Perpetuity is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements

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Forthcoming in
37 HARV. ENVTL. L. REV. _ (2012)

Although it gathers a wide range of information and citations, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment and Termination of Conservation Easements*[1] ignores governing law and facts and makes mistakes in analysis that lead to flawed conclusions. Most

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[1] 36 Harv. Envtl. L. Rev. 1 (2012) (hereinafter "*The Challenge*").
[2] *The Challenge* at 4.
[3] Land Trust Alliance, Amending Conservation Easements: Evolving Practices

notably, *The Challenge* ignores the primacy of federal law and federal requirements applicable to those that elect to take federal tax deductions and relies on case law that, upon inspection, does not support the thesis. *The Challenge* implies that conservation easement donors and the government entities and land trusts accepting conservation easement donations are free to ignore both federal tax law requirements and the rules that govern administration of charities and the charitable gifts they solicit and accept.

The Challenge states that it is based on the assumed "unsettled nature of the law surrounding perpetual conservation easement amendment and termination."[2] There is little indication from the IRS or the public face of the land trust community that the law of federally deductible conservation easements is unsettled. To the contrary, the law is clear: conservation easements are solicited and granted in perpetuity, to be amended or terminated only in extraordinary circumstances and to be terminated only with court approval or as a result of condemnation.[3] Visit 100 or 500 land trust websites, and the message on easement amendment and termination is virtually uniform—both are described as extremely difficult or impossible. The websites are equally uniform in weaving a promise out of the words "protect your land" "forever."[4]

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[2] *The Challenge* at 4.

[3] Land Trust Alliance, Amending Conservation Easements: Evolving Practices and Legal Principles (Aug. 2007). The Alliance Report explains at 24:

> If the conservation easement was the subject of a federal income tax deduction, then Internal Revenue Code Section 170(h) and the Treasury Regulations Section 1.170A-14 apply. Such an easement must be "granted in perpetuity" and "the conservation purpose [of the contribution must be] protected in perpetuity." The easement must be transferable only to another government entity or qualified charitable organization that agrees to continue to enforce the easement. The easement can only be extinguished by the holder through a judicial proceeding, upon a finding that continued use of the encumbered land for conservation purposes has become "impossible or impractical," and with the payment to the holder of a share of proceeds from a subsequent sale or development of the land to be used for similar conservation purposes. To the extent an amendment amounts to an extinguishment, the land trust must satisfy these requirements.

[4] *E.g.,* Gallatin Valley Land Trust, http://www.gvlt.org/land-conservation ("Each conservation easement is tailored for the property's unique resources and for the landowner's vision. The agreements run with title to the land and last forever. The Gallatin Valley Land Trust is responsible for making sure the easement's terms are upheld in perpetuity through our stewardship program."); Montana Association of Land Trusts, http://www.montanalandtrusts.org/faqs/ ("current landowners who grant or otherwise convey a conservation easement want assurances their property will be protected not just through their lifetime,

The challenge of existing law arises only for organizations that wish not to abide by the requirement of perpetuity.

I. Federal Law Governs All Land Trusts as 501(c)(3) Charities

A land trust is a 501(c)(3) nonprofit corporation formed and subject to oversight under state law but also qualified and supervised as a charity under federal law.[5] A conservation easement donor who intends to seek a federal tax deduction must find an "eligible donee" to accept the donation, and the easement terms must prohibit transfer of the easement except to another eligible donee that agrees to continue to carry out the conservation purposes of the easement.[6] An "eligible donee" is any government unit in the United States and any 501(c)(3) charity that meets the public support test (a "qualified organization"), has the commitment to protect the conservation purpose of the donation, and has the resources to enforce the conservation restrictions.[7]

Land trusts are thus formed under the law of a particular State and operate under that law as well as the law of any other State in which they do business. State law controls a variety of corporate matters such as the minimum number of directors, annual meeting and filing requirements, and so on.[8] To qualify to accept conservation easements entitled to enjoy federal tax deductions, however, a land trust must satisfy all applicable provisions of federal law.[9] Federal law is paramount when it is made applicable by Congress and the pertinent facts. The

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but forever"); Vermont Land Trust, http://www.vlt.org/land-protection/frequently-asked-questions ("When you conserve your land, you sign a legal document called a conservation easement and dedicate your property, forever, to being a part of Vermont's rural, productive, and natural landscape."); West Virginia Land Trust, http://www.wvlandtrust.org/pdfs/Land_Trust_Folder_Brochure_WEB.pdf ("It is the responsibility of the Land Trust to monitor easement compliance forever."). For many more examples, put the words "perpetuity," "forever" and "land trust" or "conservation easement" into any search engine.

[5] I.R.C. § 501(c)(3). *See generally* Marion Fremont-Smith, Governing Nonprofit Organizations (2004).

[6] Treas. Reg. § 1.170A-14(c).

[7] I.R.C. § 170(h)(1)(B), (3); Treas. Reg. § 1.170A-14(c). The IRS can and will strip a land trust of its nonprofit status for violation of federal perpetuity requirements. *E.g.*, IRS Private Letter Ruling 201110020.

[8] *E.g.*, Dana Brakman Reiser, Charity Law's Essentials, 86 Notre Dame L. Rev. 1, 6-13 (2011).

[9] I.R.C. § 170(h); *see* James J. Fishman, The Federalization of Nonprofit Regulation and Its Discontents, 99 Ky. L.J. 799 (2010).

Supremacy Clause so mandates.[10] "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[11]

As the Supreme Court explains, the Supremacy Clause operates in a variety of circumstances to prevent or resolve potential or actual conflict between different laws:

> [1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977),
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> [2] when there is outright or actual conflict between federal and state law, e. g., *Free v. Bland*, 369 U. S. 663 (1962),
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> [3] where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132 (1963),
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> [4] where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85 (1983),
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> [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), or
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> [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U. S. 52 (1941).[12]

To be tax exempt themselves and to be qualified to accept donated conservation easements giving rise to federal income tax deductions for the donors, land trusts must satisfy the panoply of

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[10] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

[11] *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005); *Gage v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, 112 S.Ct. 2374, 2388, 120 L.Ed.2d 73, 90 (1992); *see* Viet D. Dihn, Reassessing the Law of Preemption, 88 Geo. L.J. 2085 (2000); Stephen Gardbaum, Congress's Power to Preempt the States, 33 Pepperdine L. Rev. 39 (2005); Garrick B. Pursley, The Structure of Preemption Decisions, 85 Neb. L. Rev. 912 (2007).

[12] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (with added numerals and paragraphing).

federal requirements governing 501(c)(3) charities, including prohibitions on private benefit and private inurement., as well as specific eligible donee requirements under I.R.C. § 170(h) and Treasury Regulation § 1.170A-14(c).[13] A State cannot lawfully legislate to diminish the requirements of sections 170(h), 501(c)(3) or 1.170A-14 for purposes of federally deductible donations. Federal tax requirements would be rendered meaningless if States could eliminate one or more federal tests for status as a 501(c)(3) charity or diminish requirements imposed by Treasury Regulations as a prerequisite to receipt of federal tax deductions.

II. Federal Law Governs Key Aspects of Most Conservation Easements

A conservation easement is "a restriction granted in perpetuity on the use which may be made of real property — including, an easement or other interest in real property that under state law has attributes similar to an easement."[14] Whether a particular donee or transfer qualifies for a federal charitable income tax deduction under section 170(h) is a matter of federal concern, and Congress has prescribed a myriad of requirements that must be met for an easement donation to receive a federal tax deduction.[15] To qualify for the federal income tax deduction for the donor, a conservation easement must (1) be perpetual, (2) be conveyed to and held by a "qualified conservation organization," and (3) be "exclusively for conservation purposes." A valid "conservation purpose" is defined to include (a) protection of a relatively natural habitat for wildlife and plants, (b) preservation of open space (including farmland or forest land when following a government conservation policy); (c) preservation of land areas for outdoor recreation by, or education of, the general public, and/or (d) the preservation of a historically important land area or certified historic structure.[16] An easement will be treated as conveyed "exclusively for conservation purposes" only if the conservation purpose of the easement is "protected in perpetuity."[17] Thus, section 170(h) requires perpetuity twice: the easement must be granted in perpetuity (section 170(h)(2)) *and* the

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[13] James J. Fishman, Stealth Preemption: The IRS's Nonprofit Corporate Governance Initiative, 29 Va. Tax Rev. 545 (2010); *see* James J. Fishman, The Federalization of Nonprofit Regulation and Its Discontents, 99 Ky. L.J. 799 (2010).

[14] Treas. Reg. § 1.170A-14(b)(2) (as amended in 2009).

[15] *Gillespie v. Comm'r*, 75 T.C. 374, 378–79 (1980) (whether a particular transfer qualifies for a federal estate tax charitable deduction is a matter of federal concern, and Congress may prescribe requirements for tax-deductible gifts to charity).

[16] *See generally* I.R.C. § 170(h).

[17] I.R.C. § 170(h)(5)(A).

conservation purpose must be protected in perpetuity (section 170(h)(5)).

The Treasury Regulations, based largely on the legislative history of section 170(h),[18] contain numerous additional requirements intended to ensure that the conservation purpose of a conservation easement will be "protected in perpetuity."[19] The opening paragraph of the Treasury Regulations explains that, although a income tax deduction is generally not allowed for donation of a partial interest, an exception is made for conservation easement donations "*if the requirements of this section are met*."[20] To qualify for a federal tax deduction, an easement must contain at least the following express—and true—recitals:

- Grantee is a qualified organization under I.R.C. § 170(h) and Treasury Regulations § 1.170A-14(c), effectively, a § 501(c)(3) nonprofit land trust or a government entity;
- The conservation easement is granted in perpetuity (I.R.C. § 170(h)(2)(c), (h)(5)(A); Treas. Reg. § 1.170A-14(g)(1));
- The conveyance gives rise to an immediately vested property right (Treas. Reg. § 1.170A-14(g)(6)(ii));
- The easement runs with the land and is binding on successors and assigns;
- Grantee has a right with reasonable notice to enter the property to determine compliance with the easement terms (Treas. Reg. § 1.170A-14(g)(5)(ii));
- Grantee has a right to enforce the terms of the easement (Treas. Reg. § 1.170A-14(g)(5)(ii));

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[18] S. Rep. No. 96-1007 (1980).

[19] Those requirements include:

(i) the "restriction on transfer" requirement (Treas. Reg. § 1.170A-14(c)(2)),
(ii) the "no inconsistent use" requirement (Treas. Reg. § 1.170A-14(e)(2)),
(iii) the "general enforceable in perpetuity" requirement, (Treas. Reg. § 1.170A-14(g)(1)),
(iv) the "mortgage subordination" requirement (Treas. Reg. § 1.170A-14(g)(2)),
(iv) the "mining restrictions" requirement (Treas. Reg. § 1.170A-14(g)(4)),
(v) the "baseline documentation" requirement (Treas. Reg. § 1.170A-14(g)(5)(i)), and
(vi) the "donee notice," "donee access," and "donee enforcement" requirements (Treas. Reg. § 1.170A-14(g)(5)(ii)).

"Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

[20] Treas. Reg. § 1.170A-14(a) (emphasis added).

- Grantee has the right to require restoration of the property to its condition at the time of the donation (Treas. Reg. § 1.170A-14(g)(5)(ii));
- The easement must be recorded in the real property records of the county or counties in which the property is located (Treas. Reg. § 1.170A-14(g)(1));
- Any mortgage or deed of trust must be subordinated to the easement (Treas. Reg. § 1.170A-14(g)(2));[21]
- The easement must prohibit transfer except to another qualified donee that, as a condition of transfer, is required to carry out the conservation purposes (Treas. Reg. § 1.170A-14(c)(2));
- The easement must provide that, in the event of extinguishment of the easement or any sale, exchange or involuntary conversion of the property [such as condemnation], the grantee must be entitled to a portion of the proceeds in a proportion based on the value of the easement to the value of the property as a whole at the time of the gift (Treas. Reg. § 1.170A-14(c)(2) & (g)(6)(ii));[22]
- The easement must prohibit surface extraction of minerals including sand and gravel (Treas. Reg. § 1.170A-14(g)(4));[23]
- The easement must provide that owner will notify grantee in writing before any exercise of a reserved right (Treas. Reg. § 1.170A-14(g)(5)(ii));
- The easement must identify date and preparer of baseline documentation that must be completed before the donation is made (Treas. Reg. § 1.170A-14(g)(5)(i));
- Baseline documentation must be accompanied by a signed statement by grantor and grantee that the baseline "is an accurate representation of the property at the time of the transfer" (Treas. Reg. § 1.170A-14(g)(5)(i)(D));

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[21] *Kaufman v. Comm'r*, 136 T.C. 294 (2011), *vacated in part & remanded*, 2012 U.S. App. LEXIS 14858 (1st Cir. July 19, 2012). This requirement also applies to a right of first refusal, life estate, long term ground lease or other real property interest that could affect permanent protection of the land.

[22] *Carpenter v. Comm'r*, T.C. Memo. 2012-1; Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter*, 13 Fla. Tax Rev. _ (2012) .

[23] *See Great Northern Nekoosa Corp. v. United States,* 38 Fed. Cl. 645 (1997).

- The easement is being done exclusively for one or more of the conservation purposes set forth in section 170(h) and Treas. Reg. § 1.170A-14;

These requirements are vital to accomplishment of the federal purposes in granting tax deductions for qualifying conservation easements.[24] In *Comm'r v. Simmons*, the court specifically held that a tax exempt organization would fail to enforce conservation easement provisions "at its peril" and that the easements in that case were deductible because they would prevent in perpetuity any changes to the properties inconsistent with the conservation purposes.[25] In so holding, the court implicitly rejected the amici's argument that swaps are permitted.[26]

The amount of the deduction is determined by a "qualified appraisal," as prescribed in significant detail by federal law, typically comparing the value of the specific parcel before and after the conservation easement.[27] Failure to have a qualified appraisal as mandated by federal law defeats the federal income tax deduction.[28] It would be impossible to appraise perpetual easements to determine the amount of the deduction if the easements could, as *The Challenge* argues, be modified, terminated or swapped pursuant to changing state laws.

Congress imposed very strict requirements that must be met

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[24] The legislative history of I.R.C. § 170(h) reflects the intent of Congress to limit the deduction to conservation easements that preserve "unique or otherwise significant land areas or structures" and to "those cases where the conservation purposes will in practice be carried out." *See* S. Rep. No. 96-1007 (1980). Congress contemplated that contributions would be made only to organizations that have commitment and resources to enforce the perpetual restrictions and protect the conservation purposes. *Id.* Congress also intended to limit deductible contributions "to those transfers which require that the donee (or successor in interest) hold the conservation easement . . . exclusively for conservation purposes (i.e., that they not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction . . . exclusively for conservation purposes." *Id.* See also *Glass v. Comm'r*, 471 F.3d 698 (6th Cir. 2006); see Roger Colinvaux, The Conservation Easement Tax Expenditure: In Search of Conservation Value, 37 Columbia J. Envtl. L. 1, 9-10 (2012) (estimating a total revenue loss of $3.6 billion from federal charitable income tax deductions provided to individual conservation easement donors between 2003 and 2008).

[25] *Comm'r v. Simmons,* 646 F.3d 6, 9 (D.C. Cir. 2011).

[26] Brief for the National Trust for Historic Preservation et al. as Amici Curiae Supporting Appellee at *17, *Comm'r v. Simmons, ,* 646 F.3d 6, 9 (D.C. Cir. 2011), 2010 WL 6511476 (D.C. Cir. 2010).

[27] IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 15, 2012).

[28] *Whitehouse Hotel L.P. v. Comm'r*, 615 F.3d 321 (5th Cir. 2010).

for donation of conservation easements to create federal charitable income tax deductions and other federal tax benefits. Had Congress wished, it could have authorized tax benefits for entities and easements that satisfied requirements established by the States.[29] Instead, Congress provided for specific and strict federal requirements, ensuring that federal tax deductions would be available only for the designated federal conservation purposes and only if those purposes are "protected in perpetuity."

The foregoing requirements are not a buffet from which donors and land trusts may select some items and leave others untouched. A land trust and donor that wish to transfer a conservation easement that qualifies for federal tax deductions must satisfy federal law.

There may be state income tax deductions in addition to or instead of the federal deductions, and some States provide for state tax credits for donated easements. The law governing these state deductions and credits may or may not incorporate a requirement for satisfaction of federal tax requirements for deductible conservation easements.[30] A State could elect to grant tax benefits to easement donations that do not satisfy federal requirements for conservation easements.[31] Moreover, States may authorize the creation and transfer of mitigation easements and purchased easements that do not satisfy the federal requirements.[32] These

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[29] Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter,* 13 Fla. Tax Rev. _ (2012) (there is no mention in section 170(h), its legislative history or the Treasury Regulations regarding deference to state and local extinguishment procedures, even though some procedures existed at the enactment of section 170(h) and drafting of the Treasury Regulations).

[30] *E.g.*, Colo. Rev. Stat. § 39-22-522(2) (2011) (state tax "credit shall only be allowed for a donation that is eligible to qualify as a qualified conservation contribution pursuant to section 170 (h) of the internal revenue code, as amended, and any federal regulations promulgated in connection with such section").

[31] States, like landowners, are not obliged to accept federal restrictions and receive federal financial benefits. E.g., *Quern v. Mandley*, 436 U.S. 725, 735-36, 98 S.Ct. 2068, 56 L.Ed.2d 658 (1978) (States need not participate in federal welfare programs); *James v. Valtierra*, 402 U.S. 137, 140, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971) (local governments not required to accept funds under Housing Act of 1937); *Massachusetts v. Mellon*, 262 U.S. 447, 480, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject"); George D. Brown, Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs, 28 Am. U.L. Rev. 279 (1979).

[32] For a comparison of the provisions of over 100 state statutes authorizing creation or acquisition of conservation easements and the requirements of

may have perpetuity requirements of their own, however, often coextensive with federal requirements.[33] States are free to develop laws governing conservation easements for which *state* tax benefits may be available. States cannot alter the requirements for federal tax deductions.[34]

Despite these variations, almost all donated easements are drafted to comply with federal requirements because donors want federal deductions when they are available. The land trust community norm is to draft easements in conformity with the federal tax requirements absent a powerful reason to vary from those requirements.

III. *The Challenge* Fails to Account Fully for Governing Federal Law

A fundamental problem in *The Challenge* is its failure to take into account the primacy of federal law as it relates to tax-deductible conservation easements. *The Challenge* addresses several "different legal regimes [that] guide their creation, implementation, enforcement, modification, and termination,"[35] as though the legal regimes were all of equal force and relevance. In doing so, *The Challenge* confuses the issues significantly.

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federal tax law, see Nancy A. McLaughlin, Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law, 46 Real Prop. T. & Est. L.J. 1, 11-19 (2011) [hereinafter National Perpetuity Standards, Part 2], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888689.

[33] E.g., *County of Colusa v. California Wildlife Conservation Board*, 145 Cal.App.4th 637, 52 Cal.Rptr.3d 1 (2006) (county successfully challenged a state-acquired conservation easement purporting to convert agricultural land into wildlife habitat, based on statutory and contractual requirements for the land to remain in agriculture); *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc.*, 73 App.Div.3d 1257, 900 N.Y.S.2d 494 (2010), *appeal denied*, 15 N.Y.3d 715, 939 N.E.2d 809, 913 N.Y.S.2d 643 (2010) (Boy Scouts sold perpetual conservation easement to State providing for certain public access rights); *see* Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,612 (Nov. 28, 1995) ("The wetlands and/or other aquatic resources in a mitigation bank should be protected in perpetuity with appropriate real estate arrangements (e.g., conservation easements, transfer of title to Federal or State resource agency or non-profit conservation organization)."), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/mitbankn.cfm (last visited April 17, 2012).

[34] The power to tax is the power to destroy. See generally *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911); *McCulloch v. Maryland*, 17 U.S. (4 Wheat. 159) 316, 4 L.Ed. 579 (1819). Thus, state power to determine what deductions are permitted to reduce federal taxes would similarly be the power to destroy. See *McCray v. United States*, 195 U.S. 27, 24 S.Ct. 769, 49 L.Ed. 78 (1904).

[35] *The Challenge* at 3.

Property owners donating and land trusts accepting easements for which federal tax deductions will be sought do not have the option whether to follow state law, the Uniform Conservation Easement Act, the Restatement (Third) of Property: Servitudes, the Land Trust Standards and Practices, or procedures voluntarily adopted by land trusts instead of applicable federal law. All of these sources[36] must be construed to be consistent with federal law, must be deemed inapplicable, or must otherwise fall to the wayside if an easement is to be entitled to a federal deduction.[37] If there is governing federal law, then no other law or secondary source can control the availability of federal tax deductions in conflict with that federal law. To be eligible for a federal charitable income tax deduction, a conservation easement must be drafted to comply with section 170(h) and the Treasury Regulations, and the easement provisions that satisfy such requirements must be enforceable under state law. For example, to be eligible for a federal income tax deduction, the conservation easement must prohibit transfer of the easement except to another eligible donee that agrees to continue to enforce the easement.[38] The fact that the state enabling statute is silent on that requirement does not mean that the restriction-on-transfer provision included in the easement deed to satisfy federal tax law requirements can be ignored.[39] To the contrary, federally deductible conservation easements are restricted charitable gifts, or "contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations."[40]

In many respects, of course, state law, the Restatement

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[36] The term "sources" is used because the Restatement, the Uniform Laws and Standards and Practices are not law at all unless adopted as law by the Congress or state legislatures or the courts. The first two of these sources are highly respected and worthy of deference because they reflect the combined efforts of judges, scholars and practicing attorneys. But they are not the law.

[37] *E.g.*, Josh Eagle, Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements, 35 Harv. Envtl. L. Rev. 47, 56 (2011).

[38] Treas. Reg. § 1.170A-14(c)(2).

[39] *The Challenge* at 26-31.

[40] *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012) (restricted gift and charitable trust are used synonymously and are subject to the same rules), citing *Kaufman v. Comm'r*, 136 T.C. 294, 306-07 (2011) (*Kaufman II*), *vacated in part & remanded*, 2012 U.S. App. LEXIS 14858 (1st Cir. July 19, 2012), *aff'g* 134 T.C. 182, 186 (2010) (*Kaufman I*). *See also* National Perpetuity Standards, Part 2, at 20 ("Absent enforceability under state law, the provisions included in a conservation easement deed to satisfy the various federal tax law requirements would constitute mere window dressing, and the conservation purposes of the contributions would not be "protected in perpetuity" as mandated by Congress.").

(Third) of Property: Servitudes, and the Uniform Conservation Easement Act (UCEA) are fully consistent with federal law. The UCEA is most readily recognizable as consistent with federal law when its language is properly understood. The UCEA provides, for example, that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[41] This language was clearly never intended to impose substantive law in conflict with federal law but rather to address the procedural mechanics.[42] Conservation easements must be in writing, notarized, recorded and otherwise processed in the same manner as other easements in the particular State when they are created, conveyed, assigned, modified, and so on. There is no hint in the UCEA that the Uniform Act was intended to do more.[43] Any intent to do more with respect to federally deducted easements would be barred by federal law.

In fact, to prevent any confusion on this very point, the UCEA commentary expressly states that the UCEA "leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts," and restricted charitable gifts such as conservation easements are enforced in the same manner as charitable trusts.[44] When those seeking greater freedom to amend

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[41] Uniform Conservation Easement Act § 2(a) (2007), *available at* www.nccusl.org (last visited April 17, 2012).

[42] The UCEA was designed to address "historical legal impediments to the acquisition of lesser interests, such as easements, restrictions and covenants, and equitable servitudes. These restrictions appear artificial and archaic in light of current policies, and the Uniform Conservation Easement Act provides the means to eliminate them in a simple, straightforward fashion." Uniform Conservation Easement Act Summary (2007), *available at* http://www.nccusl.org/ActSummary.aspx?title=Conservation Easement Act (last visited May 2, 2012).

[43] *See* Josh Eagle, Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements, 35 Harv. Envtl. L. Rev. 47, 60 (2011) ("Although the Uniform Conservation Easement Act suggests that conservation easements of lesser duration would constitute recognized property interests as a matter of state property law, the donation of such easements will not give rise to a federal tax deduction.").

[44] Uniform Conservation Easement Act § 3 cmt. (2007), *available at* www.nccusl.org (last visited April 17, 2012). The comment to section 2 explains, with added emphasis:

> The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example,

and terminate conservation easements began to cite the UCEA as evidence that charitable principles do not apply,[45] the drafters revised the comments to clarify their intent and defeat that argument.[46]

The Challenge questions the wording of the UCEA comments, misunderstanding the intent of the Act and the purpose of its comments.[47] For example, *The Challenge* criticizes the UCEA's placement of information on *cy pres* and charitable trust

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> easements may be created only for certain purposes intended to serve the public interest and may be held only by certain "holders." These limitations find their place comfortably within the limitations applicable to charitable trusts, which may be created to last in perpetuity, subject to the power of a court to modify or terminate the trust pursuant to the doctrine of cy pres. See comment to Section 3. *Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be "in perpetuity" if certain tax benefits are to be derived*.

[45] *See, e.g.*, Robert H. Levin, A Guided Tour of the Conservation Easement Enabling Statutes, 18-20 (2010), *available at* http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf (last visited July 2, 2012); C. Timothy Lindstrom, Hicks v. Dowd: The End of Perpetuity?, 8 Wyo. L. Rev. 25, 39-41 (2008). *See also* Nancy A. McLaughlin, National Perpetuity Standards, Part 2, page 41 (in *Salzburg v. Dowd*, in which the Wyoming Attorney General filed suit objecting to a County's termination of a perpetual conservation easement, the land owners argued in their briefs at trial that there is "nothing special" about a conservation easement when it comes to modification or termination and cited the Wyoming UCEA for the proposition that conservation easements can be modified or terminated "in the same manner as other easements").

[46] Uniform Conservation Easement Act prefatory note, § 3 cmt. (2007) ("because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose - i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes - the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements."), *available at* www.nccusl.org (last visited April 17, 2012). The UCEA is intended to be applied and construed so as to make the law uniform among all States that have adopted it. Accordingly, courts are especially likely to rely upon the comments to the Act to guide its interpretation. As explained by the Connecticut Supreme Court: "Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved . . . . Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws." *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993). *See generally* Nancy A. McLaughlin & W. William Weeks, Salzburg v. Dowd, Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight, 10 Wyo. L. Rev. 73 (2010) [hereinafter Setting the Record Straight].

[47] *The Challenge* at 26-31.

principles in the comments instead of in the UCEA text.[48] In fact, the UCEA had a very limited and focused purpose, and its drafters intentionally did "not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments."[49] The comments to section 3 of the UCEA explain:

> The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes.[50]

This explanation directly answers *The Challenge*'s objection to placement of the charitable trust discussion in the comments.

The UCEA is fundamentally designed to fulfill a procedural goal. "The UCEA does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with."[51] As a result, the UCEA itself was never intended to impose or restrict applicability of substantive charitable trust principles. The comment to section 4 declaring that the UCEA "leaves intact the existing case and statute law of adopting states as it relates to the modification and

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[48] *Id*.

[49] UCEA Commissioners' Prefatory Note, *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/ucea81.htm (last visited June 13, 2012) (the UCEA validates conservation easements created in a variety of contexts (e.g., donation, purchase, exaction) and containing a variety of terms (term of years, terminable upon satisfaction of certain conditions, and perpetual) and, thus, the laws governing the administration of charities and charitable gifts will apply with different force to different types of conservation easements).

[50] UCEA § 3 comments. *See also* Setting the Record Straight at 83-84.

[51] UCEA § 3 comments.

termination of easements and the enforcement of charitable trusts" specifically negates the argument that the UCEA's silence may be interpreted to defeat application of charitable trust principles.[52]

The Challenge's representation that restricted gift principles do not apply to conservation easements is a serious error, particularly in light of the UCEA drafters' clear intent that those principles do apply and the Tax Court's holding in *Carpenter v. Comm'r* that the tax deductible easements constituted restricted gifts. Donated easements are accepted by land trusts subject to the donor's restrictions and prohibitions applicable to the specific acres subject to the easement. There can be no lawful transfer of the conservation easement away from the specific donated acres without violation of the donor's intent and of federal law. If a land trust is forthright and states its intent to retain the right to transfer a conservation easement in whole or in part, that very statement defeats the federal tax deduction even if the donor might have been willing to grant discretion to the land trust.[53]

The Restatement (Third) of Property: Servitudes reflects that modification and termination of perpetual conservation easements held by government entities and charitable organizations are governed by a special set of rules based on charitable trust principles, and those rules apply regardless of how the easements were acquired. The drafters explain: "Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes."[54] Despite recognizing the Restatement as one of the relevant legal regimes, *The Challenge* criticizes the Restatement's content as inconsistent with *The Challenge*'s own erroneous interpretation of the Regulations as permitting termination of an easement if its purpose is protected elsewhere (i.e., a swap)[55]—an interpretation expressly rejected by the IRS[56] implicitly rejected by the D,C.

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[52] UCEA § 4 comments. *See also* UCEA §3 comments.

[53] *Carpenter v. Comm'r*, T.C. Memo. 2012-1 (conservation easements extinguishable by parties' mutual agreement, even if subject to a standard such as impossibility, fail as a matter of law to comply with perpetuity requirements of section 170(h)); see *Comm'r v. Simmons,* 646 F.3d 6, 11 (D.C. Cir. 2011) easements found deductible "will prevent in perpetuity any changes to the properties inconsistent with conservation values").

[54] Restatement (Third) of Property: Servitudes § 7.11 cmt. a (2000).

[55] *The Challenge* at 12, 64-66; *see* section VIII *infra*.

[56] E.g., IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 15, 2012); IRS Form 990 Schedule D Instructions, *available at* http://www.irs.gov/pub/irs-pdf/i990sd.pdf; IRS General Information Letter (March 5, 2012), 2012 TNT 66-25 (swaps are not permissible unless they comply with the extinguishment regulation).

Circuit in *Simmons*,[57] and inconsistent with section 170(h) and the Treasury Regulations as explained below). The Restatement does not support *The Challenge*'s interpretation because that interpretation is inconsistent with the concept of a perpetual conservation easement, which is fundamentally different from the tradable or fungible easements *The Challenge* proposes are appropriate. *The Challenge* also fails to address relevant provisions in the Restatement (Third) of Trusts[58] and Uniform Trust Code,[59] both of which affirmatively endorse application of charitable trust principles to conservation easements.

The Challenge's efforts to treat the Land Trust Alliance Standards and Practices as a legal regime also fail.[60] Not only were the Standards and Practices not drafted by or for attorneys, but they are also designed, as stated in their Introduction, to be "ethical and technical guidelines" or "guiding principles" to be voluntarily adopted in whole or in part by nonprofit organizations.[61] Accordingly, the Standards and Practices are not a legal regime and cannot constitute or supersede laws. The Standards and Practices expressly mandate compliance with law,[62] and specifically with federal tax law as it relates to deductible

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[57] *Comm'r v. Simmons,* 646 F.3d 6, 9 (D.C. Cir. 2011).

[58] Restatement (Third) of Trusts § 28 cmt. a (2003).

[59] Uniform Trust Code § 414(d) (2000) (amended 2005), *available at* http://www.law.upenn.edu/bll/ulc/uta/2005final.htm (provisions allowing for modification or termination of certain "uneconomic" trusts do not apply to conservation easements); *accord*, *Id.* § 414 cmt. ("creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the 'trustee' could constitute a breach of trust."); *see* Nancy McLaughlin & Mark Machlis, Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements, 2008 Utah L. Rev. 1561.

[60] *The Challenge* at 5 (treating the Practices as one of "four different legal regimes"); *id.* at 31-33 (citing Standard 11 as authorizing amendment or termination of easements without third-party approval or judicial proceedings).

[61] As stated in the Introduction, "there are many ways for a land trust to implement the practices, depending on the size and scope of the organization." "The Land Trust Alliance encourages all land trusts to implement Land Trust Standards and Practices at a pace appropriate for the size of the organization and scope of its conservation activities." http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (last visited June 13, 2012).

[62] Land Trust Alliance, Standards and Practices, Practice 2(A), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (last visited April 15, 2012) ("The land trust complies with all applicable federal, state and local laws.").

easements[63] and applicable charitable trust laws.[64]

The Alliance's Amendment Report recognizes that some amendments are occurring and adopts conservative principles to guide decisions relating to amendment.[65] This secondary analysis also cannot be considered law and cannot contravene federal law. The Amendment Report is instructive, however, as it recognizes significant limitations on easement amendment or termination from multiple sources that are ignored in *The Challenge*, including:

- Land trust governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents;
- Internal Revenue Code and Treasury Regulation requirements for perpetuity and prohibitions on private inurement and private benefit;
- State and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts;
- State laws on fraudulent solicitation,[66] misrepresentation to donors,[67] consumer protection and the like;
- State laws regulating the conduct of fiduciaries depending on the circumstances of easement creation, relationships with donors and obligations undertaken by the land trust;[68]

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[63] Land Trust Alliance, Standards and Practices, Practice 8(C), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (last visited April 15, 2012) ("For land and easement projects that may involve federal or state tax incentives, the land trust determines that the project meets the applicable federal or state requirements, especially the conservation purposes test of I.R.C. §170(h).").

[64] Land Trust Alliance, Standards and Practices, Practice 8(D), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (last visited April 15, 2012) ("All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit.").

[65] Land Trust Alliance Amending Conservation Easements: Evolving Practices and Legal Principles (Aug. 2007).

[66] *E.g.*, Leslie Ratley-Beach, Managing Conservation Easements in Perpetuity 205 (2009); Conservation Law Clinic, Legal Considerations Regarding Amendment to Conservation Easements 7 (2007).

[67] *E.g.*, *Maryland Environmental Trust v. Gaynor*, 370 Md. 89, 803 A.2d 512 (2002), *rev'g* 140 Md.App. 433, 780 A.2d 1193 (2001).

[68] *E.g.*, Cal. Bus. & Prof. Code § 17510.8 ("Notwithstanding any other provision of this article, there exists a fiduciary relationship between a charity or any person soliciting on behalf of a charity, and the person from whom a charitable contribution is being solicited. The acceptance of charitable contributions by a charity or any person soliciting on behalf of a charity establishes a charitable

- State and local laws governing land use, conveyances and the like; and
- Contractual and other obligations to easement donors, grantors, funders and others.

Finally, *The Challenge* devotes considerable space to discussing provisions based on state law, a proposed Vermont law and a Montana procedure voluntarily adopted by land trusts that is not even proposed to be law.[69] This entire analysis starts from the faulty premise that state law or voluntary procedures offer a co-equal legal regime to federal law, that a donor and land trust need only satisfy state requirements, as opposed to federal tax law requirements, when seeking and holding a federal tax deduction.[70] Federal law mandates that there shall be no deductions for nonperpetual easements and that land trusts shall ensure the perpetual existence of donated conservation easements. There is frankly nothing that a State can enact that could lawfully diminish the perpetuity required for donated easements receiving a federal tax deduction. Likewise, no State can lawfully authorize a 501(c)(3) land trust to terminate or amend federally deducted easements more freely than permitted by the Internal Revenue Code and Treasury Regulations. There are a few, limited and specific instances in which the Treasury Regulations defer to state law, such as payment of compensation on condemnation, but these instances are the exceptions that prove the rule that compliance with federal law is prerequisite to federal tax deductions and to continuing recognition as a 501(c)(3) charity.

The Challenge also simply ignores the constitutional and other barriers to the retroactive application of new state legislation, policies, or regulations to alter the terms of existing perpetual conservation easements.[71] Although it is perhaps understandable

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trust and a duty on the part of the charity and the person soliciting on behalf of the charity to use those charitable contributions for the declared charitable purposes for which they are sought. This section is declarative of existing trust law principles.").

[69] *The Challenge* at 43-61.

[70] This faulty premise is embodied in the fabric of *The Challenge*, including its treatment of the "four different legal regimes" each with "different treatment of amending and terminating perpetual conservation easements." *The Challenge* at 5. Once a donor elects to take a federal tax deduction, the donor must comply with federal tax law requirements as well as any additional requirements that may be imposed by state law. The donor is not free to ignore federal law and look only to another "legal regime" unless expressly adopted into federal law by the Code or Treasury Regulations.

[71] *See, e.g.*, *Kapiolani Park v. Honolulu*, 69 Haw. 569, 751 P.2d 1022, 1027 (1988) ("Gifts to trustees or to eleemosynary corporations, accepted by them to

that this critical issue might not be fully discussed, it should not have been ignored in an article that urges States to "consider crafting new or modifying existing legislation, policies, or regulations to address easement termination and amendment."[72]

The Challenge next discusses a few court decisions as reflecting a common law governing conservation easements.[73] The first, *Bjork v. Draper*, is identified as an amendment case although it also significantly involved an extinguishment—removal of a portion of land encumbered by an easement in exchange for substitution of an equally-sized parcel of new land—for which "judicial proceedings in a court of competent jurisdiction" were expressly required by the easement itself.[74] The amendments and extinguishment were held "invalid because they conflicted with the express provisions of the easement."[75] *Bjork* does not support a new common law under which conservation easements may be amended or terminated. Just the opposite is true.

The second cases discussed by *The Challenge*, *Hicks v. Dowd*, and its successor, *Salzburg v. Dowd*, uphold federal tax law, charitable trust principles, and perpetuity. In *Hicks*, the Wyoming Supreme Court dismissed the case on the ground that Hicks, a resident of a county in which a conservation easement was located who objected to its termination by the county without a court proceeding, lacked standing to enforce a charitable trust. The court invited the Wyoming Attorney General, as supervisor of charitable trusts, "to reassess his position." The Wyoming Attorney General

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be held upon trusts expressed in writing or necessarily implied from the nature of the transaction, constitute obligations which ought to be enforced and held sacred under the Constitution. It is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres."), quoting *In re Opinion of the Justices*, 237 Mass. 613, 131 N.E. 31, 32 (1921); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1324 (8th Cir. 1991) ("Okla. Stat. tit. 15, § 178 is an unconstitutional impairment of contracts insofar as it is applied to insurance contracts entered before the statute became effective"). Although *Kapiolani* refers to charitable trusts, the law governing the enforcement of charitable gifts or restricted gifts is derived from the law of charitable trusts. *E.g.*, *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012); *Carl J. Herzog Found. v. University of Bridgeport*, 699 A.2d 995, 998 n. 2 (Conn. 1997).

[72] *The Challenge* at 43.

[73] For a different interpretation of these cases and a discussion of other cases and controversies involving the modification and termination of easements, see *National Perpetual Standards*, Part 2, at Part III.

[74] *Bjork v. Draper*, 381 Ill.App.3d 528, 534, 886 N.E.2d 563, 568 (2008) (*Bjork I*), *appeal denied*, 229 Ill.2d 618, 897 N.E.2d 249 (2008), *appeal after remand*, 404 Ill.App.3d 493, 936 N.E.2d 763 (2010) (*Bjork II*), *appeal denied*, 239 Ill.2d 550, 943 N.E.2d 1099 (2011).

[75] *Bjork II*, 404 Ill.App.3d 493, 499, 936 N.E.2d 763, 768, citing *Bjork I*, 381 Ill. App. 3d at 541-42.

then asserted in *Salzburg* that the easement, for which the donors had received a sizable federal tax deduction, constituted a restricted charitable gift or charitable trust that could not be terminated without court approval in a cy pres proceeding as provided in the easement deed.[76] The case settled, reinstating the easement in full force, subject to court sanctioned amendments acknowledging that the Dowds lacked control over or liability for mineral extraction and permitting transfer of the easement to another qualified holder if the Scenic Preserve Trust became unable to continue.[77] These amendments acknowledged points that were undeniably true without any amendment and were sanctioned by the court in any event.[78] Nothing in the resolution of this dispute supports any diminution of federal perpetuity requirements.

Most troubling, *The Challenge* inaccurately states that two recent cases have rejected application of principles governing restricted charitable gifts or charitable trusts to perpetual conservation easements.[79] Neither case reached that result. In the first, *Carpenter v. Commissioner*, the Tax Court held that, while the easements at issue were not formal charitable trusts under Colorado law, they did constitute "restricted gifts," defined as a "contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations."[80] Charitable gifts made for specific purposes are referred to in some states as charitable trusts, and in others as restricted gifts, but the substantive rules governing these gifts (including the requirement that the recipient administer the gift in accordance with the donor's precise directions and limitations) apply equally to all such gifts.[81]

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[76] *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007), subsequent decision, *Salzburg v. Dowd*, Civ. No. CV-2008-0079 Stipulated Judgment (Feb. 17, 2010), *available at* http://www.docstoc.com/docs/47716227/Download-Stipulated-Judgment-Salzurg-v-Dowd---IN-THE-DISTRICT (last visited June 19, 2012).

[77] *The Challenge* at 39 & n.221 (describing the settlement).

[78] *Salzburg v. Dowd*, Civ. No. CV-2008-0079 Stipulated Judgment (Feb. 17, 2010), *available at* http://www.docstoc.com/docs/47716227/Download-Stipulated-Judgment-Salzurg-v-Dowd---IN-THE-DISTRICT (last visited June 19, 2012).

[79] *The Challenge* at 10-11 n.50, 23 n.120, citing *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012); *Long Green Valley Ass'n v. Bellevale Farms*, No. 0228, 2011 Md.App. LEXIS 154 (Md. Ct. Spec. App. Nov. 30, 2011), *reconsidered & remanded*, 2012 Md.App. LEXIS 19 (Md. Ct. Spec. App. Feb. 14, 2012), *reconsidered & remanded*, 205 Md. App. 636, 46 A.3d 473 (Md. Ct. Spec. App. 2012).

[80] *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012). A 2012 Tax Court opinion by Judge Haines who wrote *Carpenter* refers to extinguishment by judicial proceeding as a "specific requirement" of the Treasury Regulations. *Mitchell v. Comm'r*, 138 T.C. No. 16 (2012).

[81] *Compare Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523, 525–27 (2006) (devise of testator's residence and surrounding acreage to a

Accordingly, the use of different terminology in different jurisdictions to describe these gifts is a distinction without a difference.[82] Moreover, in a different case, *Kaufman v. Comm'r*, a regular opinion binding on all Tax Court judges, the Tax Court recognized that the extinguishment regulation "appears to be a regulatory version of the doctrine of cy pres."[83] *The Challenge*'s failure to acknowledge that the Carpenter Tax Court held that the tax-deductible easements constituted restricted charitable gifts is a misleading omission.

The second case that *The Challenge* misinterprets is *Long Green Valley Ass'n v. Bellevale Farms*. Representing that *Long Green Valley Ass'n* stands for the proposition that charitable principles do not apply to perpetual conservation easements is inappropriate as that case involved a purchased, expressly nonperpetual, easement. *The Challenge* cites the first, withdrawn opinion of the Maryland court.[84] That court expressly reconsidered its opinion, first at the request of the Maryland Attorney General and then at the request of plaintiffs. Its revised opinions affirmatively preclude applying its holding to perpetual easements.[85] The court held:

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land trust for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of I.R.C. § 170(h) "unambiguously created a charitable trust," and testator's failure to use the term "trust" or "trustee" did not alter the outcome as strict use of those terms is not required to establish a trust) *with Carl J. Herzog Foundation v. University of Bridgeport*, 243 Conn. 1, 699 A.2d 995, 997-98 (1997) (although the gift may not create a formal trust, "'equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation'"), quoting *Lefkowitz v. Lebensfeld*, 68 App.Div.2d 488, 494-95, 417 N.Y.S.2d 715 (1979).

[82] Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter,* 13 Fla. Tax Rev. _ (2012).

[83] *Kaufman v. Comm'r*, 136 T.C. 294, 306-07 (2011) (*Kaufman II*), *vacated in part & remanded*, 2012 U.S. App. LEXIS 14858 (1st Cir. July 19, 2012), *aff'g* 134 T.C. 182, 186 (2010) (*Kaufman I*). As a Tax Court opinion (as opposed to a memorandum opinion), *Kaufman II* is binding upon all Tax Court judges. Tax Court Rule 152; *see* Mary Ann Cohen, How to Read Tax Court Opinions, 1 Hous. Bus. & Tax. L.J. 1, 5 (2001). *See also* Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter,* 13 Fla. Tax Rev. _ (2012).

[84] *The Challenge* at 23 n.120, 62 & n.376, 63 n.381

[85] *Long Green Valley Ass'n v. Bellevale Farms*, No. 0228, 2011 Md.App. LEXIS 154 (Md. Ct. Spec. App. Nov. 30, 2011), *reconsidered & remanded*, 2012 Md.App. LEXIS 19, *50 (Md. Ct. Spec. App. Feb. 14, 2012), *reconsidered & remanded*, 205 Md. App. 636, 46 A.3d 473 (Md. Ct. Spec. App. 2012) ("assuming, without deciding, that an agricultural preservation easement purchased by MALPF or the State for the benefit of MALPF qualifies as a

> In sum, this case involves a conservation easement purchased for what we understand to be the grantor's asking price, and which expressly provides that it may be terminated after twenty-five years upon satisfaction of certain conditions. We think it unnecessary to our result, and express no opinion as to how the principles generally applicable to charitable trusts would apply to expressly perpetual conservation easements conveyed in whole or in part as charitable gifts, or purchased under other statutes or provisions.[86]

All these sources may provide guidance to the extent they are consistent with federal tax law and the required perpetuity of conservation easements. None supports the notion that States or holders may adopt their own processes and procedures to govern transfer and extinguishment of federal tax-deductible perpetual conservation easements in a manner inconsistent with federal law.

IV. Federal Law Mandates Perpetuity for Donated Easements

A conservation easement transaction is voluntary. The owner and land trust each decide whether the benefit of the transaction is worth the burden, and they negotiate terms that are not prescribed by law. The owner gives up some rights of ownership in the land, such as the right to subdivide, and the land trust accepts a perpetual obligation to monitor and enforce the restrictions. By doing so, the land trust furthers its charitable mission to protect land from development and harm. In addition to any state property tax benefit, and state income tax deductions or credits, the owner typically receives potential estate and gift tax benefits,[87] and either publicly subsidized funds[88] or income tax

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'conservation easement,' we are not persuaded that the charitable trust doctrine must be applied to purchased, nonperpetual agricultural preservation easements, nor even that it should be.").

[86] *Long Green Valley Ass'n v. Bellevale Farms*, No. 0228, 2012 Md.App. LEXIS , *reconsidered & remanded*, 205 Md. App. 636, 683, 46 A.3d 473, 502 (Md. Ct. Spec. App. 2012).

[87] Potential estate tax benefits are triggered because the value of the land is diminished by the conservation easement restrictions. *See* I.R.C. §§ 2031(c), 2055; Treas. Reg. § 1.2055.

[88] Mitigation conservation easements are often purchased, as are some agricultural easements, and federal or state funds are frequently used for part or all of the purchase. .E.g., Cal. Fish & Game Code §§ 2098-2100; Conservation and Mitigation Banking, *available at* http://www.dfg.ca.gov/habcon/conplan/mitbank/ (last visited Sept. 9, 2012); Purchase Conservation Easements, *available at*

benefits.[89] Finally, the owner gains the security of knowing that the land is protected. For owners who love their land, the last benefit is frequently the most significant.[90]

Conservation easement restrictions imposed by land trusts are routinely intended and normally required to be perpetual. *The Challenge* specifically states its intent to address perpetual easements in particular.[91] *The Challenge* acknowledges: "The defining characteristic of all qualifying easement gifts is that they are perpetual, ostensibly to provide public benefit forever."[92] Although restrictions for a term of years are legally possible in many States, the effort to negotiate term easements is substantially the same as that for perpetual easements, and funding sources are limited. Very few land trusts expend effort on restrictions that are not perpetual in nature.[93]

Donated easements for which federal tax deductions are received are required by federal law to be perpetual,[94] and the IRS has been increasingly vigilant in enforcing these requirements.[95]

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http://wyominglandtrust.org/services-purchase-CE.shtml (last visited Sept. 9, 2012).

[89] I.R.C. § 170(h); Treas. Reg. § 1.170A-14. These deductions may be substantial, exceeding $10 million in some instances.

[90] Stephen J. Small, the attorney who helped draft the Internal Revenue Service regulation allowing for tax benefits for qualified easement donations, is repeatedly quoted for the statement: "Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land." *E.g.*, Attleboro Land Trust, *available at* http://www.attleborolandtrust.org/work_fundraising/fundraising.htm; New York Times (October 12, 2003), *available at* http://www.nytimes.com/2003/10/12/nyregion/pushing-the-sprawl-back-landowners-turn-to-trusts.html?pagewanted=all&src=pm (both visited April 17, 2012).

[91] *The Challenge* at 4.

[92] *The Challenge* at 6 (footnote omitted).

[93] Vermont Land Trust, Land Conservation: The Case for Perpetual Easements (2007), *available at* http://www.vlt.org/news-publications/other-publications/201 (last visited April 17, 2012); Note, Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements (2006), *available at* http://digitalcommons.law.uga.edu/landuse/10 (last visited April 16, 2012).

[94] I.R.C. § 170(h)(2)(C), (5)(A); Treas. Reg. § 1.170A-14(b)(2); IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 15, 2012) ("Conservation easements are not in perpetuity if they can be abandoned or terminated.").

[95] *See, e.g.*, *Carpenter v. Comm'r*, T.C. Memo. 2012-1 (conservation easements extinguishable by mutual agreement of the parties, even if subject to a standard such as impossibility, fail as a matter of law to comply with the perpetuity requirements of section 170(h)); IRS Conservation Easement Audit Techniques

As a general rule, purchased easements follow the same templates as donated easements, also affirmatively requiring perpetuity in accordance with funders' requirements. There may be legal requirements for perpetuity in purchased easements, such as mitigation easements and easements funded by a body that insists on perpetuity for a public purpose.[96]

In all these instances, the fact that a state law or some secondary source may indicate that a conservation easement might be less than perpetual is irrelevant when a federal tax deduction is taken. Federal law mandates perpetuity for donated easements, and the easements themselves, funding requirements and other documents usually require perpetuity in other circumstances.[97]

Federal tax law mandates that recipients of federal tax deductible conservation easements must have the commitment to protect the conservation purpose of the donation and the resources to enforce the conservation restrictions.[98] The IRS Audit Guide

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Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 15, 2012); IRS Form 990 Schedule D Instructions, *available at* http://www.irs.gov/pub/irs-pdf/i990sd.pdf; IRS General Information Letter (March 5, 2012), 2012 TNT 66-25 (swaps are not permissible unless they comply with the extinguishment regulation).

[96] E.g., Paul Doscher, Terry M. Knowles & Nancy A. McLaughlin, Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements: Guidelines for New Hampshire Easement Holders, available at http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf (last visited Sept. 9, 2012); Purchased Agricultural Easements, York County Pa., *available at* http://yorkcountypa.gov/property-taxes/agricultural-preservation-board/application-information/faq.html (last visited Sept. 9, 2012).

[97] The multiple federal requirements in section 170(h) and the Treasury Regulations establishing that federal law preempts and applies uniformly to tax deductible conservation easements to mandate perpetuity regardless of state law are detailed exhaustively in Nancy A. McLaughlin, Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards, 45 Real Prop. Tr. & Est. L.J. 473 (2010). *See also* National Perpetuity Standards, Part 2 (comparing state law provisions addressing transfer, release, and termination of conservation easements to the requirements of federal law, and explaining that to be eligible for a federal charitable income tax deduction for the donation of a conservation easement the donor must satisfy both federal tax law requirements and any additional requirements that may be imposed by state law).

[98] I.R.C. § 170(h)(3); Treas. Reg. § 1.170A-14(c)(1); *see* C. Timothy Lindstrom, A Guide to the Tax Aspects of Conservation Easement Contributions at 19 (March 2007) ("An organization that allows easement terminations or amendments in a manner that is inconsistent with the conservation purposes of the easement fails to qualify as an 'eligible donee' because it demonstrably lacks "the commitment to protect the conservation purposes of the donation" as required by the Regs."), *available at*

suggests looking at a range of information to assess land trust commitment, including the land trust's website, tax returns and property monitoring reports as well as interviews with donors and staff and observation of the land.[99] Specifically on monitoring reports, the Guide states: "Monitoring reports are a good source to verify whether the taxpayer is in compliance with, and the donee organization is enforcing, the terms of the easement. In some cases, donee organizations have allowed changes after the donations that were in violation of the terms of the easement."[100]

The importance of a land trust's continuing commitment to perpetuity is emphasized in the 2011 Instructions for Schedule D (Form 990): "For purposes of maintaining its tax exemption, the recipient tax exempt organization must protect the perpetuity requirement of the conservation easements it holds."[101] Apparently because some land trusts used semantic games to avoid earlier reporting obligations, the Instructions now declare that

> an easement is modified when its terms are amended or altered in any manner. . . . An easement is transferred if, for example, the organization assigns, sells, releases, quitclaims, or otherwise disposes of the easement whether with or without consideration. An easement is released, extinguished, or terminated when it is condemned, extinguished by court order, transferred to the land owner, or in any way rendered void and unenforceable, in each case whether in whole or in part. . . .
>
> The[se] categories . . . are not to be considered legally binding or mutually exclusive. For example, a modification may also involve a transfer and an extinguishment, depending on the circumstances. Use of a synonym for any of these terms does not avoid the application of the reporting requirement. For example, calling an action a "swap" or a "boundary line adjustment" does not mean the

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http://www.conservationtaxcenter.org/plnpro/taxguide2007.pdf (last visited April 17, 2012).

[99] IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 13, 2012).

[100] *Id.*

[101] IRS 2011 Instructions for Schedule D (Form 990), *available at* http://www.irs.gov/pub/irs-pdf/i990sd.pdf at 2 (last visited April 17, 2012).

> action is not also a modification, transfer, or extinguishment.[102]

The IRS has thus made it clear that it is incorrect to argue, as *The Challenge* does, that the original easement has not been extinguished when easement restrictions are transferred from one parcel to another. The Schedule D Instructions expressly provide: "An easement is also released, extinguished, or terminated when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property."[103]

If anyone could think the Instructions are unclear, an IRS general information letter ends the issue. Asked "whether a contribution of an easement is deductible under section 170(h) of the Code if it is made subject to the condition that the easement can be swapped," the IRS answered: "except in the very limited situations of a swap that meets the extinguishment requirements of section 1.170A-14(g)(6) of the Regulations, the contribution of an easement made subject to a swap is not deductible under section 170(h) of the Code."[104] The term "swap" was defined

> as an agreement to remove some or all of the originally protected property from the terms of the original deed of conservation easement in exchange for either the protection of some other property or the payment of cash. . . . "[t]he goal of a swap is generally to free all or a portion of the originally protected property from the easement's restrictions so that such property can be put to previously prohibited uses." . . . [T]he transaction may be characterized by the parties as an amendment, modification, adjustment, or migration.[105]

Swaps condemned by the IRS are effectively identical to transfers proposed in *The Challenge.*[106] Finally, one commentator has explained the fundamental flaw in the argument that swaps are or should be permissible under section 170(h):

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[102] *Id.*
[103] *Id.*
[104] IRS General Information Letter, No. 2012-0017 (Mar. 5, 2012), *available at* http://www.irs.gov/pub/irs-wd/12-0017.pdf (last visited April 18, 2012).
[105] *Id.*; see *The Challenge* at 45, 64-68, 72-76.
[106] The only apparent difference is that the possibility that the swap discussed by the IRS would be disclosed in the original easement, whereas there is no apparent transparency about the transfers proposed in *The Challenge*.

> to be eligible for the federal subsidy under section 170(h), a conservation easement must satisfy one or more of the fairly elaborate conservation purposes tests as well as the myriad other requirements in section 170(h) and the Treasury Regulations at the time of its donation. If swaps were permissible, the owner of the land and the holder of the easement could, on the day following the donation or any time thereafter, agree to remove ten, fifty, or even one hundred percent of the original land from the protection of the easement in exchange for the protection of some other land, and the new land and the provisions governing its protection would not have to meet the threshold conservation purposes tests or any of the other requirements in section 170(h) and the Treasury Regulations.[107]

Thus, swaps by any name defeat the threshold conservation purposes tests and other federal requirements in section 170(h) and the Treasury Regulations so that the conservation purposes of tax-deductible conservation easements would not be perpetual as Congress intended.

V. Perpetuity Is a Sacred Promise to Donors, Taxpayers and the Public

Conservation easement donors are principally motivated by desire to protect the specific land they love.[108] Land trusts promise protection forever,[109] the Treasury Regulations contemplate protection until "continued use of the property for conservation purposes" has become "impossible or impractical" due to changed conditions. Easement donors believe they have achieved the most permanent protection of their land possible.[110] There is

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[107] Nancy A. McLaughlin, Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 1: The Standards, 45 Real Prop. Tr. & Est. L.J. 473, 520-21 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1743204.

[108] *E.g.*, William P. O'Connor, Amending Conservation Easements Exchange at 8 (Land Trust Alliance 1999) (for many easement donors, "permanent protection of land was the transcendent goal"); Western Reserve Land Conservancy, *available at* http://www.wrlandconservancy.org/news-2010-03-08.htm (quoting donor: "I love the land, the beauty of the woods and the wildlife. I am determined to preserve it in its natural state for posterity. This easement with Western Reserve Land Conservancy has made that possible.").

[109] *E.g.*, Ruth Ansell, A Conservation Easement Is Forever, *available at* http://www.bedfordlandtrust.org/Articles/article.conservation.easement%20(1).pdf (last visited April 13, 2012).

[110] This consistent belief is manifest in donor statements on hundreds of land trust websites. For example, the Land Trust Alliance offers a letter for landowners to send to their Congressmen to support tax incentives stating, in

overwhelming evidence that easement donors donate for the express purpose of protecting their specific land forever or as close to forever as possible.[111]

There is no evidence that easement donors donate to protect an abstract "conservation purpose" or that they contemplate that their easement will be a taxicab that can replace passengers (conservation land),[112] or that swaps or exchanges were contemplated by Congress, the Treasury, or the public as posited by *The Challenge*.[113] To the contrary, donors are motivated to protect their own specific land.[114] Section 170(h) and the Treasury Regulations also contemplate perpetual protection of the specific parcel of land encumbered by the tax-deductible conservation, unless continued use of that specific property for conservation purposes becomes impossible or impractical as a result of changed conditions.[115] Having acquired an easement based on promises of

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part: "I protected my land from development for my children and generations to come by donating a conservation easement to *[name of land trust]*." Template Landowner Thank You Letter to Co-sponsors, *available at* http://www.landtrustalliance.org/policy/tax-matters/documents/12-ty-donors-to-reps.doc (last visited May 2, 2012)..

[111] *E.g.*, Inland Northwest Land Trust, 20 Years, 20 Voices; Two Decades of Conversation About Conservation, *available at* http://www.inlandnwlandtrust.org/finds.php?find_id=553 (last visited April 13, 2012) ("While development of the land would have been financially rewarding, it was not the right thing to do." – John Magnuson, conservation easement landowner 12/2005; "Not one house on the lake. Developers and realtors have called us for years, wanting to put houses around the Owens Lakes, but we just didn't want to see anything happen to the lakes." – Vickie Hershey, 12/2000); *see* Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach, 31 Ecology L.Q. 1, 41-50 (2004) (summarizing multiple surveys).

[112] *E.g.*, Earle Family Farm Conservation Easement, Upper Saco Valley Land Trust, *available at* http://www.usvlt.org/categories/conserved/easements/earle_farm_easement.html (last visited April 13, 2012) (quoting Nancy Earle: "We have owned the land for over half a century and are really attached to it. We love the land and don't ever want to see it cut up and developed.").

[113] *The Challenge* at 45, 64-68, 72-76.

[114] *E.g.*, Gathering Waters Conservancy, In Their Own Words, Landowners' Stories of Protecting Their Land, *available at* http://www.gatheringwaters.org/assets/documents/special-publications/ITOW.pdf at 11 ("though I am as ever powerless to know what lies ahead except for one thing – this farm will remain as we love it"), at 13 ("Prior to the easement, I had nightmares of houses in my "front yard" after I died! At least we've been able to insure that this will not happen as long as civilization exists."), at 33 ("Our land can never be further developed – ever; it gives us comfort.").

[115] *See, e.g.*, Treas. Reg. § 1.170A-14(g)(5)(i) (the baseline documentation that must be provided to the donee "is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the

perpetuity, land trusts are obligated to fulfill those promises by federal tax law, by charitable trust principles, by fiduciary duty to donors, by the terms of the conservation easement, and by practical reality that future donations will dry up if promises are breached.[116]

Taxpayers also have a strong interest in the perpetuity of conservation easements that taxpayers have subsidized through income tax deductions enjoyed by donors. Given that easements represent a very significant segment of charitable gifts in total dollars even though easements are donated by a comparatively small number of taxpayers, all taxpayers bear a financial burden in creation of conservation easements. Congress and taxpayers would never have supported the multi-billion dollar investment in tax deductions[117] for conservation easements if easements lasted only three or ten or even fifty years.[118] The investment of tax deductions and corresponding loss to the federal Treasury can be justified only if deductions "buy" permanent land protection in the

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easement, could be adversely affected by the exercise of the reserved rights"). This regulation contemplates the perpetual protection *of the conservation interests associated with the particular property encumbered by the easement*, not conservation interests in general. The extinguishment regulation provides a very limited exception to the general rule that the conservation interests associated with the particular property identified in the easement must be "protected in perpetuity," and that exception applies in very limited circumstances (i.e., when it can be established to the satisfaction of a judge that continuing to protect the conservation values of the original property has become "impossible or impractical" due to changed conditions.) *See also* Treas. Reg. § 1.170A-14(c)(2) (prohibiting the donee from selling, trading, or otherwise transferring the easement, whether or not for consideration, except to another eligible donee who agrees to continue to enforce the easement or in the context of an extinguishment that complies with the extinguishment and proceeds regulations).

[116] *E.g.*, Rob Atkinson, Obedience as the Foundation of Fiduciary Duty, 34 J. Corp. L. 43 (2008); Rob Atkinson, Reforming Cy Pres Reform, 44 Hastings L.J. 1111, 1121 (1993) ("disregarding donor intent will have an adverse effect on charitable giving"); Susan N. Gary, The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing, 85 Chi-Kent L. Rev. 977 (2010) (collecting many authorities).

[117] Roger Colinvaux, Charity in the 21st Century: Trending Towards Decay, 11 Fla. Tax. Rev. 1 (2011).

[118] *E.g.*, Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach, 31 Ecology L.Q. 1 (2004) (describing federal tax incentives); Debra Pentz, The Conservation Resource Center, State Conservation Tax Credits: Impact and Analysis (2007) (describing state tax incentives), *available at* http://conserveland.org/lpr/library?parent_id=18216 (last visited Nov. 29, 2009); Jeff Pidot, Conservation Easements: New Perspectives in an Evolving World: Conservation Easement Reform: As Maine Goes Should the Nation Follow?, 74 Law & Contemp. Prob. 1, 4-5 (2011).

form of perpetual conservation easements.[119] Indeed, federal tax law expressly forbids income tax deduction for donation of anything other than perpetual easements.[120]

Laws governing charitable solicitation are significant in that a charity's request for donation and the actual donation combine to restrict use of the gift. A land trust cannot ask for a stewardship donation and spend it on the annual holiday party any more than the land trust can invite donation of land for its new headquarters and then subdivide the land to sell lots. No law supports the proposition that different rules apply to conservation easements that the land trust has solicited by promising protection of the land in perpetuity and then memorialized that promise in the easement deed.

Everyone recognizes that there are rare circumstances in which an easement or a portion of an easement may terminate. In one example, easement land abuts a two lane road that is later widened, requiring the taking of a strip of the easement land for the road. The Tax Regulations anticipate these circumstances and allow termination subject to the requirement that the proceeds are recovered by the land trust and used in a manner consistent with the purposes of the original contribution, the original easement.[121] The land would be subject to condemnation for the road without the easement, and eminent domain law provides substantial protection to a donor and land trust against a misuse of the condemnation process through public hearings, required findings of necessity, court proceedings and jury trial. *The Challenge* takes this rare circumstance and expands its use to a host of vaguely identified situations in which land trusts would have flexibility to discard one easement in favor of protection of some other land.[122]

Although the Tax Regulations limit termination to a

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[119] Daniel Halperin, Incentives for Conservation Easements: The Charitable Deduction or a Better Way, 74 Law & Contemp. Prob. 29 (2011) (collecting many authorities); Janet E. Milne, Watersheds: Runoff from the Tax Code (2010), *available at* http://ssrn.com/abstract=1571408; Stephanie Stern, Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives, 48 Ariz. L. Rev. 541 (2006); Note, The "Interior" Revenue Service: The Tax Code as a Vehicle for Third-Party Enforcement of Conservation Easements, 37 B.C. Envtl. Aff. L. Rev. 425 (2010).

[120] I.R.C. § 170(h)(2)(C), (5)(A).

[121] Treas. Reg. § 1.170A-14(g)(6); *see Johnston v. Sonoma County Agricultural Preservation & Open Space District*, 100 Cal.App.4th 973, 123 Cal.Rptr.2d 226 (2002) (district's conveyance of utility easement over conservation easement land was proper without voter or legislative approval, as the conveyance was made under threat of condemnation).

[122] *The Challenge* at 7-16, 73-76.

"judicial proceeding,"[123] *The Challenge* proposes that a judicial proceeding is merely a safe harbor or just one option.[124] Judge Haines in *Carpenter* did not state that the extinguishment regulation is a safe harbor. Rather, he stated that "the extinguishment regulation provides taxpayers with *a guide, a safe harbor, by which to create the necessary restrictions* to guarantee protection of the conservation purpose in perpetuity."[125] Interpreted in context, "the necessary restrictions" are those set forth in the extinguishment regulation: (i) a judicial proceeding, (ii) a finding that continued use of the land for conservation purposes has become impossible or impractical, and (iii) the holder's use of its share of the proceeds "in a manner consistent with the conservation purposes of the original contribution."[126] Indeed, in a subsequent regular Tax Court opinion binding on the Tax Court,[127] Judge Haines refers to "the judicial proceeding requirement of section 1.170A–14(g)(6)(i)" as a "specific requirement."[128]

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[123] Treas. Reg. § 1.170A-14(g)(6)(i); *see* C. Timothy Lindstrom, A Guide to the Tax Aspects of Conservation Easement Contributions at 31 (March 2007) ("the Regs do not contemplate that an easement may be terminated other than by judicial action in a manner more or less consistent with the charitable trust doctrine."), *available at* http://www.conservationtaxcenter.org/plnpro/taxguide2007.pdf (last visited April 17, 2012).

[124] *The Challenge* at 11.

[125] *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 18 (2012).

[126] *Id.*; Treas. Reg. § 1.170A-14(g)(6). In *Carpenter*, Judge Haines expressly referred to footnote 7 in *Kaufman II*. *Carpenter v. Comm'r*, T.C. Memo 2012-1, at 12 (2012), citing *Kaufman v. Comm'r*, 136 T.C. 294, 306-07 (2011), *vacated in part & remanded*, 2012 U.S. App. LEXIS 14858 (1st Cir. July 19, 2012). In that footnote, the Tax Court did not state that tax-deductible conservation easements can be extinguished outside of a judicial proceeding. Rather, the Tax Court stated that it declined to rule on "whether the language establishing the restriction [the conservation easement deed] must incorporate provisions requiring judicial extinguishment (and compensation) in all cases." Presumably a conservation easement that is silent regarding extinguishment but nonetheless is extinguishable under state law only in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of proceeds to the holder to be used for similar conservation purposes, would be deductible. The Tax Court also noted in footnote 7 that a rule mandating that the conservation easement deed incorporate provisions requiring judicial extinguishment is suggested by the "restriction on transfer" regulation, which provides that a donee may not transfer a conservation easement except (i) to another eligible donee who agrees to continue to enforce the easement or (ii) in the context of an extinguishment that complies with the requirements in Treas. Reg. § 1.170A-14(g)(6) (the extinguishment and proceeds regulations); *see* Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter*, 13 Fla. Tax. Rev. _ (2012).

[127] Tax Court Rule 152; *see* Mary Ann Cohen, How to Read Tax Court Opinions, 1 Hous. Bus. & Tax. L.J. 1, 5 (2001).

[128] *Mitchell v. Comm'r*, 138 T.C. No. 16 (2012).

The farther one deviates from a true judicial proceeding to extinguish a tax-deductible conservation easements, the less protection there is for donors, the public and federal taxpayers. Multiple significant reasons support requiring court approval of easement termination as well as amendments detrimental to easement purposes, including

> (1) the significant public investment in conservation easements and the conservation and historic values they protect; (2) the enormous economic value inherent in the development and use rights restricted by conservation easements; (3) the political, financial, and other pressures that may be brought to bear on both governmental and nonprofit holders to release or terminate conservation easements; (4) the increasing scarcity of undeveloped land; (5) the high stakes involved in the termination of a conservation easement; and (6) the necessity of according a certain amount of deference to the intent of conservation easement donors so as not to chill future conservation easement donations.[129]

Many easements expressly provide, as did the *Bjork* easement, that court approval is required for extinguishment of the easement.[130] Donors are often informed by land trusts that easements cannot be extinguished without court action.[131] Equity is also a significant concern. As one commentator has explained:

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[129] Nancy McLaughlin & Mark Machlis, Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements, 2008 Utah L. Rev. 1561, 1580; Nancy A. McLaughlin, Extinguishment of Perpetual Conservation Easements: Charting a Course After *Carpenter*, 13 Fla. Tax. Rev. _ (2012) (explaining the reasons underlying the extinguishment and proceeds requirements in the Treasury Regulations). *See also* Clemens Muller-Landau, Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers to Modify or Terminate Conservation Easements, 29 J. Land Res. & Envtl. L. 281 (2009).

[130] Michigan Model Conservation Easement paragraph 13, *available at* http://landtrust.org/ProtectingLand/MichModelEasementTextVersion.htm; CE Paragraph Databank paragraph 10, *available at* http://www.bbklaw.com/?t=40&an=3775&format=xml (all last visited April 17, 2012); *see Carpenter v. Comm'r*, T.C. Memo. 2012-1 (extinguishment by judicial proceeding requirement of Treas. Regs. § 1.170A-14(g)(6)(i)).

[131] *E.g.*, Gathering Waters Conservancy, Conservation FAQ ("It is very difficult to extinguish a conservation easement. Conservation easements are designed to protect natural resources in perpetuity. They can be extinguished only by a judge and only in very specialized circumstances."), *available at* http://www.gatheringwaters.org/about-land-trusts/conservation-options-for-landowners/conservation-easements/conservation-easements-faq/ (last visited April 17, 2012).

> An efficient, effective, and equitable federal tax incentive program for the acquisition of conservation easements intended to permanently protect unique or otherwise significant properties requires uniform national standards that dictate not only the type of easements that are donated, but also the manner and circumstances under which such easements can be subsequently transferred or extinguished. This was recognized by Congress and the Treasury, and is reflected in the restriction on transfer, extinguishment, division of proceeds, and other perpetuity provisions of section 170(h) and the Treasury Regulations. Indeed, it would make no sense to impose elaborate conservation purposes, baseline documentation, and other threshold requirements at the time of the donation of tax-deductible conservation easements, but leave the subsequent transfer and extinguishment of such easements to the vagaries of the state enabling statutes.[132]

VI. Good Drafting Solves Many Issues of Changing Conditions

Change is the one true constant. All conservation easements must be drafted in light of possible future changes in every aspect of the land and people interested in the land. Careful drafters address not only current land and conditions when preparing conservation easements but also foreseeable future changes that may occur. Thus, expanding suburbia or urban uses on nearby properties need to be considered in how easement land may be affected. Lands in a flood plain need an easement that addresses the impact of floods or droughts. Climate change should be considered in drafting all or substantially all easements. In areas subject to tornados or earthquakes, easements should address resolution of land management disputes that may arise following such events. Agricultural easements must address changes in farming techniques, crops, water availability and the like. These potential changes over time obviously need to be addressed in any well-drafted easement, and the land trust community has long understood the importance of doing so.[133]

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[132] National Perpetuity Standards, Part 2, at 68-69 ("Federally subsidized perpetual conservation easements should be no more easily transferable or terminable in Montana or Michigan than in Maine or Minnesota.").

[133] Jessica E. Jay, Drafting Conservation Easements at 7 (2010) ("continue to emphasize that changed conditions surrounding the property are not justification

Good drafting takes time and knowledge of the land. A conservation easement is not a commercial lease on a strip mall unit. Instead, a well drafted easement may require several visits to the land and meetings with donors, coupled with thoughtful consideration of future uses and impacts on the land. There is, as some say, "a lot of bad paper out there"—easements that were poorly drafted for many reasons. The land trust community will need to address the bad paper while remaining true to promises made to donors and taxpayers and to the obligations of charitable organizations.

VII. Changed Circumstances Rarely Support Amendment or Termination

The IRS explains: "Conservation easements should not be amended except in limited circumstances such as to correct a typographical error in the original easement document. . . . However, if a remote future event, like an earthquake, can extinguish the easement, the donation would nevertheless be treated as in perpetuity."[134] The only other IRS example of a possible proper case for extinguishment of part or all of an easement is condemnation.[135]

Conservation easements are perpetual transfers of property rights from an owner to an eligible donee—advertised as perpetual by the land trust, required by the IRS to be perpetual, intended by the donor to be perpetual.

Many changed circumstances are foreseeable events or alterations that could and should have been foreseen. Indeed, the whole purpose of a conservation easement is to remain binding on the parties and the land despite changes in circumstances, such as enhanced profitability of land for development. Land may become more or less valuable with or without particular permitted uses.

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for the easement's termination, only the total loss of all conservation values may justify termination, and even then, allow for substitution of new purposes for the public's benefit instead"), *available at* http://www.conservationlaw.org/publications/13-DraftingGuidance.pdf (last visited April 17, 2012).

[134] IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html (last visited April 13, 2012), citing Treas. Reg. § 1.170A-14(g)(3).

[135] Treas. Reg. § 1.170A-14(i)(6); *see* Amending Easements: the Question of Accommodating Change in The Conservation Easement Handbook: Managing Conservation and Historic Preservation Easement Programs 130 (Janet Diehl & Thomas S. Barrett, eds. 1988) ("When the terms of an easement are negotiated," both parties should consider "these provisions as unchangeable . . . . No organization or property owner should ever agree to a conservation easement with the idea that its terms will be changed later").

The fact that an easement precludes a valuable use of land is not a basis for amendment but a reason for the easement's existence. Tax deductions or credits may turn out not to be available as parties had expected, but this has no effect on the easement's permanence.[136] Parties to transactions routinely take the risk that tax consequences may differ from what was anticipated, but that event does not justify undoing even ordinary transactions, much less perpetual ones. These are risks in any transfer of property rights. Discovery of valuable mineral rights does not support revocation of other types of deeds transferring part or all of a parcel in fee, so there is no reason that discovery of mineral rights on easement land that cannot be mined because of the easement should warrant termination of the easement. Development opportunities may arise after the easement is recorded that were not contemplated before. Perpetuity means that it does not matter how valuable the land would be or may become without the easement's restrictions. As explained in the Restatement (Third) of Property: Servitudes:

> If no conservation or preservation purpose can be served by continuance of the servitude, the public

[136] As a result, *Walter and Otero County Land Trust*, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005), is wrongly decided. *E.g.*, Remarks of Steven T. Miller, Commissioner, Tax Exempt and Government Entities, IRS (Mar. 28, 2006) ("upon learning that the tax credit was not marketable, as expected, the donors petitioned for the return of the easement. This situation gives us grave concern, because it too violates the requirement that easements be granted in perpetuity"), *available at* http://www.irs.gov/pub/irs-tege/miller_speech_3_28_06.pdf (last visited April 17, 2012); C. Timothy Lindstrom, A Guide to the Tax Aspects of Conservation Easement Contributions at 18 (March 2007) ("Many people wonder if they can provide in their easement that the easement terminates if the tax benefits are denied for some reason, or if the tax benefits turn out to be less than anticipated. Of course the answer is that they cannot make such a provision because it violates the requirement that the easement be granted in perpetuity."), *available at* http://www.conservationtaxcenter.org/plnpro/taxguide2007.pdf (last visited April 17, 2012). The perpetuity of a conservation easement cannot be contingent on any event occurring after the donation of the easement, such as whether the donor receives the desired tax benefit. "If the contribution is a conditional gift, the taxpayer cannot take a deduction." IRS Conservation Easement Audit Techniques Guide, *available at* http://www.irs.gov/businesses/small/article/0,,id=249135,00.html. Land trusts are not permitted to make assurances relating to tax deductions. Land Trust Alliance, Standards and Practices, Practice 10(C), *available at* http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf (last visited April 15, 2012) ("The land trust does not make assurances as to whether a particular land or easement donation will be deductible, what monetary value of the gift the Internal Revenue Service (IRS) and/or state will accept, what the resulting tax benefits of the deduction will be, or whether the donor's appraisal is accurate."). For an extended discussion of *Walter and Otero County Land Trust*, see National Perpetuity Standards at 32-35, 40-43.

> interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land.[137]

Casual or common use of changed circumstances to justify amendment or termination of conservation easements is a repudiation of the very concept of perpetuity. Of course there will be greater development pressure on many easement lands in the future—the easements are intended to preserve those lands as natural oases in the midst of development.

VIII. Conservation Easements Are Not Taxicabs

In proposing expansion of land trusts' ability to amend and terminate conservation easements, *The Challenge* uses an analogy in which the easement is a taxicab carrying its conservation purposes through time so that perpetuity can be satisfied if the conservation purposes endure even if the taxicab is taken to a junkyard and destroyed.[138] This analogy is unsupported in law and deeply offensive to easement donors in fact. Donors who made personal and financial sacrifices relying on land trust promises of perpetuity cannot learn of the taxicab analogy without powerful negative reactions.[139]

The analogy is based on a misreading of Treasury Regulations that do not appear in the Tax Code. One easy way to reject the analogy is that the Tax Code mandates perpetuity, and the Treasury Regulations cannot diminish or alter the Code.[140] In fact, however, the two can and must be construed consistently by applying the same perpetuity requirements in both cases. *The Challenge* claims that, because the Regulations allow an easement to be terminated under specific circumstances, "the Regulations emphasize perpetuating an easement's purposes over time, as opposed to perpetuating the deed of the easement itself."[141] But the Regulations authorize extinguishment only in very limited circumstances--if a "subsequent unexpected change in the conditions surrounding the property . . . make it impossible or

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[137] Restatement (Third) of Property: Servitudes § 7:11 cmt. a (2000).
[138] *The Challenge* at 7 n.28.
[139] The author is such a donor and has observed intense negative reactions on the part of other donors.
[140] A regulation may not amend a statute, *Koshland v. Helvering*, 298 U.S. 441, 447, 56 S.Ct. 767, 770, 80 L.Ed. 1268 (1936), or add to the statute "something which is not there." *United States v. Calamaro*, 354 U.S. 351, 359, 77 S.Ct. 1138, 1143, 1 L.Ed.2d 1394 (1957); *e.g.*, *Iglesias v. United States*, 848 F.2d 362, 367 (2d Cir. 1988) (collecting many authorities).
[141] *The Challenge* at 7.

impractical"[142] to continue to use the property for conservation purposes" *and* only with judicial oversight and a payment of a designated minimum proportionate share of proceeds to the holder to be used to accomplish similar conservation purposes.[143] The Treasury Regulations also expressly mandate that the holder be prohibited from transferring the easement except (i) to another eligible donee that agrees to continue to enforce the easement or (2) in the context of an extinguishment that complies with the provisions of the federal extinguishment and proceeds regulations. Nothing in the Regulations supports the interpretation that perpetuation of the easement's purpose on entirely different land is an acceptable alternative to the perpetuity of the easement in any circumstance other than impossibility or impracticality. To the contrary, the requirement for perpetuity, repeated several times in the Code and Regulations, argues powerfully for to the contrary.

The taxicab analogy undermines the purpose of perpetual conservation easements and jeopardizes use of these easements as a land protection tool. A majority of easement donors (and restricted use fee land donors) grant these property interests to land trusts because the donors love and wish to protect *their* land forever.[144] Tax deductions are an incentive and a benefit, but they do not begin to compensate for lost land value.[145] Instead, the true

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[142] Impractical means much more than inconvenient. *See* Restatement (2d) of Contracts §261 comment d ("Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved."); Robert L. Birmingham, Why Is There *Taylor v. Caldwell*? Three Propositions About Impracticability, 23 U.S.F.L. Rev. 379 (1989); Sheldon W. Halpern, Application of the Doctrine of Commercial Impracticability: Searching for the Wisdom of Solomon, 135 U. Pa. L. Rev. 1123 (1987). Moreover, circumstances and events that were foreseeable at the time of entering into the easement, such as climate change, expanding development pressure, and rising land values, are insufficient. *E.g.*, Note, The Doctrine of Impossibility of Performance and the Foreseeability Test, 6 Loy. L.J. 575 (1975).

[143] Treas. Reg. § 1.170A-14(g)(6)(i).

[144] The representations land trusts make to donors regarding the permanent protection of *their* land support this conclusion. Land trusts do not solicit easement donations on their websites or in their promotional materials by stating that the land trusts will be free to swap or trade a landowner's easement when some ostensibly "better" conservation opportunity comes along. Land trusts represent that they are undertaking the obligation to protect the donor's specific land "in perpetuity" or "forever." Many of such land trust representations are collected in many footnotes in this article.

[145] Nancy A. McLaughlin, Increasing the Tax Incentives for Conservation Easement Donations - A Responsible Approach, 31 Ecology L.Q. 1, 45-46 (2004) ("federal tax incentives compensate the typical easement donor for only a modest percentage of the reduction in the value of his or her land resulting from an easement donation. Any charitable donation that requires a significant

value of the easement is the knowledge that the land will be protected into the distant future, long after the current owner is dead. The taxicab analogy posits ~~suggests~~ that the land trust can freely renege on its promise to protect Aunt Sally's farm because the land trust board of directors in a future year finds another property more appealing. If Aunt Sally is typical of easement donors and she had known about the taxicab analogy, she very likely would not have donated the easement.[146] Donors who learn of this and similar arguments for flexibility expressed by a minority of the land trust community are outraged and feel betrayed.[147] The mere existence of the taxicab analogy places future conservation easement donations at risk because, if prospective donors realize that a conservation easement donated to protect their specific land could be swapped at the whim of a future land trust board, many would not donate.[148] Moreover, the substantial federal investment would not be protected as Congress intended because none of the requirements of 170(h) and the Treasury Regulations would have to be satisfied with respect to the new protected parcel or the new easement burdening that parcel.

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financial sacrifice must be motivated by factors other than, or in addition to, the anticipated tax savings").

[146] *E.g.*, *Id.* at 45 ("The surveys indicate that for most easement donors, a strong personal attachment to and concern about the long-term stewardship of their land is the primary factor motivating their donations, while tax incentives generally play a subsidiary or supplemental role."); Vermont Land Trust, Land Conservation: The Case for Perpetual Easements 1 (2007), *available at* http://www.vlt.org/TermEasementsJuly2007.pdf (with regard to Vermont Land Trust easements, "although the tax and financial benefits were usually important considerations, the owner's primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends").

[147] Nancy A. McLaughlin, Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy, 40 U. Richmond L. Rev. 1031, 1051 (2006) (donor gave up an easier life for herself for the promise of the permanent protection of her land and deceased donor's daughter expressed her "'sense of outrage and betrayal'" at a proposed subdivision on easement land) (quoting daughter's letter).

[148] According to a 2005 nationwide survey, (i) "97 percent of the respondents said they consider it a 'very' or 'somewhat' serious matter if charities are spending money donated to them on unauthorized projects, while 78.7 percent said they would 'definitely' or 'probably' stop giving to any nonprofit organization that accepts contributions for one purpose and uses the money for another," (ii) 72.4 percent said that, when a nonprofit uses money "for a purpose other than the one for which it was given," the nonprofit's managers "should be held legally or criminally liable for acting in a fraudulent manner," and (iii) "97.4 percent said that respecting a donor's wishes was 'very' or 'somewhat' important to the 'ethical governance' of a nonprofit." *See* Public Will Punish Nonprofits That Misuse Designated Grants, New Zogby Survey Finds (Dec. 14, 2005) at 1 (on file with Nancy A. McLaughlin) (explaining results of the survey commissioned by plaintiffs in *Robertson v. Princeton University*); http://www.cehe.org/resources/ZogbyResults.pdf (last visited April 17, 2012).

If a land trust discovers that other lands need to be protected, the solution is not to terminate existing perpetual conservation easements but to do whatever can be done to protect the additional land. Release of existing perpetual conservation easements or an easement's restrictions to leverage protection of other land is a breach of faith to the donor, to federal taxpayers, to future donors and to the entire land trust community.

IX. Conclusion

Conservation easements are challenging to draft and to hold. Each one provides lessons to the land trust and drafters in how to do the next one better. States are, of course, free to establish easement purchase and tax incentive programs that allow easements to be terminated pursuant to state-created processes and procedures, and some have done so. Land trusts are also free to raise funds to purchase conservation easements that expressly grant the land trusts the right to amend or terminate the easements as the land trusts may see fit or upon satisfaction of conditions of their choice, subject to whatever requirements might be imposed by state law and assuming the land trusts negotiate with the grantor for this discretion and memorialize such discretion in the easement deed (instead of representing that the easement is perpetual). But States and land trusts that wish to benefit from federal tax incentives offered for easement donations must satisfy federal tax law requirements. Congress has mandated that federally deductible conservation easements be "granted in perpetuity," their conservation purposes "protected in perpetuity," and the holders not have the right to sell, release, or otherwise transfer such easements except as provided in the extinguishment regulation. Conservation easements protect beloved farms and forests, vineyards and vernal pools across America because donors believe the promise of perpetuity. If that promise is dishonored, donors' trust will have been betrayed, the public's subsidy forfeited, and our great grandchildren will all lose.