

# ARTICLES

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## Custom-Made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuse<sup>†</sup>

|  |    |
|--|----|
| Abstract .....   | 2  |
| Introduction.....  | 2  |
| I. Relevant Background .....                               | 4  |
| II. Major Front-End Abuses of the § 170(h) Deduction ..... | 7  |
| A. Valuation Abuses .....                                  | 7  |
| B. Conservation Purpose Abuses .....                       | 9  |
| III. USDA Conservation Programs .....                      | 11 |
| A. USFS & CEs .....  | 13 |
| 1. The Forest Legacy Program.....                          | 15 |
| B. NRCS & CEs .....  | 18 |
| 1. Agricultural Conservation Easement Program ..           | 19 |
| IV. Resource-Specific Land Trusts .....                    | 21 |
| V. Common Tools Used by Resource-Specific Programs...      | 24 |
| A. Front-End Procedural Tools.....                         | 24 |
| 1. Resource-Type Prioritization .....                      | 25 |
| 2. Hard-Line Eligibility Requirements.....                 | 26 |
| B. Institutional Knowledge.....                            | 27 |
| 1. Localized Approaches.....                               | 28 |
| VI. Recommendations .....                                  | 28 |

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|   |    |
|---|----|
| A. Minimum Deed Terms .....               | 29 |
| B. Federal Resource Agency Approval ..... | 30 |
| Conclusion .....                          | 30 |

### ABSTRACT

*Conservation easements (CE) are widely recognized as a double-edged sword. On one hand, CEs are praised because they protect, usually in perpetuity, millions of acres of non-federal land from development. However, CE policy is slated to undergo wide reform due to abuse of the generous tax benefits that are awarded to landowners who donate CEs. The Treasury Department has proposed specific changes to the portion of the Internal Revenue Code that governs CEs, yet there is little widespread consensus for proper reform measures.*

*This Article theorizes that, unlike the vast majority of CEs managed by state and local land trusts for general conservation purposes, CEs administered to protect specific resources are far less often the object of abuse or litigation. For example, the United States Department of Agriculture (USDA) administers CE programs specifically designed to conserve agricultural land and forestland. Additionally, some conservation organizations implement CEs dedicated to that organization's narrow focus on the preservation of certain flora, fauna, or ecosystems. This article argues resource-based specialization sparks more extensive front-end planning and builds greater institutional knowledge, which are keys to minimizing CE abuse and ensuring successful CE use over the long term. Thus, a resource-based approach should be incorporated into successful CE reform to avoid losing the CE as a vital conservation tool.*

### INTRODUCTION

Conservation easements (CE) are an invaluable land conservation tool, but extensive and increasing litigation concerning the federal charitable income tax deduction available to landowners who donate CEs as charitable gifts indicates the need for their reform. These seemingly simple contract-like agreements between a volunteering landowner and a qualified conservation organization or government entity have revealed their complexity in recent years, and their governing principles need to adjust accordingly. New CE tax policy should account for the diverse nature of resources protected by CEs to ensure successful land preservation while minimizing litigation and abuse of tax deductions.

Tax-deductible CEs are used to protect a wide variety of resources: farms, golf courses, historical building facades, forests, ranches, and recreational properties, just to name a few. Unlike many other federal resource protection tools, which are written with a specific resource in mind, the only directly applicable federal law governing tax-deductible CEs is Internal Revenue Code § 170(h), which authorizes deductions more generally—for the donation of a wide variety of CEs.<sup>1</sup>

In contrast, resource-specific management statutes dominate progressive federal environmental and natural resources law. For example, the National Forest Management Act seeks to govern the sustainable management of federally held forest resources, the Clean Water Act controls use or abuse of water resources, the Clean Air Act does the same for air, and so on. This specialization in environmental regulation suggests different resources are most effectively controlled, regulated, and protected in different ways. The Clean Air Act’s rules about hazardous air pollutants differ from its rules concerning air pollutants that are not hazardous to human health and from the Clean Water Act’s rules about water pollution or use. It is unrealistic to expect successful management of both air and water resources from a single set of rules. It likewise is unrealistic to expect successful governance of historical building facades, to use a relevant example, using the same set of rules that govern wildlife refuges. Nevertheless, on a national level, the federal tax incentive program for CE donations relies on a tax code section that applies the same rules to CEs protecting a broad array of resources.

Resource-specific legal tailoring is widely accepted and used within environmental regulation and should be applied to CE reform. Specialization and national uniformity is a practice evolved with society to ensure successful environmental protection, and tax-deductible CEs should be no exception. Careful reform will ensure these CEs maintain their vital place in the conservation landscape while minimizing abuse.

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<sup>1</sup> I.R.C. § 170(h)(4)(A) (2015) (“[T]he preservation of land areas for outdoor recreation by, or the education of, the general public, the protection of . . . relatively natural habitat[s] of fish, wildlife, or plants, or similar ecosystem[s], the preservation of open space (including farmland and forest land) . . . for the scenic enjoyment of the general public, or pursuant to a clearly delineated . . . governmental conservation policy, [and in either case such open-space preservation must yield significant public benefit], or the preservation of an historically important land area or a certified historic structure.”).

This Article lays out a conceptual framework for building a resource-specific element into the federal tax incentive program for CEs. The first section briefly outlines the relevant background and legal principles concerning how § 170(h) generally functions today. The second section gives an overview of the challenges that have arisen with the federal tax incentive program. The third section discusses two U.S. Department of Agriculture (USDA) programs that use resource-specific CEs as a tool to protect non-federal land. The fourth section looks at the CE acquisition methodology of charitable conservation organizations that have tailored their mission according to specific resources they seek to protect. The final section identifies the strengths of these CE implementation methods that can be used as guidelines to create resource-specific CE rules for the federal tax incentive program.

## I

### RELEVANT BACKGROUND

Put simply, a CE is an agreement between a landowner and a qualified conservation organization or government body that restricts future activities on the subject land to protect the land's conservation value.<sup>2</sup> In practice, this agreement functions more or less like a contract with the deed acting to bind the parties.<sup>3</sup> The landowner retains ownership of the land, but gives certain rights to restrict the use of the property, generally those that might impede conservation, to the easement holder.<sup>4</sup> However, unlike a typical contract, the public is the beneficiary of a CE, and the public subsidizes the acquisition of CEs through tax incentive and easement purchase programs. Accordingly, a variety of other federal and state laws that protect the public interest, like those governing charitable organizations or charitable donations, also apply to CEs.<sup>5</sup> In addition, what CEs protect, how they protect it, and the sheer number of CEs are quickly increasing and adding to the complexity of this seemingly straightforward arrangement.

The most significant federal tax incentive offered to landowners who donate CEs is the charitable income tax deduction under § 170(h),<sup>6</sup>

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<sup>2</sup> ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d ed. 2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J. L. PROP. & SOC'Y 107, 134-35 (2015).

<sup>6</sup> *Id.* at 119.

which authorizes a deduction for the donation of a wide variety of CEs.<sup>7</sup> Typically, taxpayers are not eligible for tax benefits for donating only partial property interests, but the Internal Revenue Code makes an exception for “qualified conservation contributions.”<sup>8</sup> Under § 170(h), a landowner who donates a CE can claim a charitable income tax deduction provided the CE is “granted in perpetuity,”<sup>9</sup> to a “qualified organization,”<sup>10</sup> exclusively for one or more of four specified conservation purposes,<sup>11</sup> and the conservation purpose is “protected in perpetuity.”<sup>12</sup> A landowner may also claim a deduction for the donation component of a part sale or part gift (also called a “bargain sale”) of a CE.<sup>13</sup> The value of the CE for purposes of the deduction is generally equal to the difference between the fair market value of the land not encumbered by the easement and the fair market value of the land once it has been encumbered.<sup>14</sup> Many states offer additional state tax benefits for CE donations.<sup>15</sup>

The Uniform Conservation Easement Act (UCEA) is a model conservation easement enabling statute that has been adopted in some form by almost half of the states.<sup>16</sup> The UCEA principally encourages states to enact provisions that override traditional common law impediments to the long-term validity of CEs, which are often held in gross, “meaning they benefit one or more individuals who do not own land adjacent to the easement.”<sup>17</sup> However, state enabling statutes vary because they do not have to follow the UCEA verbatim or meet any national criteria. Further, states can enact laws that make it impossible

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<sup>7</sup> *Id.* at 119–20.

<sup>8</sup> I.R.C. § 170(f)(3)(A), (B)(iii) (2005).

<sup>9</sup> *Id.* § 170(h)(1)(A), (2)(C).

<sup>10</sup> *Id.* § 170(h)(1)(B), (3).

<sup>11</sup> *Id.* § 170(h)(1)(C), (4).

<sup>12</sup> *Id.* § 170(h)(5).

<sup>13</sup> *See, e.g.,* *Browning v. Comm’r*, 109 T.C. 303, 325 (1997) (holding that Plaintiffs’ were entitled to claim a charitable contribution for the bargain sale of an easement to the county government).

<sup>14</sup> Treas. Reg. § 1.170A-14(h)(3)(i) (2009).

<sup>15</sup> BYERS & PONTE, *supra* note 2, at 11–12.

<sup>16</sup> Uniform Law Comm’n, *Legislative Fact Sheet- Conservation Easement Act*, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited Dec. 15, 2016); *see also* Dana Joel Gattuso, *Conservation Easements: The Good, The Bad, and the Ugly*, NAT’L CTR. FOR PUB. POL’Y RESEARCH (May 2008), <http://www.nationalcenter.org/NPA569.html> (describing the UCEA generally).

<sup>17</sup> *Id.*

to comply with portions of § 170(h). For example, in *Wachter v. Commissioner*, the Tax Court held the donation of the CEs in question, which were governed by North Dakota law, did not qualify for a deduction under § 170(h) because they were not “granted in perpetuity.”<sup>18</sup> Under North Dakota law, any easement created in the state has a maximum duration of ninety-nine years, regardless of the terms of the deed.<sup>19</sup>

The UCEA also specifies conservation purposes of a CE, limits the organizations that can hold a CE, and provides provisions for authorizing third-party enforcement of CEs.<sup>20</sup> However, the UCEA does not offer guidance regarding how to craft resource-specific CEs or how to value the economic and conservation values of CEs depending on the resource in question. Thus, the UCEA attempts to achieve uniformity within the CE system and related applicability of the tax benefit and to provide states, localities, and land trusts with guidance on CE implementation but fails for the same reasons as § 170(h). Like § 170(h), the UCEA does not offer guidance on different types of CEs that are implemented with different resources in mind or create a true national implementation system. Thus, the UCEA mirrors the issues of § 170(h) in that, though it provides guidance on how to coordinate with federal law, it does not actually implement a national law and does not offer guidance on how to specialize CEs with respect to specific resources.

Some of the most common CEs are open space easements, agricultural easements, facade easements, forest easements, wetland easements, habitat easements, and grassland easements, but the list goes on. This diversity makes reform extremely difficult to fully address. Consequently, this Article simply provides a conceptual framework without fully considering every potential resource-specific nuance of the federal tax incentive program. For example, this Article will not specifically address facade easements, although the principles developed promoting resource-specific management could be readily applied in that context, as historic facades are equally if not more distinct than variable natural resource conservation values.

This Article is also limited to providing conceptual guidance on reforms relating to the acquisition of resource-specific CEs (“front-end” reforms) and does not make comprehensive policy

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<sup>18</sup> 142 T.C. 140, 149 (2014).

<sup>19</sup> *Id.* at 146.

<sup>20</sup> Gattuso, *supra* note 16.

recommendations. Specifically, this Article does not address the equally important task of implementing reforms to ensure the proper enforcement, administration, and interpretation of perpetual CEs over the long term on behalf of the public (“back-end” reforms).

## II

### MAJOR FRONT-END ABUSES OF THE § 170(h) DEDUCTION

On some level, § 170(h) is to blame for the vast majority of abuse<sup>21</sup> concerning CEs. Its generosity is almost certainly the reason for the widespread use of CEs as a voluntary conservation tool. But for this generosity, potential CE donors would have far less incentive to abuse the tax system. As evidenced by the litigation in this context, two major forms of abuse of the § 170(h) deduction are the donation of CEs that are either overvalued or do not satisfy the conservation purposes tests specified in § 170(h). The discussion below is only a brief overview of these issues. Though it does not depict the entire scope of the problem, this discussion should help illustrate how CE specialization could address common § 170(h) pitfalls.

Proponents of CEs often cite their voluntary, localized nature as a positive. However, these positive qualities make application of a broad federal statute like § 170(h) difficult and susceptible to abuse because local controls are not uniform or resource specific. Additionally, there is minimal front-end control or involvement by the federal government when CEs are donated, which allows issues to rise to the surface, usually in some type of audit process, only after the easement is already in effect and the tax deduction has been claimed.

#### A. Valuation Abuses

To be eligible for a deduction under § 170(h) for the donation of a CE, the owner of the property must obtain a qualified appraisal of the CE.<sup>22</sup> The Treasury Regulations interpreting § 170(h) provide the

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<sup>21</sup> The term “abuse” refers to CE users cashing in on huge tax benefits without providing the intended conservation benefit or any burden on their land by either overvaluing or under-protecting the land at issue. The abuses are commonly recognized by the IRS and by legal and tax professionals. *E.g.*, Joe Stephens, *IRS Starts Team on Easement Abuses*, WASH. POST (June 9, 2005), [https://www.washingtonpost.com/archive/politics/2005/06/09/irs-starts-team-on-easement-abuses/bce00d7f-5d12-40be-86c4-9876b58c85a7/?utm\\_term=.c7d3801def](https://www.washingtonpost.com/archive/politics/2005/06/09/irs-starts-team-on-easement-abuses/bce00d7f-5d12-40be-86c4-9876b58c85a7/?utm_term=.c7d3801def).

<sup>22</sup> 26 U.S.C. § 170(h)(4)(B)(iii)(I).

amount of the deduction depends on the CE's fair market value at the time it is donated.<sup>23</sup> According to the Treasury Regulations, the ideal way to determine the fair market value of an easement would be to use sales of comparable easements.<sup>24</sup> However, comparable CE sales are generally unavailable because CEs are generally not bought and sold in open markets,<sup>25</sup> and their terms and the properties they encumber are generally different (they are not "comparable").<sup>26</sup> Accordingly, appraisers are generally forced to use the Treasury Regulation's backup method to determine value—the before and after method: "[T]he fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction."<sup>27</sup>

Because of the indirect way CEs are valued, the various valuation methods that may be employed, the fact that there generally will be a range of plausible before and after values for the subject properties, and the fact that appraisers are employed by the taxpayers, appraisers often assert high values for conservation easements. As a result, the IRS often disputes these asserted values and prepares or obtains its own appraisals, and rightfully so considering the size of the deductions that are claimed. For example, in *Palmer Ranch Holdings v. Commissioner*, the taxpayer originally claimed a \$23.9 million deduction for the donation of a CE on just over eighty-two acres in Sarasota County, Florida (a deduction of \$291,000 per acre).<sup>28</sup> Large numbers like those in *Palmer Ranch* are not uncommon, equating to large losses in federal tax revenue.<sup>29</sup>

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<sup>23</sup> Treas. Reg. § 1.170A-14(h)(3)(i) (2009).

<sup>24</sup> *Id.* § 1.170A-14(h)(3)(ii) (2009).

<sup>25</sup> See *Browning v. C.I.R.*, 109 T.C. 303, 325 (1997) (holding that Plaintiffs could introduce evidence of fair market value before and after CE donation where CEs sold as part of a county's bargain sale program did not provide accurate valuation).

<sup>26</sup> See, e.g., *Trout Ranch, LLC v. C.I.R.*, 493 F. App'x 944, 955 (10th Cir. 2012) (affirming tax court valuation where comparables were "scarce" or were bargain sales).

<sup>27</sup> Treas. Reg. § 1.170A-14(h)(3)(i) (2009).

<sup>28</sup> 107 T.C.M. (CCH) 1408 (2014) (The court eventually allowed the taxpayer to claim a \$19.9 million deduction, but the case is now on appeal.).

<sup>29</sup> See, e.g., *Kiva Dunes Conservation L.L.C. v. C.I.R.*, 97 T.C.M. (CCH) 1818 (2009) (sustaining a \$28.6 million deduction for the donation of a CE on a 140-acre golf course); *Herman v. C.I.R.*, 98 T.C.M. (CCH) 197 (2009) (disallowing a \$21.8 million deduction claimed with regard to a facade easement restricting use of some of the development rights above a historic building on Fifth Avenue in New York City); *Seventeen Seventy Sherman St., LLC v. C.I.R.*, 107 T.C.M. (CCH) 1599 (2014) (disallowing a \$7.2 million claimed deduction for the donation of interior and exterior easements on a shrine in downtown



### ***B. Conservation Purpose Abuses***

As noted earlier, tax-deductible conservation easements can be donated for a wide variety of broadly stated conservation purposes. Further, the regulations impose only general limitations on the retention of development and use rights that could have negative implications for the conservation purposes of a tax-deductible CE.<sup>30</sup> Subsequent litigation shows that this vague guidance lends itself to interpretation disputes.

For example, in *Turner v. Commissioner* and *Herman v. Commissioner*, the courts found that limitations on development in the taxpayers' CEs were not enough to support conservation purposes under § 170(h).<sup>31</sup> In *Turner*, the taxpayer donated a conservation easement that purported to reduce the number of residential lots on a 29.3-acre parcel located near President Washington's Mount Vernon estate from sixty-two to thirty lots.<sup>32</sup> However, approximately half the property was in a one hundred-year floodplain, a constraint that itself limited development to only thirty lots under existing zoning laws.<sup>33</sup> In finding that the conservation easement did nothing to protect open space or the historic character of the area, the Tax Court explained that the taxpayer "simply developed the . . . property to its maximum yield within the property's zoning classification."<sup>34</sup>

In *Herman*, the Tax Court disallowed a \$21.8 million deduction claimed with regard to a facade easement that purported to restrict the use of a portion of the development rights above a historic structure on

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Denver); *Belk v. C.I.R.*, 774 F.3d 221 (4th Cir. 2014) (affirming the Tax Court's disallowance of a \$10.5 million deduction claimed with regard to a conservation easement encumbering a 184-acre golf course); *Mountanos v. C.I.R.*, 107 T.C.M. (CCH) 1211 (2014) (disallowing a \$4.7 million deduction claimed with regard to remote rugged undeveloped land in Lake County, California).

<sup>30</sup> See Treas. Reg. § 1.17A-14(d)(4)(v) (prohibiting deductions for easements that would permit a degree of development that would interfere with scenic qualities or governmental purpose of the easement); *id.* § 1.17A-14(e)(2)–(3) (prohibiting deductions for CEs that would allow for the destruction of an important resource unless destruction of one resource is necessary to protect the resource the CE is intended to protect); *id.* § 1.17A-14(g)(1) (requiring that uses of the subject land be consistent with the conservation purposes of the land).

<sup>31</sup> *Turner v. Comm'r*, 126 T.C. 299 (2006); *Herman v. Comm'r*, 98 T.C.M. (CCH) 197 (2009).

<sup>32</sup> *Turner*, 126 T.C. at 301.

<sup>33</sup> *Id.* at 313.

<sup>34</sup> *Id.* at 317.

Fifth Avenue in New York City.<sup>35</sup> The court found that the conservation easement did not prevent demolition of the historic structure and that limiting the right to develop a portion of the airspace above the building did not preserve either the structure or a historically important land area.<sup>36</sup> Accordingly, the court found the facade easement did not satisfy the historic preservation conservation purpose test.<sup>37</sup>

On the other hand, in *Glass v. Commissioner*, the Sixth Circuit rejected the IRS's argument that the habitat protection conservation purposes test was not met because the grantors retained too many use rights in their easements.<sup>38</sup> *Glass* involved two conservation easements that encumbered only a small portion of a ten-acre parcel on the shore of Lake Michigan.<sup>39</sup> The Sixth Circuit rejected the IRS's argument, despite the small size of the property and the grantors' retention of rights to recreate and build accommodating facilities like a boathouse and footpath on the property.<sup>40</sup> The court found that potential high-quality habitat for endangered eagles would continue to exist even when landowners exercised those rights.<sup>41</sup> Thus, the CE was sufficient to support the conservation purposes test.<sup>42</sup>

The IRS made a similar argument regarding reserved rights in *Butler*, which involved conservation easements encumbering land in Georgia.<sup>43</sup> The grantors in *Butler* reserved significant development and use rights in the easements, including residential subdivision, agricultural, commercial timbering, and recreational rights.<sup>44</sup> However, the grantors introduced evidence at trial in the form of testimony from environmental consultants that the habitat on the property would continue to be protected even at full exercise of all reserved rights, and the IRS failed to introduce any evidence to the contrary.<sup>45</sup> The Tax Court held for the grantors, finding that, although the evidence on the

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<sup>35</sup> Herman, 98 T.C.M. (CCH) 197, \*1 (2006).

<sup>36</sup> *Id.* at \*9.

<sup>37</sup> *Id.* at \*11.

<sup>38</sup> 471 F.3d 698, 708 (6th Cir. 2006).

<sup>39</sup> *Id.* at 700.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 709.

<sup>42</sup> *Id.*

<sup>43</sup> *Butler v. C.I.R.*, 103 T.C.M. (CCH) 1359, \*4 (2012).

<sup>44</sup> *Id.* at \*13.

<sup>45</sup> *Id.* at \*9.

issue was “sparse,” the habitat would continue to be protected even at full exercise of all the reserved rights.<sup>46</sup>

Golf courses are also a contentious topic in this context, and the Treasury Department (Treasury) has proposed eliminating the deduction for conservation easements on golf courses.<sup>47</sup> The Treasury argues golf courses provide benefit only to select individuals who have the opportunity to use or live near the course, are particularly susceptible to overvaluation, and may result in environmental degradation.<sup>48</sup> On the other hand, golf course advocates point out that golf courses provide over two million acres of green space nationally that can be managed sustainably to provide habitat, forests, water or other environmental assets.<sup>49</sup>

The above cases illustrate the difficulty in determining whether a CE satisfies the conservation purposes test under § 170(h). Without more guidance or specificity as to what constitutes “conservation purposes,” the abuse and debate surrounding CE tax benefits will almost certainly continue.

### III USDA CONSERVATION PROGRAMS

The Natural Resources and Environment “Mission Area” of the USDA is charged with ensuring the “health of the land through sustainable management.”<sup>50</sup> That Mission Area’s two agencies, the U.S. Forest Service (USFS) and the Natural Resources Conservation Service (NRCS), work to “prevent damage to natural resources and the environment, restore the resource base, and promote good management.”<sup>51</sup> NRCS acts primarily as a technical and financial facilitator of land conservation, while the USFS acts as both a direct land manager of National Forests and a technical assistant to forestland

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<sup>46</sup> *Id.* at \*35.

<sup>47</sup> DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2016 REVENUE PROPOSALS 189 (2015).

<sup>48</sup> *Id.*

<sup>49</sup> *Prepare Golf for the Future*, WE ARE GOLF, <http://wearegolf.org/sustainability/value/> (last visited June 26, 2015).

<sup>50</sup> *USDA Mission Areas: Natural Resources and Environment*, U.S. DEP’T OF AGRIC. (Mar. 21, 2012), [http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea\\_NRE.xml](http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea_NRE.xml).

<sup>51</sup> *Id.*

owners in a lesser capacity.<sup>52</sup> However, both agencies foster conservation of working resource systems intended to provide ecosystem services, rather than the pure preservation that other federal agencies, such as the National Park Service, strive for. Thus, the underlying philosophy of these two agencies is generally to manage resources for long-term sustainable use beyond their inherent scenic, conservation, recreational, or historic qualities. Because CEs can be used to manage sustainable resources as well as protect conservation values, it follows that both agencies rely on CEs as a tool for land conservation.<sup>53</sup> Thus, these agencies contribute to the increasing use of CEs nationally.<sup>54</sup>

Every four years, Congress passes legislation governing the activities of the USDA that is known as the Farm Bill.<sup>55</sup> According to the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, the Farm Bill is “the single most important piece of legislation for improving the quality of life and economic vitality of our rural communities.”<sup>56</sup> The 2008 Farm Bill included eight conservation programs intended to encourage new conservation and provide more funding for technical assistance.<sup>57</sup> It also focused on cooperative conservation programs by allocating six percent of all program funds to carry out cooperative projects that bring together “producers, states, nonprofit organizations and other groups.”<sup>58</sup> The last and most significant of the 2008 Farm Bill’s conservation initiatives was its limitation of participation in the USDA conservation programs to individuals whose gross adjusted incomes do not exceed \$1 million annually, unless that income is derived from farming, ranching, or forestry.<sup>59</sup>

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<sup>52</sup> *See generally About: Regulations and Policies*, U.S. FOREST SERV., <http://www.fs.fed.us/about-agency/regulations-policies> (last visited Nov. 21, 2016).

<sup>53</sup> *USDA Mission Areas: Natural Resources and Environment*, U.S. DEP’T OF AGRIC. (Mar. 21, 2012), [http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea\\_NRE.xml](http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea_NRE.xml).

<sup>54</sup> *See generally About: Regulations and Policies*, U.S. FOREST SERV., <http://www.fs.fed.us/about-agency/regulations-policies> (last visited Nov. 21, 2016).

<sup>55</sup> *Farm Bill: Investments for the future*, U.S. COMM. ON AGRIC., NUTRITION, AND FORESTRY 1 (2008), [http://www.agriculture.senate.gov/imo/media/doc/2008\\_farm\\_bill\\_highlights.pdf](http://www.agriculture.senate.gov/imo/media/doc/2008_farm_bill_highlights.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 2–4.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 3.

The 2012 Farm Bill purported to implement the “most significant reforms in agricultural policy in decades” and claimed it would reduce the national deficit by \$23 billion by ending direct payments to farmers and streamlining and consolidating programs.<sup>60</sup> Taken together, the 2008 and 2012 Farm Bills drastically changed the USDA’s operations and policy and, in turn, dramatically increased their use of CEs as a conservation tool. It is also important to note the fiscal measures of the 2012 Farm Bill because, as shown below, the need to decrease the budget naturally resulted in prioritization of resources. The following parts detail the changes from the 2008 to 2012 Farm Bill with respect to CE implementation.

### A. USFS & CEs

In addition to its direct management of federally held national forests, the USFS encourages healthy management of state and privately held forestlands. Because more than fifty-seven percent of all forestland in the United States is privately owned, and it is being converted for development at an alarming rate—over 10.3 million acres from 1982 to 1997—the federal government has a strong interest in promoting preservation on private lands.<sup>61</sup> This is an issue not only because of direct loss of forestlands, but also because isolation of forest fragments can change or lessen the ability of private, state, and national forests to provide their full ecological, economic, and social benefits.<sup>62</sup>

Over the years, Congress has offered fairly direct production- and finance-centric incentives for forest sustainability and management, such as reforestation tax benefits or timber production exclusions from income taxation.<sup>63</sup> Incentives to acquire CEs are a valuable addition to these tax incentives because CEs can be used for less production-

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<sup>60</sup> *Agriculture Reform, Food and Jobs Act of 2012*, U.S. S. COMM. ON AGRIC., NUTRITION, AND FORESTRY, <http://www.ag.senate.gov/issues/agriculture-reform-food-and-jobs-act-of-2012>.

<sup>61</sup> STATE FOREST SERV. TEAM ET AL., *USDA Forest Service Forest Legacy Program: 5-Year Strategic Direction*, App. A (2005), [http://www.fs.fed.us/spf/coop/library/flp\\_strategicdir.pdf](http://www.fs.fed.us/spf/coop/library/flp_strategicdir.pdf) [hereinafter *FLP Strategic Direction*]. (Strategic Direction, authored in 2005, is the most recent update currently on the USFS website concerning the conceptual goals of the FLP.)

<sup>62</sup> *Id.* at 3.

<sup>63</sup> John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm . . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 *FORDHAM ENVTL. L.J.* 691, 697–98 (1997).

centric purposes. Unlike the forest-specific tax incentives, which focus on expenditures for the implementation of timber production, CEs can be used to conserve forest ecosystem services other than timber production, such as water, wildlife, fire preparedness, or erosion control.<sup>64</sup>

The Cooperative Forestry Assistance Act (CFAA), enacted in 1978, recognizes the importance of protecting privately owned forestlands because most of the nation's forestlands are in private ownership and subject increasing development and population pressures.<sup>65</sup> The CFAA emphasizes the importance of protecting working forests to provide not only forest commodities, but also ecosystem services, like fish and wildlife habitat, watershed function and water supply, aesthetic qualities, historical and cultural resources, and recreational opportunities.<sup>66</sup> The CFAA started the momentum of federal involvement, beyond reforestation credits, in state and private forestland holdings. Because this momentum was started with the idea of protecting ecosystems, rather than just timber reserves, federal protection of state and private forest resources has been a more intentional, well-planned process, as evidenced by the evolution of its Cooperative Forestry programs shown below.

Today, in the most recent offshoot of the CFAA, the USFS implements "Cooperative Forestry" programs to encourage healthy forest management on non-federal forestlands by working with states and private land owners to improve forest health.<sup>67</sup> Four national programs exist under the Cooperative Forestry umbrella: "Forest Stewardship," "Forest Legacy," "Community Forest," and "Urban and Community Forestry."<sup>68</sup>

New policies in the 2008 Farm Bill prompted the USFS to redesign its Cooperative Forestry programs.<sup>69</sup> The purpose of the redesign was to address "the greatest threats to forest sustainability and accomplish meaningful change in high priority areas."<sup>70</sup> The USFS has stated that

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

<sup>65</sup> U.S.D.A. FOREST SERV., FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES, 2 (2003), [http://www.fs.fed.us/spf/coop/library/fpl\\_guidelines.pdf](http://www.fs.fed.us/spf/coop/library/fpl_guidelines.pdf).

<sup>66</sup> *Id.*

<sup>67</sup> *Cooperative Forestry*, U.S. FOREST SERV. (July 15, 2014), <http://www.fs.fed.us/spf/coop/>.

<sup>68</sup> *Id.*

<sup>69</sup> *State and Private Forestry Redesign*, U.S. FOREST SERV. (last updated Mar. 10, 2016, 3:41 PM), <http://www.fs.fed.us/spf/redesign/> [hereinafter *Redesign*].

<sup>70</sup> *Id.*

this new approach applies “progressive competitive strategies” to a portion of the federal funds devoted to state and private forest protection projects.<sup>71</sup> To aid in this prioritization process, the USFS required each state to complete a state-wide “Assessment and Strategy for Forest Resources,” which analyzes forest conditions and trends in the state and delineates priority rural and urban forest landscape areas. The idea behind these assessments is to provide long-term plans for the investment of federal, state, and other resources where they will be most effective.<sup>72</sup>

The USFS’s motivation behind the redesign is that the nation’s forests are experiencing new and significant health challenges, such as rising tree mortality due to disease and invasive pests, increased wildfire size and intensity, climate change disturbances, and conversion to non-forest uses.<sup>73</sup> The agency’s focus on prioritization suggests that budget increases are not following the increased threats at a comparable rate. Because CEs are a relatively cheap way to manage large tracts of land, it makes sense that the USFS is incorporating them as a major tool to help meet the redesign’s purpose: to “shape and influence forestland use on a scale, and in a way, that optimizes public health benefits from trees and forests for both current and future generations.”<sup>74</sup>

### *1. The Forest Legacy Program*

The USFS Cooperative Forestry Program charged with CE implementation is the Forest Legacy Program (FLP).<sup>75</sup> The 2012 Farm Bill extended the FLP through 2017 and set a new authorized level of funding for the program at \$200 million per year.<sup>76</sup> As it does with all Cooperative Forestry programs, the USFS partners with states to implement the FLP, a strategy that supports state efforts to protect

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (The USFS redesign webpage states that forests are being permanently converted to non-forest uses at a rate of one million acres per year.)

<sup>74</sup> *Id.*

<sup>75</sup> *Forest Legacy Program*, U.S. FOREST SERV. (last updated Dec. 16, 2013, 2:19 PM), <http://www.fs.fed.us/spf/coop/programs/loa/aboutflp.shtml> [hereinafter *Forest Legacy Program*].

<sup>76</sup> U.S. S. COMM. ON AGRIC., NUTRITION, & FORESTRY, 112TH CONG., AGRICULTURAL REFORM, FOOD, AND JOBS ACT OF 2012: SECTION BY SECTION SUMMARY 44 (Comm. Print 2012).

environmentally sensitive forestlands that are threatened by development or other non-forest uses.<sup>77</sup> The broad goals of the FLP are to promote forestland protection, conservation opportunities, and ecological values such as “important scenic, cultural, wildlife, recreational, and riparian resources.”<sup>78</sup> Land that falls within these goals is protected either with a CE or by fee-simple purchase.<sup>79</sup> However, unlike § 170(h), the FLP continues to narrow and specify as eligibility is further limited to states that prepare an “Assessment of Need” that shows, at a minimum, that there are environmentally important areas threatened by conversion to non-forest uses in the state.<sup>80</sup>

The FLP laid out the program’s priorities in 2005 in its “5-Year Strategic Direction” (“Strategic Direction”), which outlines strategies for achieving the broad goals of the FLP, namely to improve accountability and performance of the program on a uniform national level with the intention of creating a national perspective.<sup>81</sup> The Strategic Direction’s four main priorities for the FLP are to (i) promote strategic conservation of private forests, (ii) conserve private forests that provide environmental and economic benefits to people and communities, (iii) slow the conversion and parcelization of environmentally and economically important private forests, and (iv) continually improve FLP business practices.<sup>82</sup> These goals sound broad, but the Strategic Direction adds specificity. For example, in promoting the strategic conservation of forests, FLP looks for projects that contribute to “regional, landscape, or watershed-based efforts to protect important private forests, regardless of tract size.”<sup>83</sup> Strategic conservation within the FLP’s framework also means focusing on local conservation priorities, as determined by the state assessment plans,

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<sup>77</sup> *Forest Legacy Program*, *supra* note 75.

<sup>78</sup> *National S&PF Authorities and Guidance* 8 (May 11, 2011), <http://www.fs.fed.us/spf/redesign/spf%20authorities.pdf> [hereinafter *Redesign Authorities*].

<sup>79</sup> *Id.*

<sup>80</sup> USDA FOREST SERV. STATE & PRIVATE FORESTRY COOP., FORESTRY FINAL AMENDED FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES 8 (June 30, 2003 amended Dec. 21, 2011); *see also Guide to the Forest Legacy Program*, THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide> (last visited Nov. 21, 2016).

<sup>81</sup> *FLP Strategic Direction*, *supra* note 61, at 1.

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

<sup>83</sup> *Id.* at 5.



and attempting to “strategically link to other protected lands to create a cumulative conservation effect.”<sup>84</sup>

Meeting the “benefits to people and communities” standard under the second goal of the Strategic Direction requires satisfaction of one of the following three sub-goals: protecting waters; providing economic activities; and conserving fish, wildlife, plants, and unique forest communities.<sup>85</sup> Additionally, it is a USFS priority to protect state and private lands that are adjacent to or within national forests because they often interact as a single ecosystem.<sup>86</sup> Poor forest health of private inholdings or adjacent lands could potentially damage the health of national forests by subjecting them to insect problems or wildfire.<sup>87</sup>

The Strategic Direction’s “Guiding Principles” are as follows: striving for permanent protection of important forestlands, commitment to constant improvement, use of state assessment plans as a foundational source of local input, use of partnerships to purchase CEs or fee-simple forest properties, and encouragement of professional forest management and traditional forest uses that can coexist with the conservation purposes of a CE.<sup>88</sup> While the Strategic Direction encourages traditional forest uses where the users create multiple use management plans and use best management practices, “priority is given to lands which can be effectively protected and managed and that have important scenic or recreational values; riparian areas; fish and wildlife values, including threatened and endangered species; or other ecological values.”<sup>89</sup>

Though its guiding principles are somewhat broad, the FLP’s selection and acquisition of CEs is carefully planned. The FLP uses a competitive ranking process involving state and federal committees to select CEs that best meet the program’s goals.<sup>90</sup> Consequently, rather than funding and implementing the majority of CEs offered, the FLP

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<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Robert L. Glicksman, *Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management*, 87 NEB. L. REV. 833, 879 (2009) (noting that problems faced by ecosystems will not “respect the political boundaries separating private from state or federal land”).

<sup>88</sup> *FLP Strategic Direction*, *supra* note 61, at 4.

<sup>89</sup> *Id.*

<sup>90</sup> See *Forest Legacy Program Users’ Guide*, USDA FOREST SERV. (June 2006), [http://www.fs.fed.us/cooperativeforestry/library/flp\\_usersguide.pdf](http://www.fs.fed.us/cooperativeforestry/library/flp_usersguide.pdf).

funds only the CEs that are best suited to meet the program's goals in the long run. The FLP is also deliberate and specific with respect to the resources it intends to protect. It identifies resources that are of national importance, like water resources, but also recognizes the importance of local input to identify resources of local importance, like lands connecting or expanding vital natural tracts or ecosystems.

Originally, the USFS negotiated the purchase of easements and fee-simple properties directly.<sup>91</sup> In 1996, Congress amended federal law to allow the USFS to make grants to states to allow the states to undertake the acquisitions themselves.<sup>92</sup> Currently, FLP funds are allocated via cost sharing with states for project or administrative grants.<sup>93</sup> Under this system, grant applicants must provide at least twenty-five percent of the project cost, an amount that may not derive from other federal funding.<sup>94</sup> Often the cost share is made in the form of a donation by the landowner.

All projects that receive FLP funds are required to report their accomplishments in the Forest Legacy Information System to measure performance over time.<sup>95</sup> The FLP purports to be a great success, having conserved over 2.3 million acres of private forestland, and is experiencing "solid growth in terms of budget."<sup>96</sup> According to the USFS: "The program has been successful due to the clear national need for a conservation program that focuses on forests and to the hard work of state, local, and nonprofit partners to produce effective results."<sup>97</sup>

### ***B. NRCS & CEs***

NRCS's broad mission is to provide farmers and ranchers with financial and technical assistance to promote conservation and sustainable agricultural activities.<sup>98</sup> Like the direct production benefits used to promote forest regeneration projects by private forestland owners, farm owners can apply for direct production benefits based on

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<sup>91</sup> *Id.*

<sup>92</sup> *Forest Legacy Program*, *supra* note 75; THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide> (last visited Nov. 21, 2016).

<sup>93</sup> *See FLP Strategic Direction*, *supra* note 61.

<sup>94</sup> *Forest Legacy Program*, THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide> (last visited Nov. 21, 2016).

<sup>95</sup> *FLP Strategic Direction*, *supra* note 61, at 8.

<sup>96</sup> *FLP Strategic Direction*, *supra* note 61, at 4; *Forest Legacy Program*, *supra* note 75.

<sup>97</sup> *FLP Strategic Direction*, *supra* note 61, at 4.

<sup>98</sup> *About NRCS*, USDA NAT. RES. CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about/> (last visited Nov. 21, 2016).

the crops they produce.<sup>99</sup> However, like the § 170(h) deduction, agricultural subsidies have become infamous for abuse.<sup>100</sup> Agricultural subsidies are criticized for harming the environment, disturbing the free market, and presenting high costs to the government.<sup>101</sup> While it could be argued that, like agricultural subsidies, CEs are disturbing the free market,<sup>102</sup> NRCS's use of CEs can be seen as a less controversial way to allocate federal resources, and if done properly, with less potential for abuse.

### *1. Agricultural Conservation Easement Program*

The most recent Farm Bill, the Agriculture Act of 2014, went into effect on February 27, 2015.<sup>103</sup> This Act consolidated the Wetlands Reserve Program, the Farm and Ranch Lands Protection Program, and the Grassland Reserve Program into the Agricultural Conservation Easement Program (ACEP).<sup>104</sup> ACEP facilitates the acquisition of two types of CEs: agricultural land easements and wetland reserve easements.<sup>105</sup> Under the agricultural land easements component of ACEP, NRCS provides matching funds to state and local government, tribes, and qualified conservation organizations to help them purchase easements protecting agricultural lands in perpetuity.<sup>106</sup> In contrast, under the wetland reserve easements component, NRCS purchases easements directly from landowners to protect the wetlands and associated lands either in perpetuity or for thirty years.<sup>107</sup>

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<sup>99</sup> Marcelo Ostrea: *How U.S. Agricultural Subsidies Harm the Environment, Taxpayers, and the Poor*, NAT'L CTR. FOR POL'Y ANALYSIS (Aug. 7, 2013), <http://www.ncpa.org/pub/ib126>.

<sup>100</sup> Tim Worstall, *The Real Problem with Farm Subsidies: They Don't Subsidize Farms*, FORBES MAG. (2013), <http://www.forbes.com/sites/timworstall/2013/03/20/the-real-problem-with-farm-subsidies-they-dont-subsidise-farms/>.

<sup>101</sup> Ostrea, *supra* note 99.

<sup>102</sup> See John M. Vandilck, *Waiting for Uncle Sam to Buy the Farm . . . Forest or Wetland*, 8 FORDHAM ENVTL L.J. 691 (2006).

<sup>103</sup> *Id.*

<sup>104</sup> *2014 Farm Bill*, USDA NAT. RES. CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/> (last visited Nov. 21, 2016).

<sup>105</sup> AGRICULTURAL CONSERVATION EASEMENT PROGRAM RULE, 7 C.F.R. § 1468 (2015) [hereinafter ACEP FINAL RULE]; U.S. S. COMM. ON AGRICULTURE NUTRITION AND FORESTRY, 113TH S., 2014 FARM BILL TITLE BY TITLE SUMMARY, <http://www.agriculture.senate.gov/download/?id=A04E89D3-90B5-4BC6-90EA-AB34D1851E05>.

<sup>106</sup> ACEP FINAL RULE, *supra* note 105.

<sup>107</sup> *Id.*

Unlike the conservation purposes tests under § 170 (h), the eligibility requirements for ACEP CEs are extensive and specific. Program-wide, the following lands are ineligible: federal lands except those held in trust for Indian Tribes, state-owned lands, land subject to an existing easement, and lands that have onsite or offsite conditions that would undermine the purpose of the program. ACEP further limits eligibility within each of its two components. Another limiting factor is that available funding is based on the resource in question. Wetland and grassland easements, for example, are eligible for more funding from NRCS and require less from state or local organizations.<sup>108</sup> For agricultural land easements, ACEP requires local cooperative agreements which lay out the procedures for purchasing the CEs, the specific requirements for every easement, and the terms that must be included in the easements (“minimum deed terms”).<sup>109</sup> The minimum deed terms help to ensure consistency in the funding, drafting, administration, enforcement, and interpretation of the CEs, including monitoring and reporting requirements, which are useful in enforcement, though not addressed in this Article.<sup>110</sup>

Moreover, after eligibility is established, ACEP prioritizes projects by creating a ranking system for funding, in which parcels compete for assistance during a given funding period.<sup>111</sup> In addition to the national ranking criteria, states may set ranking criteria and scoring systems, but the national ranking criteria must comprise at least half of the parcel’s score.<sup>112</sup> The national ranking criteria are quantitative and include factors such as percentage of prime, unique soil; grazing uses and related conservation values to be protected; percent of cropland, pastureland, grassland, or rangeland in the overall parcel; ratio of the farm’s overall size to the average size in the particular area; population growth in the area; proximity to other protected land; whether adjacent land is currently enrolled in a CE program or was previously enrolled in the past programs; and “other similar criteria.”<sup>113</sup> Enrollment in past

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (Parties or entities under the Cooperative Agreements may be “Indian Tribe, state government, local government, or a nongovernmental organization that has an agricultural land easement program . . .”).

<sup>110</sup> See *Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. DEP’T AGRIC., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>.

<sup>111</sup> ACEP FINAL RULE, *supra* note 105.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

programs is important to consider because, for example, conservation reserve program contracts (which only temporarily protect the conservation values of land) eventually expire, and the subject land could benefit from protection under a long-term or perpetual easement.<sup>114</sup>

On a state level, state conservation and technical committees may consider, “the location of a parcel in an area zoned for agricultural use, the eligible entity’s performance in managing and enforcing easements, multifunctional benefits of agricultural land protection, geographic regions where enrollment of particular lands may help achieve program objectives, and diversity of natural resources to be protected.”<sup>115</sup> Because they will vary by locality, the state criteria outlined in the national rule document are more general.<sup>116</sup> The ranking system can also assign negative points for organizations that are delinquent on annual monitoring reports for CEs.<sup>117</sup> States may also establish minimum thresholds for points in the ranking system below which projects will not be funded.<sup>118</sup>

Thus, like the FLP, ACEP does not accept every CE that is offered and instead uses careful front-end scrutiny to determine which CEs are best suited for conservation and most deserving of federal funding. This selection process, which is absent in § 170(h), helps to ensure that ACEP CEs will provide a significant public benefit in exchange for the tax dollars spent.

#### IV RESOURCE-SPECIFIC LAND TRUSTS

Land trusts with resource-specific missions more closely mirror the federal programs discussed above. Nonprofit conservation organizations, most commonly state or local land trusts, acquire and hold CEs both through and outside of the above federal programs.<sup>119</sup> As of 2010, there reportedly were 1,723 active land trusts, 24 of which

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *infra* Section V.

were categorized as national land trusts.<sup>120</sup> The vast majority of land trusts appear to be location-, rather than resource-specific, meaning their mission is local conservation generally.<sup>121</sup> While these “general conservation” land trusts appear to be the most common, some local and national nonprofits accept and hold CEs only in accordance with their more resource-specific missions.

The Nature Conservancy is likely the most well-known land trust that strictly prioritizes the CEs it accepts. It explains:

The Conservancy today only will accept donations of conservation easements or purchase an easement on lands where significant conservation benefits are obtained. (In recent years, these increasingly are areas that have been identified as “portfolio sites” through ecoregional planning, a scientific process conducted by Conservancy scientists and outside experts.) The Conservancy has often turned down offers of donations of conservation easements on lands that do not fulfill the Conservancy’s mission, even though the lands may have important ecological values.<sup>122</sup>

Some land trusts narrow their missions even further with respect to specific resources. For example, Ducks Unlimited and its affiliate Wetlands America Trust implement and hold conservation easements to “ensure that large acreages of wetlands, riparian habitats and important uplands will be preserved for the benefit of waterfowl, other wildlife and the enjoyment of future generations.”<sup>123</sup> Ducks Unlimited does not accept all CEs; rather, it concentrates its conservation efforts on areas of particular importance to waterfowl.<sup>124</sup>

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<sup>120</sup> *2010 National Land Trust Census*, THE LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/land-trusts/land-trust-census>.

<sup>121</sup> *Find a Land Trust*, THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/find-land-trust>; see, e.g., *Mission Statement*, THE MONTANA LAND RELIANCE, <http://mtlandreliance.org/about-us/mission-statement/> (“The mission of The Montana Land Reliance is to partner with landowners to provide permanent protection for private lands that are significant for agricultural production, forest resources, fish and wildlife habitat, and open space.”).

<sup>122</sup> *Conservation Easements, Landowners With Whom The Conservancy Negotiates Easements*, THE NATURE CONSERVANCY, <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml> (explaining that the Nature Conservancy “uses a science-based planning process for each ecoregion across the world to assemble portfolios of conservation lands that collectively represent viable examples of all native species and plant communities within that ecoregion”).

<sup>123</sup> *Duck’s Unlimited Conservation Easement Program*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/land-protection/ducks-unlimited-conservation-easement-program>.

<sup>124</sup> *Conservation Easement FACs*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/land-protection/conservation-easement-FAQs>.

The Humane Society of the United States' Wildlife Land Trust limits its CEs to lands that can serve as permanent sanctuaries for wildlife.<sup>125</sup> In addition to screening potential properties for wildlife values, such as critical habitat or habitat linkages, all Wildlife Land Trust CEs prohibit recreational and commercial hunting or trapping, as well as development within protected areas.<sup>126</sup>

Similarly, Alabama's Freshwater Land Trust only holds CEs that are "critical for the protection of rivers and streams and that provide recreational opportunities for the community."<sup>127</sup> Further narrowing the scope of CEs that it protects, the Freshwater Land Trust set specific conservation priorities and identified a seven-county area in which it aims to have one property per county that ranks high in each of its priorities.<sup>128</sup>

Another example, Vital Ground, is a land trust whose mission is "to protect and restore North America's grizzly bear populations by conserving wildlife habitat."<sup>129</sup> Like the federal programs, Vital Ground is "both selective and strategic" in its conservation strategies to connect fragmented lands that serve as important grizzly habitat.<sup>130</sup>

These resource-specific land trusts scrutinize potential CEs by looking at the land in question for specific resource values, rather than any conservation value that might meet § 170(h)'s broad conservation purposes tests. They also tailor the terms of their CEs to carry out their specific purposes and provide maximum protection of the targeted conservation values. Additionally, these land trusts gradually develop a special institutional knowledge concerning areas that will both meet § 170(h)'s conservation purposes test and be in accordance with their particularized missions.

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<sup>125</sup> *Qualifying Criteria*, THE HUMANE SOCIETY WILDLIFE LAND TRUST, <http://www.wildlifelandtrust.org/how-you-can-help/protect-your-land/qualifyingcriteria.html> [hereinafter HUMANE SOCIETY].

<sup>126</sup> *Conservation Options for Landowners*, THE HUMANE SOCIETY WILDLIFE LAND TRUST, <http://www.wildlifelandtrust.org/how-you-can-help/protect-your-land/conservation-options-for.html>.

<sup>127</sup> *Who We Are*, FRESHWATER LAND TRUST, <http://www.freshwaterlandtrust.org/who-we-are> [hereinafter FRESHWATER LAND TRUST].

<sup>128</sup> *Common Questions*, FRESHWATER LAND TRUST, <http://www.freshwaterlandtrust.org/who-we-are/common-questions/>.

<sup>129</sup> *Our Vision*, VITAL GROUND, <http://www.vitalground.org/about/about-us/foundation-info/> [hereinafter VITAL GROUND].

<sup>130</sup> *Id.*

## V

**COMMON TOOLS USED BY RESOURCE-SPECIFIC PROGRAMS**

Resource-specific CE implementation could begin to address two common forms of abuse of the § 170(h) deduction: valuation and conservation purposes abuses. The resource-specific USDA and land trust CE acquisition programs analyzed above overlap in their common use of front-end procedural mechanisms to acquire CEs, much like those of the National Environmental Policy Act (NEPA). The use of these mechanisms is important because it does two major things that can minimize or reduce valuation abuse and failures in meeting the conservation purposes test of § 170(h). First, these controls promote greater front-end consideration of each CE. Second, the controls use and build specific institutional knowledge within the CE implementation organizations that can be applied to each CE. The following section discusses how the above programs promote these two values and, in turn, increase the likelihood of CEs that ensure conservation without the abuses discussed in this Article.

***A. Front-End Procedural Tools***

Like the idea of resource specification in environmental laws, the importance of mandatory forethought in regulatory schemes is not a new concept either. NEPA, for example, requires governments to evaluate the potential adverse environmental consequences of their actions before allocating federal funding.<sup>131</sup> The Land Trust Alliance, the national umbrella organization for the nation's land trusts, has also addressed forethought specifically with respect to CEs. The Land Trust Alliance promotes "Strategic Conservation . . . a process that produces tools to aid decision makers in identifying, prioritizing, pursuing, and protecting those specific tracts of land that will most effectively and efficiently achieve the land trust's mission."<sup>132</sup> For example, strategic plans for organizations that focus on freshwater resources help those land trusts to focus on the protection of critical stream corridors, watersheds, and water supplies.<sup>133</sup> Strategic plans may also call for the mapping of areas to delineate places with low or high conservation

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<sup>131</sup> Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757, 775 (2005).

<sup>132</sup> *Strategic Conservation*, THE LAND TRUST ALLIANCE, <http://www.climatechange.lta.org/get-started/plan/strategic-conservation>.

<sup>133</sup> *Id.*



values.<sup>134</sup> Front-end strategizing has also been coined as “green infrastructure,” explained by the Conservation Fund as: “solutions that government leaders, conservationists, and others need to create systemic and lasting change—in major cities, watersheds, and even multi-state regions. Strategic conservation makes economic sense—establishing an environmental legacy for future generations in the most efficient and cost effective manner.”<sup>135</sup>

Like NEPA and the Land Trust Alliance’s recommendations above, resource-specific CE programs promote more intensive front-end planning to strategize resource use. Under NEPA, agencies that undertake a major federal action, must take a “hard look” at the potential consequences at the earliest practicable time.<sup>136</sup> Broadly speaking, a “major federal action” includes significant allocations of federal funding or decisions made by federal agencies such as grants or denials of permits.<sup>137</sup> In contrast, under § 170(h) major amounts of federal funding are allocated to CE acquisition without sufficient front-end procedural hurdles. The success of the programs analyzed in this Article is partially due to promotion of NEPA-style front-end planning through (i) prioritization of resource distribution and (ii) stringent eligibility requirements.

### *1. Resource-Type Prioritization*

Rather than accepting most or all CEs offered, the resource-specific programs analyzed above prioritize the types of resources they aim to protect. For example, a major focus of the redesign of both federal programs was careful allocation of limited federal funding.<sup>138</sup> Both ACEP and FLP prioritize their CE funding based on a competitive ranking system.<sup>139</sup> In this way, these systems are designed to ensure that the CEs they fund are best suited to accomplish the forestland, agricultural land, and wetland protection purposes of the programs.<sup>140</sup> In both programs, the amount of federal funding allocated depends not only on the reduction in the fair market value of the property in

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<sup>134</sup> *Id.*

<sup>135</sup> *Strategic Conservation Planning*, THE CONSERVATION FUND, <http://www.conserva-tionfund.org/what-we-do/strategic-conservation-planning>.

<sup>136</sup> Chertok, *supra* note 131, at 775.

<sup>137</sup> *Id.*

<sup>138</sup> *Redesign*, *supra* note 69.

<sup>139</sup> ACEP FINAL RULE, *supra* note 105; *Redesign*, *supra* note 69.

<sup>140</sup> ACEP FINAL RULE, *supra* note 105; *Redesign*, *supra* note 69.

question, as is the case with respect to § 170(h), but may also depend on the resource being protected.

The land trusts with resource-specific missions discussed above also smartly prioritize their CE acquisitions to meet their resource-specific conservation goals. For example, the Alabama Freshwater Land Trust prioritizes its CE acquisitions based on freshwater resources and on location, which allows the organization to meet its freshwater resource-specific goals in particular counties.<sup>141</sup> Vital Ground is in some ways even more specific, looking at the habitats of individual bears to select geographically appropriate CEs.<sup>142</sup> The Humane Society Wildlife Land Trust prioritizes based on specific habitat values of land, rather than tract size.<sup>143</sup>

## 2. *Hard-Line Eligibility Requirements*

In addition to the priorities outlined above, the resource-specific programs have firm eligibility requirements that further limit participation. Unlike § 170(h), which requires meeting only one of four broadly defined conservation purposes tests and working with an obliging conservation organization, all of the organizations discussed by this article outline specific eligibility requirements beyond those set forth in § 170(h) for CE acquisitions. When eligibility requirements value specific resources, organizations and agencies must automatically conduct a NEPA-like “hard look” conceptual process in that they must consider certain resource values of the land in question before acquiring or funding a CE.

In addition to the Farm Bill’s general restrictions on the USDA, both the NRCS and USFS’s eligibility requirements to participate in CE programs are based on resources. If states wish to participate in the FLP, they must submit an Assessment of Need showing that the resources are both important and threatened.<sup>144</sup> If an entity wishes to participate in ACEP or the FLP, it must provide a cash match to the government’s contribution.<sup>145</sup> Not only does cash matching restrict the sheer number of eligible entities, it shows local investment in the project. This automatically decreases the likelihood of hostility towards

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<sup>141</sup> FRESHWATER LAND TRUST, *supra* note 127.

<sup>142</sup> VITAL GROUND, *supra* note 129.

<sup>143</sup> HUMANE SOCIETY, *supra* note 125.

<sup>144</sup> *Redesign*, *supra* note 69.

<sup>145</sup> ACEP FINAL RULE, *supra* note 105.

federal control from local parties and increases the chances of success through local help with the process.

Finally, unlike ACEP and FLP, § 170(h) is not subject to cut backs in federal funding, despite that it costs federal taxpayers an estimated \$1.5 billion per year.<sup>146</sup> ACEP and FLP hardline eligibility requirements also effectively weed out potentially problematic CEs before requiring analysis by the agencies of individual properties, and before imposing high costs on the federal government. Thus, eligibility requirements act as an effective procedural hurdle without requiring excessive work on the part of the agencies.

### ***B. Institutional Knowledge***

In addition to prompting front-end planning, the other important component of resource specification is that it ensures each organization acquiring CEs will have increased institutional knowledge with respect to its resource of choice. Greater institutional knowledge increases resilience, or the capacity to adapt over time, important in this case because, hopefully, CEs preserve land in perpetuity.<sup>147</sup> Resilient organizations are better suited to select and draft CEs that will better withstand litigation and are more likely to accomplish successful long-term conservation. For obvious reasons, the USFS and NRCS almost certainly have a greater knowledge of what constitutes successful forest or farmland conservation than a small, local land trust. However, the entire CE system does not need to be in federal hands to ensure more extensive institutional knowledge. The USDA programs and the resource-specific land trust programs discussed above have similar qualities that promote institutional knowledge. In addition to specifying resources, which will increase interaction with and knowledge of the resources, the programs are intentional in their incorporation of local knowledge, which ensures not only increased success with respect to a resource generally, but increases the likelihood of success with respect to specific projects, as shown below.

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<sup>146</sup> Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH ENVTL. L. REV. 69, 70 (2013).

<sup>147</sup> See generally Fitrek Burkes & Nancy Turner, *Knowledge, Learning, and the Evolution of Conservation Practice for Social-Ecological System Resilience*, 34 HUM. ECOLOGY, no.4, at 279–94 (2006).

### *1. Localized Approaches*

This Article promotes some national uniformity, but recognizes that implementation of localized approaches is also important because such knowledge can help to address some of the national program's issues. Local input within the resource-specific land trusts is almost second nature, but still important. Vital Ground, for example, approaches CEs on a case-by-case basis to look at specific bears' habitats and must inherently work with local partners to gain the knowledge to properly address that habitat.<sup>148</sup> However, even within the federal programs, in addition to resource-specific CE implementation, the programs gravitate towards or incorporate local input. In the Cooperative Forestry redesign, the USFS requires states to complete and submit statewide assessment strategies of forest resources. Additionally, if states wish to participate in the FLP, they must submit an Assessment of Need.<sup>149</sup> In ACEP, cooperative agreements with local agencies are required for all CEs. Both FLP and ACEP's ranking programs require that projects are ranked first at a state level, so that projects of great local importance are funded, or funded first. Thus, even the large federal programs are careful to utilize specific local knowledge. Use of state ranking systems as a foundational source of local input also provides strength to these programs by ensuring that they are developed with the best knowledge of local conditions and local conservation needs.

## VI RECOMMENDATIONS

Loss of private or local programs altogether would be a major loss for conservation in general. While it would not be advantageous to limit projects to the point that valid conservation opportunities decrease, the astronomical cost of the current § 170(h) deduction and reports of abuse suggest that federal funds might be better spent implementing the ACEP and FLP programs (which are currently having their funding reduced), rather than continuing the cycle of issue-ridden tax deductions. However, as successful federal CE programs seem to indicate, the use of federal expertise when allocating federal funding may ensure more successful conservation in the long run, while programs with little or no uniform federal oversight are problematic. For this reason, in addition to promoting NEPA-style front-end

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<sup>148</sup> VITAL GROUND, *supra* note 129.

<sup>149</sup> *Redesign*, *supra* note 69.

planning and incorporating the above thematic similarities into private and local programs, this Article recommends resource-specific federal oversight from the relevant federal resource agencies. Although these suggestions would require more front-end planning, and therefore more work, the increasing amount of litigation with respect to deductions claimed for CE donations seems to indicate that they would be worthwhile. Further, the possibility of stemming the revenue losses that result from the large deductions being claimed and granted makes the suggestions in this Article more compelling.

Thus, to be eligible for a federal deduction for the donation of a CE, both the grantor and grantee should be required to fulfill something equivalent to the NEPA “hard look” standard. This Article suggests two potential front-end resource-specific mechanisms to promote federal oversight and uniformity: (A) minimum deed terms and (B) federal resource agency approval.

#### *A. Minimum Deed Terms*

All taxpayers should be required to use minimum deed terms in their § 170(h) deductible CEs, as is required by the federal purchase programs and many state conservation easement purchase programs. First, minimum deed terms would help to create uniformity and avoid potential CE drafting problems or loopholes. Second, minimum deed terms could force CE implementation to be resource specific. For example, the ACEP minimum deed terms impose different restrictions for agricultural viability versus grasslands or grazing uses.<sup>150</sup> The minimum deed terms require that different types of easements impose different terms for roads, permeable surfaces, and significant features, to name a few, depending on what is necessary to protect the resource in question.<sup>151</sup> In addition, the minimum deed terms ensure that terms that should not vary from easement to easement (such as the terms relating to possible extinguishment of the easement and reimbursement of the federal government for its investment in such event) are uniform across the nation.

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<sup>150</sup> See *Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. DEP’T AGRIC. NATURAL RESOURCES CONSERVATION SERV., AGRICULTURAL CONSERVATION EASEMENT PROGRAM AGRICULTURAL USE (2015), <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (scroll right sidebar and follow “FY 2015 ACEP- ALE Minimum Deed Terms” and select download as pdf) (last visited Oct. 21, 2016).

<sup>151</sup> *Id.*

### ***B. Federal Resource Agency Approval***

Tax reform should also require that CEs donated to nonprofit land trusts or state or local government entities receive approval from the appropriate federal resource management agency to be eligible for the § 170(h) deduction. Thus, a landowner who wants to claim a deduction for the donation of a CE protecting farmland as open space would seek approval from NRCS, while a CE protecting wildlife would need to be approved by the U.S. Fish and Wildlife Service (USFWS), and so on. Because federal resource agencies like NRCS, USFS, and USFWS employ experts specializing in agricultural lands, forestlands, and wildlife, respectively, they are well-suited to evaluate eligibility for CE deductions. Additionally, these agencies already use their expertise to protect CEs under the ACEP and the FLP, or through USFWS' existing conservation programs.<sup>152</sup>

Thus, NRCS, USFS, and USFWS are qualified to evaluate conservation purposes, and, because they typically fund easement acquisitions, they also are qualified to evaluate the economic value of new easements. While this oversight would require more agency staff time, any increased cost to the agency would likely be less than the current cost of the federal tax program. This oversight would incorporate the above similarities of successful programs outlined by this article by continuing to benefit from the local knowledge of the state and local land trusts and government entities, while enhancing front-end planning through use of the institutional knowledge and resource-specific expertise of the relevant federal agency.

### **CONCLUSION**

In sum, it is necessary to reconcile the scope of resources protected locally using CEs with the nationwide application of § 170(h). While CE reform must account for the fact that CEs protect a wide variety of natural and historic resources, national tax benefits are an important contributor to the conservation successes of CEs. Conservation programs that are thoughtful and intentional in their resource allocation should not suffer while blanket provisions like § 170(h) are being abused to the tune of millions of dollars.

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<sup>152</sup> USFWS implements (or partners with other agencies and organizations to implement) wildlife conservation programs, based on a particular species of need—i.e., endangered species, or species that depend on particular habitats. See U.S. FISH & WILDLIFE SERV., *Partnerships in Conservation*, <http://www.fws.gov/endangered/what-we-do/fws-programs.html> (2013).

Resource specification is an important part of the path towards the resolution of these issues. It uses an existing framework created through decades of building on the common law by environmental and natural resources laws, and it is already used by federal resource protection programs. Resource specification creates more deliberate CE use by encouraging front-end planning and building institutional knowledge, which increases the likelihood that CEs will conserve more efficiently and with less potential for tax abuse.

Thus, CE reform is necessary to curb abuse of the important incentive offered by § 170(h). If it is addressed by the current proposed changes to the tax code, we will continue to look at CEs solely in monetary terms. In considering possible local and national reforms, it is necessary to recognize that CEs protect diverse natural resources. For the foregoing reasons, reform measures should focus on resource specification through uniform federal oversight, not the currently proposed restrictive tax code reforms that do not fully address the substance of the issue.

