable act.<sup>45</sup> Additionally, this Article suggests specifying and broadening the charitable acts permitted under Code § 501(c)(3) for conservation organizations, both to expressly recognize land conservation as a charitable act and to acknowledge expanded conservation purposes. This would provide clarity to the donors of conservation easements, as well as to the non-profit holders of those conservation easements, of the requisite qualifying acts under the Code and Regulations for tax benefits.

The expanded charitable acts and exempt purposes under Code § 501(c)(3) should match and complement the expanded conservation values and purposes under Code § 170(h) described in Part 4. This includes: dedicating land to common or community uses for access to clean air, water, and green spaces; life-sustaining needs such as food and shelter; and death-accommodating needs such as green burial. Other examples include permitting buildings and improvements to be used for workforce and affordable housing (or broader community uses), together with both redevelopment of the built environment for

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<sup>44</sup> Plus, add all the recommended reforms to the language of § 170(h), including amending Code and Regulation provisions to ensure flexibility and durability for perpetuity and to stabilize and bolster the tax incentive. See Jay, *When Perpetual Is Not Forever*, *supra* note 6, at 11, 13–14, 23; Jay, *Part Two*, *supra* note 8, at 10239, 10243.

<sup>45</sup> 26 U.S.C. § 501(c)(3) (2018); see Treas. Regs. § 1.501(c)(3)-1(d)(2) (2021) (defining *charitable*).

other public benefits such as food and shelter, and undevelopment of the built environment to stabilize against climate change and return land to its original or a new natural state. Additionally, the Code could expressly allow for grants of land back to Indigenous people and to heirs of enslaved persons using land conservation processes.

Further, this Article recommends and underscores the need to use Code § 501(c)(2) for land trust land improvement and ownership when leasing for workforce housing, agricultural production, community gardens, community centers, food and housing shelters, and in directing land ownership back to Indigenous populations and heirs of enslaved persons, with all the benefits of this tax-exempt categorization.<sup>46</sup>

This broadening of uses allowed under charitable conservation acts for nonprofit tax-exempt organizations will allow land trusts to deepen their missions to provide support and stability through changing political regimes, all while continuing to operate within a defined land-protection rubric of perpetual land conservation. Further,

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<sup>46</sup> 26 U.S.C. § 501(c)(2) (2018); see Treas. Regs. § 1.501(c)(2)-1(a) (2021) (describing the benefits of corporations holding title to property for exempt organizations); Julian Agyeman & Kofi Boone, *Land Loss Has Plagued Black America Since Emancipation—Is It Time to Look Again at ‘Black Commons’ and Collective Ownership?*, CONVERSATION (June 18, 2020), <https://theconversation.com/land-loss-has-plagued-black-america-since-emancipation-is-it-time-to-look-again-at-black-commons-and-collective-ownership-140514> (describing the concept of the *black commons*—sharing resources including land—as a means for redressing the historic deprivation of land that Black Americans have faced). Further, moving at the “speed of trust” (mission of First Light organization <https://firstlightlearningjourney.net/resources/reparations-and-rematriation-of-land/>) in rematriating land with indigenous peoples or tribes will require changes not only to the Code and Regulation to rebuild such trust and processes, but also likely to the land ownership structure implemented for indigenous persons and tribes. Tribes, however, although treated as states for some purposes under the Code, are not necessarily allowed to own land given to them, and must instead, with no hint of irony, rely on the U.S. federal government to hold such land for them “in trust”. 26 U.S.C. § 7871 (2018) (Indian tribal governments treated as States for certain purposes); 25 U.S.C. § 2201(1) (2019) (“Indian tribe” or “tribe” means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust); 5 U.S.C. §§ 5101 *et seq.* (2019) (1934 Indian Reorganization Act whereby Secretary of the Interior may accept trust lands on behalf of tribes to be held in trust by the United State).

it will be important to consider similar actions on the part of government entity conservation holders, provided they are required to possess the same oversight, scrutiny, and qualifications as non-profit, tax-exempt land trusts.

#### 6. Equalize Government Conservation Easement Holder Regulation and Oversight

Currently, Code § 170(h)(3)(A) and Regulation § 1.170A-14(c) place government entities on equal footing with charitable conservation easement holders under Code § 501(c)(3). Tax-exempt easement holders such as land trusts, however, are tightly regulated under Code § 501(c)(3) and Regulation § 1.1501(c)(3). These tax-exempt easement holders must be organized and operated to further their exempt purpose and create public benefits, without impermissibly benefiting members of the public or insiders of their organization through acts not in furtherance of their exempt purpose.<sup>47</sup> Moreover, many land trusts seek recognition of national accreditation through the Land Trust Accreditation Commission, which blends requirements of tax-exempt nonprofits with Land Trust Standards and Practices issued by the Land Trust Alliance. Such accreditation adds several more layers of oversight and qualification to land trust behavior in holding conservation easements.<sup>48</sup>

By contrast, apart from the definition of a qualifying recipient of conservation easements made exclusively for public purposes as to or for the use of a state, possession of the United States, any political subdivision thereof, the United States, or the District of Columbia, there is little to no oversight or qualification surrounding government holders of conservation easements.<sup>49</sup> The one exception is certain state

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<sup>47</sup> 26 U.S.C. § 501(c)(3) (2018); Treas. Regs. § 1.501(c)(3)-1(d)(1)(ii) (2021).

<sup>48</sup> *Requirements Manual*, LAND TR. ACCREDITATION COMM'N, <https://www.landtrustaccreditation.org/help-and-resources/requirements-manual> (last visited May 20, 2022); see *Adopt Land Trust Standards and Practices*, LAND TR. ALL., <https://www.landtrustalliance.org/topics/land-trust-standards-and-practices/adopt-land-trust-standards-and-practices> (last visited May 20, 2022) (explaining what adopting Land Trust Standards and Practices means).

<sup>49</sup> 26 U.S.C. § 170(h)(3) (2021); 26 U.S.C. § 170(c)(1) (2021). The requirement that

constitutions prohibiting state or local governments from affording special insider benefits in the nature of private inurement or impermissible private benefits to members of the public.<sup>50</sup>

Government conservation easement holders should have equal evaluation and review under the laws, regulations, and standards to that of nonprofit holders. Government easement holders should not be able to reject the will of the public or conserving landowners, for example, through exercise of home rule, patriarchal revision, or release of conservation protections, for political whims, self-serving insider benefits, or external special interests.

Government conservation easement holders should be held to the same standards as Code § 501(c)(3) tax-exempt nonprofit holders—prevented from acts without public benefits outside their exempt purpose and from creating impermissible *private benefits* or *private inurement*. This could be accomplished by requiring Code § 170(h)(3) government entities qualified to hold perpetual conservation easements made exclusively for public purposes under Code § 170(c)(1) to adhere to the same standards of public benefit required by Code § 501(c)(3) *exempt purposes*. Further, such government entities seeking to hold perpetual conservation easements could be required to reach qualified status by adopting Land Trust Standards and Practices to guide their actions over perpetuity, and to seek Land Trust Accreditation to show compliance with Standards and Practices and Code § 501(c)(3) requirements for public benefit.<sup>51</sup>

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conservation easement gifts to government entities be made exclusively for public purposes under Code § 170(c)(1) appears to be juxtaposed against those made to private individuals for private purposes, with no other guiding language: “Contributions to needy individuals are not deductible because individuals are not qualifying organizations under IRC 170.” 26 U.S.C. § 170(c)(1) (2021); INTERN. REV. SERV., U.S. DEP’T OF THE TREAS., E. DEDUCTIONS OF CONTRIBUTIONS TO IRC 501(C)(3) AND OTHER EXEMPT ORGANIZATIONS, 1985 EO CPE TEXT, (1985), <https://www.irs.gov/pub/irs-tege/eotopice85.pdf>.

<sup>50</sup> Jay, *When Perpetual Is Not Forever*, *supra* note 6, at 60; COLO. CONST. art. 11, § 2 (amended 1974) (explaining private benefit would contravene the state’s constitution, which bars private benefit by government in much the same way that it limits tax-exempt organizations); 26 U.S.C. § 501(c)(3); *see* Treas. Regs. § 1.1501(c)(3)-1(c)(2) (2021) (excluding organizations as operated exclusively for an exempt purpose if any earnings inure to private individuals or shareholders).

<sup>51</sup> 26 U.S.C. § 170(h)(3).

The Accreditation process would need to be adapted for approval of government entities as holders of perpetual conservation easements qualifying for federal tax deductions. The process should emulate Colorado's process for certifying government holders of perpetual conservation easements qualifying for state tax credits.<sup>52</sup> Placing government holders on the same footing as qualified nonprofit land trusts would ensure appropriate consideration for requests to modify, release, or terminate easements that might otherwise be considered in the context of political motivations and whims, insider benefits, and private interests, which for government entities can exist both in the private land conservation context, as well as in the more public land use processes and context.

*B. Ongoing and Responsive Needs with Adaptation to Legal Framework*

1. Balance and Integrate Land Use and Conservation Decision-Making

It is the ongoing subject of debate whether private conservation easements should be integrated into formal, public land use processes. Put differently, there is a question whether the State—meaning government of any level—should be involved in regulating or overseeing private land conservation decisions and transactions. When private citizens are making choices regarding their land that span perpetuity and are purported to provide significant public benefits, there arguably could be owed some form of check-in with or notice to the public. A public notice or comment period for private conservation decisions could be appropriate, if only to remove the cloak of privacy and in some cases, secrecy from such decisions. Further, transparency and the opportunity for the public to weigh in on (without vetoing) prospective conservation projects could create more balanced community development, and conservation with more obvious and obtainable public outcomes.

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<sup>52</sup> See 4 COLO. CODE REGS. § 752-1 (2019) (establishing minimum requirements for organizations holding conservation easements).

On the other hand, public representatives can be the subject of pressure by special interests, and political bodies can be influenced by ephemeral or time-specific interests that may work against the greater public good. Taking these pressures into consideration, the process could intentionally incorporate the public itself to provide input or even vote on prospective projects being considered by government representatives or public entities. For example, in Denver, Colorado on Election Day 2021, the citizens voted not to transform the use of a public golf course under perpetual conservation easement to more developed infrastructure—such as affordable housing—in essence terminating the easement, without public approval.<sup>53</sup>

A process involving the public in a discourse of private conservation decision-making would not have to be a micro-integration of or granular approach to public approval. In Massachusetts, for example, landowners seeking to grant conservation easements receive approval from the local conservation commission, town select board, and ultimately, the state secretary of energy and environmental affairs.<sup>54</sup> In contrast to this multi-tiered approval process, there could be some lesser form of interaction between and integration of the private will with the public interest whereby local communities and their constituents could in some manner potentially review and comment on proposed conservation projects.

Further, in the ongoing struggle between the state and private ownership controlling private land-conservation decisions, the state could assert a more proactive role on behalf of the public in preventing abuse of the tax incentives that form the motivation for perpetual land protection. As previously discussed, such local or state attention is urgently needed to respond to federal deduction abuse in the short term, but could also potentially correct past wrongs in historic land use decisions. These past wrongs include pushing indigenous populations onto reservations, failing to fulfill emancipation promises, redlining,

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<sup>53</sup> Joe Rubino, *Denver Ballot Measures 301 and 302: Voters Favor Open Space Over Development at Park Hill Golf Course*, DENVER POST: POLITICS (Nov. 4, 2021), <https://www.denverpost.com/2021/11/02/denver-election-results-2021-ordinance-301-302-park-hill-golf-course/>.

<sup>54</sup> MASS. GEN. LAWS ch. 184, §§ 31–33 (2022).

and agricultural land divestiture from Black and Indigenous people and other communities of color.<sup>55</sup>

Colorado, in response to abuse of its own conservation tax incentive, now gatekeeps private decision-making around land conservation without prioritizing applications, conservation values, or public and private benefits.<sup>56</sup> These local processes—either independently or as a complement to a federal gatekeeping process—may help to either prevent such abuse from happening or to address such abuse that has already occurred. As discussed under Part 2, at least three states already implement their own form of gatekeeping or pre-approval in private perpetual conservation grants. For example, as discussed, Massachusetts reviews each proposed conservation easement on a town-by-town basis, starting with each town’s conservation commission.<sup>57</sup> Nebraska requires government approval of proposed conservation easements prior to their acceptance “in order to minimize conflicts with land use planning.”<sup>58</sup> And, Colorado has a pre-approval process of easement transactions and easement holders when donors are seeking a Colorado gross conservation tax credit.<sup>59</sup>

The legacy of conservation-easement programs undermined by orphaned and neglected conservation easements, held by rogue or absentee land trusts—while still on perpetually protected land—will

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<sup>55</sup> See Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCIENTIST 508, 514, 534 (2000), [https://www.researchgate.net/publication/237644402\\_The\\_Rise\\_of\\_the\\_Environmental\\_Justice\\_Paradigm\\_Injustice\\_Framing\\_and\\_the\\_Social\\_Construction\\_of\\_Environmental\\_Discourses](https://www.researchgate.net/publication/237644402_The_Rise_of_the_Environmental_Justice_Paradigm_Injustice_Framing_and_the_Social_Construction_of_Environmental_Discourses); Dorceta E. Taylor, *The Evolution of Environmental Justice Activism, Research, and Scholarship*, 13 J. NAT’L ASS’N ENV’T PRO. 280, 282, 285 (2011), <https://www.cambridge.org/core/journals/environmental-practice/article/abs/introduction-the-evolution-of-environmental-justice-activism-research-and-scholarship/32C4E9DA3F1D2CF625450745B60D4779>; Dorceta Taylor, *The Challenge of Diversity in the Environmental Movement*, NONPROFIT Q. MAG. (Oct. 14, 2021), <https://nonprofitquarterly.org/thoughts-on-being-in-the-environment-while-black/> (describing past abuse to people of color and its impact on decreasing other people of color’s desire to enjoy nature).

<sup>56</sup> COLO. REV. STAT. § 24-1-122(2)(1) (2021); see COLO. REV. STAT. § 12-15-106(2)(a) (2022) (listing purposes of conservation tax credit application process).

<sup>57</sup> MASS. GEN. LAWS ch. 184, §§ 31–33 (2022).

<sup>58</sup> NEB. REV. STAT. ANN. § 76-2, 112(3) (LexisNexis 2021).

<sup>59</sup> COLO. REV. STAT. § 12-15-106(2)(a) (2021).



continue to be a largely state and local problem. Massachusetts, Nebraska, and Colorado could prevent abuse on the front end of conservation processes and thereby benefit their conservation programs with legitimate, well-perceived perpetual conservation easements. Further, where abuse already exists, states involved in conservation easement approval could conceivably rely on existing infrastructure to address the consequences of abuse, by assisting with the merger of easement-holding organizations, receivership of orphaned easements, and other potential remedies for abusive transactions, as contemplated Colorado's model of regulation.<sup>60</sup>

The counterpoint to state or local review and approval of private land conservation decision-making is that such government involvement is unwanted, intrusive overreach. There may be a way, however, to create symbiosis and synchronicity between public approval and private land conservation decisions. We can look to the example of forest science evolution—findings that individual trees within forests do not in fact compete with one another for resources, they instead collaborate and cooperate.<sup>61</sup> Conservation easements evolved out of necessity due to meager land use options for private or public perpetual land protection, and have existed for years thereafter in most states without public involvement.

Review and approval of private conservation acts nonetheless has the potential to reincorporate public perspectives into private land decisions, and to represent the public will and common good in land protection on a landscape-scale, community-wide basis. To bridge the gap between private land use decisions and public approval processes in states or municipalities that do not already integrate public considerations of private decision-making will be transformative. Consider the land resource itself as shared—based on forest science—with public involvement in private land decisions not competitive or intrusive, but collaborative. And where private land conservation can benefit from public perspectives, so too can it benefit from the reimagining of conservation qualities not as commodities of highest and

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<sup>60</sup> See GLENN ET AL., *supra* note 25, at 9–11, 14, 18.

<sup>61</sup> *Collaboration Triumphs Over Competition in the Forest*, CONSERVATION SENSE & NONSENSE (Aug. 1, 2021), <https://milliontrees.me/2021/08/01/collaboration-triumphs-over-competition-in-the-forest/>.

best use, but as interconnected, intrinsic characteristics worthy of discrete appropriations of public value.

## 2. Reimagine Land “Valuation” of Highest and Best Use of Land

One of the arguably inapposite approaches Code § 170(h) requires in valuing conservation easement gifts for tax deductions is considering the highest and best use of land before and after placing a conservation easement.<sup>62</sup> This form of valuation has the perverse result of under-valuing conservation-rich properties where there is no pressure for development to create a high “before” value or low “after” value attributed to those relinquished development rights. Agricultural, forested, working lands, and land with abundant water and wildlife habitat resources therefore may all suffer from geographic locations that do not bear any pressure for development. This is even though such conservation easements may be rich with conservation values worthy of protection. Because such “low-value” perpetual conservation easements do not yield high tax benefits, landowners are often unmotivated to grant them.

Colorado conservation stakeholders, in examining the best method and mechanism by which to return dollar value to those landowners granting conservation easements in return for valuable state conservation tax credits, have begun exploring alternate means of representing the public’s benefit from perpetual conservation easement gifts other than land value, highest and best use, and pressure for development.<sup>63</sup> The stakeholders intend any such alternative to be in addition to, and not a replacement of, the current method of valuing land’s highest and best use under the federal tax benefit structure.<sup>64</sup>

As an alternative, stakeholders have developed a Conservation Benefit Index to determine a property’s conservation easement value based on protected conservation values and restrictiveness of conservation easement terms, as opposed to the development rights a

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<sup>62</sup> 26 U.S.C. § 170(h)(1); Treas. Regs. § 1.170A-14(h)(3)(ii) (2021).

<sup>63</sup> ANDREW SEIDL ET AL., COLO. STATE UNIV.: REG’L ECON. DEV. INST., ALTERNATIVE METHODS FOR SUBSTANTIATING PAYMENTS FOR CONSERVATION EASEMENTS IN COLORADO 2–4 (2020), <https://redi.colostate.edu/wp-content/uploads/sites/50/2020/10/REDI-Report-Alt-Val-Easements-Oct-2020.pdf>.

<sup>64</sup> *Id.* at 23.

landowner gives up under the traditional method.<sup>65</sup> The Index creates value or points that are added to the baseline or “before value” analysis of a property based on these alternative categories, including scenic qualities, agricultural use, wildlife habitat, retained water, public access, educational opportunities, and recreational access.<sup>66</sup> Using these added categories and the appropriate restriction on use to protect such conservation characteristics ensures a “value” for purposes of incenting perpetual land conservation and allocating valuable conservation tax credits within the state in areas where there is little to no pressure for development.<sup>67</sup>

Until another mechanism is found to encourage conservation behavior other than tax-based incentives, (such as cash-in-hand grants and payments discussed in subpart 3 below), Colorado will continue to rely on its transferrable state tax credit, which compensates landowners up to 90% of value for granting conservation easements. The tax credit program and State Division of Conservation will continue to review conservation easement grants and their holders for legitimacy and qualification while the conservation community seeks other ways to “value” and reward land conservation for such public benefits.<sup>68</sup> Further, as a complement to alternative means of valuation, Colorado, other states, and the federal government may eventually replace tax benefits with more direct means of paying conservation easement donors for the public benefits and conservation value of their gifts, perhaps even through novel dedication and distribution of public funds.

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<sup>65</sup> *Id.* at 16–18.

<sup>66</sup> *Id.* at 16–17.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *See id.*; Treas. Regs. § 1.170A-14(d)(iv)(A) (listing factors considered in evaluating public benefit); Treas. Regs. § 1.170A-1(h)(3)(i) (describing payments resulting in state or local tax credits); *see also Conservation Groups Will Assess Alternative Methods for Valuing Conservation Work*, KEEP IT COLORADO (Oct. 26, 2020), <https://www.keepitco.org/news/2020/10/26/conservation-groups-will-assess-alternative-methods-for-valuing-conservation-work> (explaining Colorado conservation groups’ pilot testing for next generation valuation of land and distribution of state tax credit benefits).

### 3. Incorporate New Funding Mechanisms, Bonding, Sales, or Lottery Funds, as Direct Payments for Land Conservation

Equally transformative to the concept of seeking alternatives to valuing conservation gifts for tax incentives to support wholesale purchases of land (or sticks in the land ownership bundle) for their conservation value and public benefit, is that of dedicating and directing public dollars to specific individual users or landowners for less than fee or easement estates, for less than perpetual duration. A state, county, or municipality could choose to reimburse agricultural landowners or water rights owners for the value of their promises to protect their valuable resources, by attaching such resource or use to the public benefit directly in less than fee, less than easement, or less than perpetual grants.<sup>69</sup>

When land protection tools are flexible enough to include leasehold interests or less-than-perpetual duration to achieve long and short-term conservation goals, landowners of less traditionally valuable land with more conservation value are more likely to participate.<sup>70</sup> The Central Colorado Conservancy (CCC) has implemented just such a program with a less than fee, less than perpetuity conservation compensation process in response to landowners with valuable water rights and rich conservation habitat whose land values are not adequately compensated by Colorado's conservation tax credit valuation of highest and best development potential.<sup>71</sup>

The CCC's Community Conservation Connection program works with landowners who have individually agreed to set aside

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<sup>69</sup> SEIDL ET AL., *supra* note 63, at 2; *see also* ENVISION FOREST HEALTH COUNCIL, NEXT GENERATION COMMUNITY WILDFIRE PROTECTION PLAN 3, 6 (2020), [https://envisionchaffeeconomy.org/wp-content/uploads/2021/03/CWPP-Annual-Report\\_12MAR21\\_F.pdf](https://envisionchaffeeconomy.org/wp-content/uploads/2021/03/CWPP-Annual-Report_12MAR21_F.pdf).

<sup>70</sup> *See* Robert Gilman, *The Idea of Owning Land: An Old Notion Forged by the Sword Is Quietly Undergoing a Profound Transformation*, CONTEXT INST. <https://www.context.org/iclib/ic08/gilman1/> (last visited May 20, 2022) (illustrating additional information and ongoing adaptations to the context of land ownership).

<sup>71</sup> *What We Do*, CENT. COLO. CONSERVATORY, <https://www.centralcoloradoconservancy.org/what-we-do> (last visited May 20, 2022).

4,000 acres in a five-year conservation program during which they are paid out of a Chaffee County tax fund dedicated to short-term conservation protection, not to develop their agricultural or water resources.<sup>72</sup> “Landowners, who must have at least 160 acres to qualify, agree to limit non-agricultural development and continue ‘basic management practices,’ including irrigation.”<sup>73</sup>

Short-term leasing of conservation resources to ensure their protection converts traditional relinquishment of development rights in exchange for tax incentives to a direct cash payment for desired land protection outcomes. And is this not what people really want—cash itself, over a tax incentive? People are inspired to act by the money that is the product of the tax incentive, not the tax benefit itself in the form of tax savings on the federal level, or the sale of tax credits in certain states. If it were possible to skip the tax-incentive step completely and incentivize conservation behavior directly with money instead, more conservation might be accomplished more efficiently, while placing value directly in landowners’ pockets.

Such direct-to-landowner payments for conserving land already exist in several creative conservation programs in Colorado and other states today. In Colorado, they include providing tax refunds directly to conserving landowners (in lieu of tax credit sales) under Colorado’s tax credit program in years of state budget surplus; sales tax proceeds for conservation leases paid directly to landowners under Chaffee County’s Community Conservation Connection program; and grants to landowners through land trusts under Great Outdoors Colorado’s statewide lottery proceeds distribution, all of which landowners appreciate without directly engaging in the tax incentive process.<sup>74</sup>

Maintaining the tax incentive system while continuing to explore and expand opportunities for direct payments or refunds, however, would be prudent, given the many years’ reliance on such

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<sup>72</sup> Jennifer Yachnin, *Could Biden Use Private Land to Reach 30x30 Goals?*, E&E NEWS (Feb. 17, 2021),

<https://subscriber.politicopro.com/article/eenews/2021/02/17/could-biden-use-private-land-to-reach-30x30-goals-005353?source=email>.

<sup>73</sup> *Id.*

<sup>74</sup> See COLO. CONST. art. XXVII, § 1 (1993) (creating the Great Outdoors Colorado Program).

programs with unmitigated success for landowners with income to offset or credits to sell. Shedding all the inefficiencies and inequities of the tax deduction and tax credit systems by changing to refunds or direct payments will provide an appropriate segue to new compensation processes in the meantime. Moving from purely tax-based incentives to more direct payments or refunds will also address the numerous landowners excluded by tax incentives based solely on income to offset, and avoids the likely unintended consequence of maintaining land within wealthy, white ownership. Incorporating non-tax-based funding opportunities for land conservation would not only provide benefits to cash poor, land rich owners, but also provide the potential for broader, landscape scale, communitywide, common conservation gains, in contrast to perpetuating benefits solely directed to individual landowners.

*C. Necessary Future Reforms, Rebuilding Legal Framework and Paradigms*

1. Strike a Balance Between Private Land “Ownership,” Tax Incentive Structure, and the Tragedy of the Commons to Promote Conservation Acts for the Greater Good

Moving from tax-based strategies to other forms of direct payments, refunds, and funding will undoubtedly address some of the inequities created by a land conservation structure rooted in individually based tax incentives. Pairing such direct compensation mechanisms with a move from traditional land ownership structures that monetize land as currency, to a more collaborative sharing of land as a collective resource might have even more profound consequences and represent the most aspirational goal discussed herein. Because traditional land ownership and conservation tax incentives appear to have an unintended consequence of perpetuating wealthy (even including cash poor but land rich), principally white land ownership, we must look to new incentives as well as new forms of land

ownership, to increase opportunities for shared land uses, access, and benefits.<sup>75</sup>

Discarding land incentives that actively monetize land as a commodity will aid the process of more equitably distributing land uses and access among the greater population of its broader inhabitants, including for Indigenous groups, heirs of formerly enslaved persons, and people of color. If monetized land values and income tax offsets perpetuate a problem of haves and have-nots in land ownership, it is foreseeable that without proactive change, land will continue to be largely owned, transferred, and conserved by, among, and for the wealthy, white population. Without new inspiration such as expanded conservation values and deepening land trust missions under the Code and Regulations, such ownership will likely continue without consideration for original Indigenous land possession, emancipation promises, and continued disenfranchisement of heirs' property for descendants of enslaved persons, people of color, and Indigenous populations.<sup>76</sup>

Remembering that property ownership is not an inalienable human, American, or constitutional right—given that the Declaration of Independence underscores the pursuit of life, liberty, and *happiness*,

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<sup>75</sup> “Of all private U.S. agricultural land, Whites account for 96 percent of the owners, 97 percent of the value, and 98 percent of the acres.” See Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 55 (2002), [https://www.ers.usda.gov/webdocs/publications/46984/19353\\_ra174h\\_1\\_.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/46984/19353_ra174h_1_.pdf?v=0); As for whether corporations own the lion’s share of agricultural land, “[s]ome 2.6 million owners are individuals or families, and they own more than two-thirds of all farm acreage. Fewer than 32,500 non-family-held corporations own farmland, and they own less than 5 percent of all U.S. farmland.” BUREAU OF THE CENSUS, U.S. DEP’T OF COM., STATISTICAL BRIEF: WHO OWNS AMERICA’S FARMLAND? 1–2 (1993), <https://www2.census.gov/library/publications/1993/demographics/sb93-10.pdf>.

<sup>76</sup> See BUREAU OF THE CENSUS, U.S. DEP’T OF COM., *supra* note 75 (noting low levels of minority land ownership in the U.S.). Fractional distribution of landownership among heirs of indigenous and enslaved persons as a result of federal land policy represents problems for reassembly or uniting of such land ownership going forward. See *Other Resources*, INDIAN LAND TENURE FOUND., <https://iltf.org/resources/other-resources/> (last visited June 8, 2022); CTR. FOR AGRIC. & FOOD SYS., VT. L. SCH., *Heirs’ Property*, <https://farmlandaccess.org/heirs-property/> (last visited June 8, 2022).

not property<sup>77</sup>—now seems to be the right time for re-democratization of land and its uses. By complementing a concept of land ownership with a concept of borrowing, leasing, sharing, accessing, or using land under certain requirements for public good and benefits—even if promoting individual use at the local level, such as new farmers as owners, users, or lessees, or Indigenous and tribal foraging and cultural use agreements—much could be gained in the way of land conservation for overall, common good.<sup>78</sup> Broadening conservation purposes and charitable acts under land conservation incentives discussed per Part 4 and Part 5 continue to draw land conservation incentives and motivation from tax structure, but also will have the added benefit of potentially returning land use, possession, and ownership to Indigenous peoples, and to the decedents of enslaved persons. Even adjusting incentives to more directed giving, leasing, or buying of land use rights for conservation resources while helping to detach from the tax incentive system still furthers a system where land ownership is currency.

Land ownership is a means to an end—it does not in and of itself accomplish anything for its owners, but its ownership provides currency that enables borrowing, collection of rents, assemblage and protection of wealth carrying on for generations, and has the potential to provide what we discern it is that people really want in the form of income, stability, food, shelter, and security. If there is another way to provide what it is that people want and need without relying on land ownership tax-based incentives, we could move the motivation around land ownership and conservation from tax-based to leasing and direct payments.

Land conservation does not require tax incentives to thrive, just because it has historically relied on that system. It might be possible to detangle the otherwise unrelated systems of tax incentives and land ownership for conservation results (somewhat like schools relying on

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<sup>77</sup> Carol V. Hamilton, *Why Did Jefferson Change “Property” in John Locke’s Trinity, “Life, Liberty, and Property” to the “Pursuit of Happiness”?*, HIST. NEWS NETWORK (Jan. 27, 2008), <https://historynewsnetwork.org/article/46460>.

<sup>78</sup> Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. LAND USE & ENV’T L. 279, 281, 284, 298 (1998).



local property taxes to thrive),<sup>79</sup> and begin transforming into a temporary ownership or sharing structure incentivized by direct cash payments.

We are unlikely to unbundle land ownership and land conservation from tax benefits in the short term, given the immense motivation such incentives currently provide landowners to perpetually conserve their land, and the terrific success such incentives have inspired in land conservation. Adjusting incrementally within the tax-incentive system to benefit emerging conservation purposes such as climate change, and to include under-recognized constituencies as beneficiaries such as the heirs of formerly enslaved persons, is a good start from which we can continue to evolve to other forms of inspiration. From there, we can move to alternate forms of valuation, and eventually, ostensibly to shared, leased, or borrowed land usage and ownership.

It would be wonderful to live in a time and place where decisions surrounding land's use are made for the fairness to and equity of everyone impacted by that land, not just the land's owner, where we can together strive to avoid the tragedy of the commons and of the anti-commons to reside in a place not of individually owned parcels gained by force and retained by broken promises, failed reparations, and continuing disenfranchisement, but of shared, borrowed, and loaned landscapes with resources perpetually protected for the greater good of us all.<sup>80</sup>

#### CONCLUSION: IMMEDIATE, ONGOING, AND FUTURE NEEDS ENVISIONED

Setting out checklists and frameworks for immediate, ongoing, and future goals helps us to formulate plans within existing legal regimes while recognizing the need for adaptation, adjustment, and

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<sup>79</sup> DAPHNE A. KENYON, LINCOLN INST. OF LAND POL'Y, THE PROPERTY TAX-SCHOOL FUNDING DILEMMA 38 (2007); CAMPBELL F. SCRIBNER, THE FIGHT FOR LOCAL CONTROL: SCHOOLS, SUBURBS, AND AMERICAN DEMOCRACY 125 (2016).

<sup>80</sup> See Michael Heller, *The Tragedy of the Anticommons*, WEALTH COMMONS, <http://wealthofthecommons.org/essay/tragedy-anticommons> (last visited May 20, 2022) (defining *anticommons* and their use in addressing resource scarcity and conservation).

possibly dismantling and rebuilding new frameworks around shifted legal paradigms. This process envisions a progression both over time and in land conservation and ownership mechanics.

In the short term, to protect land conservation as an institution and tool, we must address imminent and urgent needs within the existing legal framework by passing the Conservation Integrity Act to curtail abuse of the conservation easement incentive and establish gatekeeping of the conservation incentive going forward. We then must update and expand Code § 170(h) and Regulation § 1.170A-14 definitions of conservation purposes, promote and permit Code § 501(c)(3) land trusts to operate to deepen actions and missions, while also requiring equivalent government conservation easement holder qualification and oversight. Finally, in the short term, we must remedy unfairness to landowners and land trusts from the imbalance of power with the IRS in implementing and enforcing the current system of tax incentives. Implicit in these immediate goals is the use of current systems to incentivize behavior around social and environmental justice under the rubric of land conservation as an outgrowth of existing land ownership structures.

Moving forward to ongoing and responsive needs requiring adaptation to legal framework, we must balance land use and conservation integration, complement land “valuation” as highest and best use of land with new value mechanisms, and incorporate or adopt new funding opportunities such as community bonding or lottery funds.

Lastly, for necessary, immediate, ongoing and future needs and reforms, including potentially dismantling and rebuilding the legal framework and paradigm of land ownership and land conservation, we can and must strike a balance between private land “ownership,” incentive structures, and the tragedy of the commons, to promote good acts in land conservation for the greater good of all.

In conclusion, reforms and reimagining of land, its conservation, and use include bolstering and expanding conservation incentives in the face of extensive abuse, integrating private land protection within communities, adjusting land monetization and valuation approaches, unbundling land ownership notions, and re-democratizing and restoring land access and use. Such reforms and reimagining are intended to sustain and secure perpetual land

conservation as a continuing, dynamic, and flexible source for critical resource management and protection at the local, state, federal, and global levels, while ensuring equitable, inclusive, diverse, and just land protection in the context of past, current, and future generations of land use and users.