

How the US Tax Code Can Save Our Most Endangered Species: Part II: How to Overcome Pitfalls in This Legal Landscape to Make the Most Beneficial Impact for Our Most Threatened Species

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Part I of this article discussed federal conservation easement law generally and how the laws are supported by the legislative intent of conservation and preservation of our nation’s species and natural resources. See Elizabeth M. Hughes, *How the US Tax Code Can Save Our Most Endangered Species*, Part I, 37 Prob. & Prop. no. 2 (Mar./Apr. 2023). Part I also explored how the proper utilization of conservation easements can be a critical and successful conservation tool. Part II of the article will delve further into the current legal landscape surrounding conservation easements and pitfalls to avoid when practicing in this area of the law along with some legislative proposals to help ease the most litigious areas.

Conservation Easement Success Stories

The conservation of habitat for vulnerable species can be achieved by either “expanding the amount of public land set aside for conservation or by establishing conservation practices on private lands.” Peter Kareiva et al., *Documenting the Conservation Value of Easements*, 3 Conservation Sci. & Prac., no. 8, Aug. 2021, at e451. Many preservationists recognize that conservation easements are the better tool because they allow for the preservation of critical habitat yet allow private landowners to own, use, sell, and devise land subject to easement restrictions on a greater land area than is available in the public domain. With conservation easements, the land remains private but also protected in perpetuity for the purposes of conservation, allowing such easements to and serve as cost-effective strategies to preserve the land and maintain the natural ecosystem. *Id.* Because of the flexibility and advantages they provide to private landowners, conservation easements have become a prominent tool for protecting habitats, species, and, accordingly, biodiversity in the United States on otherwise private lands. *Id.*

It is now widely recognized that private land conservation is key in resolving the current nature crisis. As conservation easements have developed as an important tool for land trusts and government agencies to conserve private land in the United States, an abundance of success stories related to conservation easements have arisen. See Adena R. Rissman & Adina M. Merenlender, *The Conservation Contributions of Conservation Easements: Analysis of the San Francisco Bay Area Protected Lands Spatial Database*, 13 Ecology & Soc’y 40 (2008), <https://bit.ly/3EcBOEx>. The use of conservation easements has grown dramatically since the 1980s, and they have shown to be critical particularly in the protection of grasslands, oak woodlands, and agriculture. *Id.*

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Conservation easements have emerged in an environment that encourages voluntary and economic-based approaches to conservation. *Id.* Throughout the United States, protected land can be found on farmlands, forests, scenic view areas, waterways, historic sites, wetlands, and even golf courses. These protected lands are very frequently the landscapes that are some of the very best examples of the beautiful and varied environments our nation has to offer.

To date, the US Department of Agriculture (USDA) has banded with private landowners to protect more than 5 million acres of priority conservation land on grasslands, wetlands, and prime farmlands. Press Release, US Dep't of Agric., USDA Recognizes 5 Million Acres Enrolled in Conservation Easements (Apr. 2, 2021), <https://bit.ly/3I5gZvM>. Federal programs, such as the Agricultural Conservation Easement Program (ACEP), exist to help private landowners and land trusts to protect habitats such as working farms and ranches, wetlands, and grasslands. *See id.* These programs have helped to make significant strides for US conservation goals.

Meaningful success stories of conservation easements abound. For instance, Natural Resources Conservation Service's Wetland Reserve Easement Program has preserved wetlands in the Lower Mississippi River Valley by placing conservation easements thereon. *See* Nat'l Conservation Easement Database, <https://bit.ly/3k10bOF>. This area is an internationally significant floodplain and bird habitat. *Id.* The river valley is also home to sizable and diverse wetland habitats. The program has been successful in improving water quality and reducing flooding in the area—all of which increase and improve the habitat of the local wildlife, plants, and species that rely on the area for migratory purposes such as to roost and mate.

Another success story can be found in the Malpai Borderlands Group, which is a successful ecosystem organization and conservation effort that works to protect the land on the United States–Mexico border. *See* Tyler McIntosh & Hannah Rider, *Case Studies*, in *The Road to 30: Private Land Conservation*, Ctr. for W. Priorities (Nov. 11, 2020), <https://bit.ly/3jXNV1i>. This is a very biologically diverse landscape. The region is home to the Chiricahua leopard frog, the jaguar, the New Mexico ridge-nosed rattlesnake, and many other threatened and endangered species. The private conservation efforts in this area started when the Nature Conservancy purchased a conservation easement on a large-scale ranch, the Gray Ranch, in 1990. *See id.* The Gray Ranch remains one of the largest conservation easements in the country; as one of only three easements over 200,000 acres, it is larger than some national parks such as Crater Lake, Zion, and Shenandoah. *Id.* The amount of conserved and protected land has grown to nearly two million acres and the land management team has written collaborative management plans for 19 listed species and facilitated numerous ecological monitoring and research programs. *See id.*

Individual families also commonly utilize conservation easements to keep land in their families for generations. Private owners are able to maintain the land as working farms as they simultaneously protect the unique and important ecological features of the land. *See id.* One example of many is that of the Yust family ranch in northwest Colorado. *Id.* The family wanted to ensure that their land would remain a working ranch. They also wanted to protect the sagebrush habitat on their land that supports a large population of greater sage-grouse. The family placed a conservation easement on 995 acres of the Yust Ranch and accomplished both of their goals. *Id.*

Beyond the more traditional forms of conservation easements, “conservation development” has also grown as a new type of conservation. Conservation development is an approach to development that “prioritizes the protection of natural resources, open space, and agricultural lands.” *What Is Conservation Development?*, Planetizen, <https://bit.ly/3S4oxDH>. Conservation development allows for natural areas, open space, and agricultural space as a part of the overall design of a development. *Id.* Conservation

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developments attempt to preserve the natural habitat and condition of the land as much as possible, touting benefits such as protection of biodiversity, cleaner water, and a generally more sustainable approach to development. *Id.* This new concept of conservation has also spurred concepts such as “agrihoods.” These neighborhoods provide jogging and bird watching in protected land and highlight the conservation efforts of the neighborhood as a marketability point. *Id.*

Issues to Be Aware of in the Conservation Easement Legal Landscape

Conservation easements have been subjected to heightened scrutiny of Congress, the media, and the Internal Revenue Service for many years. Tax scholars have called for reform around conservation easements to improve the laws. The reforms have focused largely on legal, tax, and public policy aspects of conservation easements and have called for more standardization of easement documents, increased monitoring of compliance, third-party easement enforcement, and suggested modifications of tax benefits for easement donations. *See* Rissman & Merenlender, *supra*.

Nevertheless, in the current environment of increased inspection and enforcement relating to contributions of conservation easements, the legal landscape in this area has been filled with pitfalls, and it is important to be aware of which transactions (and which features thereof) may garner unwanted attention. *See* Shannon R. Jemiolo & Ian Redpath, *The Benefits and Pitfalls of Qualified Conservation Contributions*, 102 Tax Notes State, Prac. & Analysis, Nov. 8, 2021. Listed here are some areas to be aware of when advising clients with respect to conservation easements.

Syndicated Conservation Easements

The IRS has been particularly focused on what are referred to as syndicated conservation easements (SCEs). What is an SCE? Essentially, a typical scenario that might garner scrutiny would be where an investor “purchase[s] an interest in a passthrough entity, which then contributes a grossly overvalued conservation easement encumbering the property to a qualified organization and then allocates a charitable contribution deduction to the investor.” *Id.* “After that contribution, the investor gets a passthrough charitable contribution deduction based on the grossly overvalued appraisal of the easement.” *Id.* To further explain, a “‘syndicated conservation easement’ is basically an investment vehicle where pre-packaged conservation easements are marketed to investors with the representation that a charitable deduction will accompany the investment in excess of the amount invested.” Cory D. Halliburton, *Syndicated Conservation Easements (and Other Tax Schemes) Beware*, Freeman Law (Feb. 2, 2022), <https://bit.ly/3jY4c6z>; *see also* IRS Notice 2017-10.

The IRS further details the issue in Notice 2017-10. IRS Notice 2017-10; *see also* Halliburton, *supra*. The Notice describes the problematic transaction as one where “promoters obtain an appraisal that purports to be a qualified appraisal as defined in § 170(f)(11)(E)(i) but that greatly inflates the value of the conservation easement based on unreasonable conclusions about the development potential of the real property.” The Notice explains that the IRS will seek to challenge the purported tax benefits from this transaction based on the overvaluation of the conservation easement. IRS Notice 2017-10; Halliburton, *supra*.

The IRS has also listed SCEs on the IRS’s “Dirty-Dozen” tax fraud schemes since 2019. *See* Jemiolo & Redpath, *supra*. The agency has made it known that it will place a priority on SCE transactions like these and will stringently enforce the law in this area. *See* News Release IR-2019-182, IRS, IRS Increases Enforcement Action on Syndicated Conservation Easements (Nov. 12, 2019), <https://bit.ly/3EavQ6W>.

Contribution Valuation Issues

Conservation easements have been described as “most efficient when the value of removed development

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rights is considerably less than the full value of the property.” Rissman & Merenlender, *supra*. In line with this concept, for many contributions of conservation easements, the most serious problems arise from valuation issues. See, e.g., *Esgar Corp. v. Comm’r*, T.C. Memo 2012-35; *Butler v. Comm’r*, T.C. Memo 2012-72.

When taxpayers undertake the due diligence required to determine the proper value of an easement, they will want to consider the *Whitehouse III* case. *Whitehouse Hotel Ltd. P’ship v. Comm’r*, 755 F.3d 236 (5th Cir. 2014). *Whitehouse III* is important because its application recognizes the difficulty in valuing conservation easements and provides a roadmap for taxpayers to consider when relying on professional advice. The Fifth Circuit held that “[o]btaining a qualified appraisal, analyzing that appraisal, commissioning another appraisal, and submitting a professionally-prepared tax return is sufficient to show a good faith investigation.” *Id.* at 250. If a taxpayer is concerned about the valuation of its conservation easement and the standard of making a good faith investigation into the value of the easement, it should keep in mind that it may rely on tax professionals to support its valuations. See *id.*; see also Frank Agostino, Anson H. Asbury & Ronald Levitt, *Give It Away Now: An Update on Conservation Easements, Charitable Deductions, and Substantial Compliance (Part 2)*, 33 *Prac. Tax Law.*, no. 3, May 2019, at 13, 14.

On the Lookout—Other Concerns with Conservation Easements

The increased popularity of conservation easements has produced much literature and litigation in this area. Some commentators laud the successes of easements and promote their significant benefit to nationwide conservation efforts. Others, however, warn of problems. There remain questions about the genuine ability to retain and enforce easements in perpetuity. In that vein, some scholars question whether the changed circumstances doctrine should apply to easements, as it is frequently used to terminate other restrictive covenants.

There is also discussion of whether the foreclosure of a pre-existing mortgage might eliminate a conservation easement. Or what if a hazardous waste spill occurs on land that is subject to a conservation easement—is the easement holder liable? How would a conservation easement be affected by adverse possession claims or eminent domain?

But even with the numerous areas to be wary of while advising clients on the proper implementation and continuation of conservation easements, there is an abundance of success stories describing situations in which easements have served to protect habitats and threatened species very effectively, protection that is crucial to conservation efforts in the United States.

Conclusion

Declines in nature, native species, and healthy biodiverse environments are threats to the healthiness and vibrancy of ecological communities across the country. See Harvey M. Jacobs, *Conservation Easements in the U.S. and Abroad: Reflections and Views toward the Future*, 2014 (Lincoln Inst. of Land Pol’y, Working Paper No. WP14HJ1, 2014), <https://bit.ly/3I7ivhf>. Habitat destruction, in particular, is driving the current extinction crisis. See Ryan Richards & Matt Lee-Ashley, *The Race for Nature, How Congress Can Help Farmers and Ranchers Save Their Lands and Survive the Coronavirus-Induced Economic Crisis*, CAP (June 23, 2020), <https://ampr.gs/3I7dKnw>. Minimizing habitat destruction is one of the most important tools for the conservation of at-risk species in the United States because “habitat loss negatively affects the population sizes of species and also the reproductive success of threatened species.” Adam J. Eichenwald, Michael J. Evans & Jacob W. Malcolm, *US Imperiled Species Are Most Vulnerable to Habitat Loss on Private Land*, 18 *Frontiers in Ecology & Env’t* 439 (2020), <https://bit.ly/3KsXSyT>. It has been shown that reducing or reversing habitat loss is one of the most critical, if not the single most crucial, goal of

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conservation because habitat destruction is the primary cause of the loss of biodiversity in species. *Id.*

The problem with nature loss is more prevalent on private lands in the United States. More than 75% of the natural areas lost to development between 2001 and 2017 in the United States occurred on privately owned land. See Valerie Volcovici, *U.S. Has Lost 24 Million Acres of Natural Land in 16 Years: Independent Report*, Reuters (Aug. 5, 2019, 11:04 PM), <https://reut.rs/3lxKZc5>. Conservation researchers have noted that the habitat of threatened and endangered species is disappearing more than twice as fast on unprotected private lands than it is on all federally regulated properties. Eichenwald, *supra*. Presently, although 26 percent of US ocean territory is protected from activities like oil and gas drilling, only “12% of U.S. land area has been conserved as national parks, wilderness areas, and other types of protected areas.” Volcovici, *supra*. The United States has a goal of protecting 30 percent of land by 2030. To achieve this goal, there needs to be an emphasis on conservation laws and strategies throughout the nation.

Conservation easements are a proven and efficient way to combat these problems. Luckily, the growth in conservation easement acres in the United States has accelerated over the past three decades. See Sabhyata Lamichhane, *Trends and Drivers of Conservation Easements in the United States* (Aug. 7, 2020) (M.S. thesis, Miss. St. Univ.), <https://bit.ly/3YSS7yh>. Conservation easements are one of the most effective tools available for conservation on private land because they motivate and empower private owners to act by providing tax incentives. Their use has successfully protected millions of acres of wildlife habitat and open space in the United States. As of 2020, it is estimated that more than 40 million acres nationally are preserved by conservation easements. This is more acreage than exists in all national parks in the contiguous 48 states. See *id.* Federal laws such as farm bills and the Endangered Species Act, along with federal and state tax incentives, are all credited with an increased implementation of easements. *Id.*

And while the existing policies and laws have effectuated a positive increase in easement implementation, there is still room for improvement. Commentators have summarized the issues well.

While encouraging the preservation of environmentally sensitive areas is an important legislative priority, the tax law has proven to be problematic. It has allowed for easements to be donated for property that was highly unlikely to ever be developed, land with little conservation value, and in some situations the nonprofit entity that received the easement has a connection with the owner who got the tax break . . . or had little expertise in managing easements.

Ike Brannon, *Amid IRS Overreach, Congress Has a Real Opportunity to Reform Conservation Easement Legislation*, Forbes (June 4, 2019), <https://bit.ly/3Eb5nGK>.

Legislative reform could make conservation easement law more effective and decrease the litigated aspects in this area of law—in turn, reducing the cost of these programs for taxpayers. For one, conservation easement law could be reformed to curb some of the typical avenues of misuse. Amendments to the current laws could specifically address the “promoters” that are involved in crafting tax shelters by using conservation easements. See *id.* Legislative changes could also address the issues related to inflated valuations related to several aspects of easements. *Id. Inter alia*, a simple solution could be proposed legislation that disallows charitable deductions when the amount of the deduction claimed exceeds a certain percentage of the total investments that would be attributable to the property that is subject to the easement.

Beneficial reform could also include language to ensure that areas that have true conservation benefits are being preserved. Right now, the IRC contains somewhat general language about the “conservation purposes” required for deductibility. Conservation easement laws could be further improved to include specifications that capture the intended purpose of the law and ensure true conservation benefits for truly

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unique habitats for our endangered species. See K. King Burnett, John D. Leshy & Nancy A. McLaughlin, *Building Better Conservation Easements for America the Beautiful*, Harv. Env't L. Rev. Online (Sept. 15, 2021), <https://ssrn.com/abstract=3925094>.

The IRC could also benefit from more stringent requirements regulating who can qualify as an eligible holder of the deductible easement. For example, confirming that the holder of the perpetual easement has the experience and financial solvency to maintain and enforce the easement would help to ensure that the conservation benefits are enforced over time. *Id.* Legislation of this kind would likely gain support on both sides of the aisle. Until then, we should continue to critically evaluate all approaches to conserving habitat and improve the areas with proven conservation success because it is imperative to safeguard our most threatened species in the country. See Eichenwald, Evans & Malcolm, *supra*.