

UNDERSTANDING *WHEN PERPETUAL IS NOT FOREVER*:
 AN UPDATE TO THE CHALLENGE OF CHANGING
 CONDITIONS, AMENDMENT, AND TERMINATION
 OF PERPETUAL CONSERVATION EASEMENTS,
 AND RESPONSE TO ANN TAYLOR SCHWING

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INTRODUCTION

Rarely in the legal discourse is an author afforded the opportunity to revisit and update a recently published law review article and to correct misunderstandings of a response thereto. *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements* (“*The Challenge*”) explores the area of law surrounding the amendment and termination of perpetual conservation easements, with specific focus on the existing legal framework, legal regimes, emerging statutory and common law, and states’ approaches to self-guidance.¹ *The Challenge*

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¹ In its first sentence, *The Challenge* describes the number of acres of private land in the United States protected with conservation easements based on the Land Trust Alliance Census as nine million. Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Condi-*

identifies next steps and options for perpetual easement modification and termination guidance, including revisions of the Treasury Regulations § 1.170A-14 (“Treasury Regulations” or “Regulations”).² *The Challenge* posits that providing clear, consistent guidance through existing or new legal frameworks ensures that perpetual conservation easements and the purposes they protect will endure over time.

This Article informs about developments since the publication of *The Challenge* and corrects misunderstandings asserted in Ann Taylor Schwing’s *Perpetuity Is Forever, Almost Always: Why It Is Wrong To Promote Amendment and Termination of Perpetual Conservation Easements* (“*The Response*”) in this issue of the *Harvard Environmental Law Review*. To understand when perpetual is not forever both conceptually and as a law review article, one must understand that the legal regimes guiding perpetual conservation easements conceive of perpetuity differently from each other. For example, a conservation easement that is extinguished consistent with the Treasury Regulations may not comport with a traditional view of that easement lasting forever, even though its purposes are perpetuated and the donation of the easement is considered to be perpetual.³ Alternatively, a perpetual conservation easement’s purposes may not conform to a traditional view of lasting forever when they are substituted with new conservation purposes pursuant to the *cy pres* doctrine proffered by the Restatement of Law, in order to perpetuate the conservation easement itself over time.⁴

Both *The Challenge* and this Article speak broadly to *all* participants of perpetual conservation easements and apply to donated, purchased, exacted, or

tions, Amendment, and Termination of Perpetual Conservation Easements, 36 HARV. ENVTL. L. REV. 1, 2 (2012); see Resources and Tools: Measuring Our Success, SAVING LAND, Winter 2012, at 34. The National Conservation Easement Database (“NCED”) now estimates at least forty million acres of land in the United States are protected with privately held conservation easements, eighteen million acres of which are registered with the database. See NCED, THE CONSERVATION DATABASE, <http://nced.conservationregistry.org> (last visited Jan. 23, 2012) (on file with the Harvard Law School Library); Kassandra Kelly, *National Conservation Easement Database*, THE CONSERVATION REGISTRY BLOG (Jan. 10, 2012), <http://blog.conservationregistry.org/tag/national-conservation-easement-database/> (“The NCED provides a comprehensive picture of the estimated 40 million acres of privately owned conservation easement lands.”).

² *The Challenge* was drafted after conversations with staff at the United States Internal Revenue Services (“IRS”), who expressed interest in a law review article illustrating the issues surrounding and possible approaches to perpetual conservation easement amendment and termination, and in particular, suggesting language for revisions of the Treasury Regulations to address perpetual easement amendment.

³ Treas. Reg. § 1.170A-14(a), (c)(2), (g)(6) (2009). Stephen J. Small, one of the principle drafters of the Treasury Regulations, opined that in drafting the Regulations’ extinguishment clause, the IRS acknowledges that perpetual may not last forever: “Reg. Sec. 14(g)(6)(i), ‘Extinguishment,’ represents a recognition by the [Internal Revenue] Service that perpetual may not really be perpetual.” Further to that end: “Of course, this particular material probably could have been left out of the Regulation, since it does not go to the issue of whether a donation qualifies for a deduction under Code section 170. In that sense, it is more in the nature of reassurance to donee organizations: the Service not only recognizes perpetual does not always mean perpetual, but is also telling you what you should do about it.” STEPHEN J. SMALL, *Federal Tax Law of Conservation Easements* ch. 16, para. 03, at 16–4 to 16–5.

⁴ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 (2000).

mitigated perpetual easements, and their non-profit, tax-exempt, government, or private foundation holders. As such, the articles are not narrowly confined to conservation easements donated for tax benefits or held by tax-exempt entities and address more expansively and extensively issues related to the perpetual character of conservation easements, regardless of the status of their holders or the reasons for their creation.

Both articles presuppose the conservation community's common goal of protecting the integrity of perpetual conservation easements, and by extension, the integrity of their holders. Both articles recognize and accept the likelihood, if not certainty, that pathways toward this common goal may at times diverge and overlap, and not always proceed along the same course.

Even if there were a unilateral, one-size-fits-all approach to these complex issues (which there is not), such an approach may not be appropriate or even legally possible for every state. In applying or creating guidance consistent with applicable state and federal laws, a state may nevertheless create a legally valid approach that also serves to protect the integrity of perpetual conservation easements and their holders. Approaches therefore do, and likely will continue to, vary from state to state within the legal framework.

I. UNDERSTANDING WHEN PERPETUAL IS NOT FOREVER IN THE CONTEXT OF THE EXISTING LEGAL FRAMEWORK AND UPDATE TO PART I

Part I of The Challenge examines the guidance set out by the different legal regimes, including the Internal Revenue Code ("Code") and its attendant Treasury Regulations, the Restatement (Third) of Property: Servitudes ("Restatement"), the Uniform Conservation Easement Act ("UCEA"), and the Land Trust Alliance ("LTA") Standards and Practices.⁵

Although not one word of the legal regimes' guidance has changed since the publication of *The Challenge*, the policies and law within the legal framework influenced by the legal regimes continue to emerge and evolve as courts, legislatures, administrative agencies, policymakers, regulators, and the parties to perpetual conservation easements anticipate, contemplate, and address issues of perpetual easement amendment or termination. *The Challenge* examines variations among and between the legal regimes' guidance for the amendment and termination of perpetual conservation easements without advocating or promoting any position relative to a specific legal regime's guidance. The review, interpretation, and analysis of the plain language of the legal regimes' guidance set forth by *The Challenge* continue to apply squarely to the issues raised both there and here.

The Code and Regulations emphasize and focus on perpetuating the conservation purposes of a conservation easement terminated due to changed conditions through the dedication of proceeds from the subsequent sale or conveyance of the unencumbered land to the purpose of the now-extinguished

⁵ See *The Challenge*, *supra* note 1, pt. I.

conservation easement.⁶ A plain reading of the Regulations' language therefore allows for an easement's termination and the treatment of its purposes as protected in perpetuity, if the proceeds are used by its holder to promote the now-terminated easement's original purposes.⁷ The Code and Regulations perpetuate a conservation easement's purposes over the vehicle containing those purposes, the deed of conservation easement, by allowing the deed to be terminated pursuant to the Regulations. This concept is illustrated in *The Challenge* by the use of a taxicab metaphor, which provides that although the deed of conservation easement "taxicab" may break down and be taken to the junkyard, so long as its original passenger-purposes continue to be perpetuated, the original conservation contribution will be considered perpetual.⁸ The metaphor does not demean the importance of protecting conservation lands in perpetuity as has been suggested by *The Response*; it simply is illustrative and explanatory of the emphasis and focus of the Code and Regulations.

As used in *The Challenge*, the metaphor illustrates the emphasis and focus not only of the Code and Regulations, but also of the Restatement and the UCEA, on perpetuating either the purposes or the deed of conservation easement (or neither). The use of metaphor does not endorse the "swap" of land under easement with land outside of an easement in order to unburden the previously encumbered land.⁹ To ascribe it such meaning would be to subvert the metaphor's purpose, utility, and context, and by extension impugn the language it represents: the plain language of the Code and Regulations. Neither the plain language of the Code and Regulations, nor the metaphor itself can be properly construed as promoting or advocating for the removal and exchange of land from under an easement's coverage.¹⁰

In fact, *The Challenge* uses an actual example of a swap to illustrate precisely the opposite position: first, that swaps may in certain circumstances act to terminate easements,¹¹ and second, that under the current legal regimes the consequences of engaging in such swaps are largely inadequate to deter them from occurring.¹² Further to the same end and subsequent to the publication of

⁶ *Id.*

⁷ *Id.*

⁸ *See id.* The metaphor is a commonly used literary device employed to suggest a likeness or analogy between two objects or items, which would otherwise be considered dissimilar or unlike.

⁹ *The Challenge* describes the concept of a swap as the removal of land from under a conservation easement and replacement of that land with other substitute land, or the removal of all land from under conservation easement, and replacement of that land with an entirely new conservation easement elsewhere. *See The Challenge, supra* note 2, at 14, 45, 64–68; *see also infra*, notes 16–17 and accompanying text.

¹⁰ *The Challenge* suggests purpose perpetuation occurs through proceeds dedicated to protecting the same purposes as the now-defunct conservation easement elsewhere. *The Challenge, supra* note 1, at 7–9, 24. The dedication of proceeds elsewhere, even to a new conservation easement, likely would not occur contemporaneously with the easement's termination, and therefore would not be considered a swap, because the holder does not receive proceeds until the unencumbered land is sold, conveyed, or condemned, which could be any number of years after the easement's termination.

¹¹ *See The Challenge, supra* note 1, at 64–65.

¹² *See The Challenge, supra* note 1, at 65–67.

The Challenge, the Chief Counsel's Office of the IRS issued a general information letter addressing a swap of land under perpetual conservation easement that nearly identically restates the position represented by *The Challenge*.¹³

The letter rightly states that except when a swap meets the criteria of a permitted termination pursuant to section 1.170A-14(g)(6), which occurs only when changed conditions make an easement's purposes impossible or impractical to accomplish, swaps are not otherwise permitted pursuant to the Code or Regulations. "Therefore, 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."¹⁴ The letter states the prevailing law regarding swaps.¹⁵ Despite *The Response*'s assertions to the contrary, *The Challenge*'s analysis and use of the swap example comports precisely with the Chief Counsel's opinion.¹⁶

New IRS instructions for Form 990, also released after the publication of *The Challenge*, similarly track the Chief Counsel's opinion. The form and its instructions seek quantification by non-profit organizations of the total number of easements held by the organization that have been "modified, transferred, released, extinguished, or terminated, in whole or in part, during the tax year."¹⁷ The instructions specifically identify that the definition of released, extinguished, or terminated includes a "swap": "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."¹⁸ *The Challenge* is consistent with both of these documents, not only in applying the plain language of the Code and Regulations, but also in characterizing certain "amendments" as partial terminations under the existing language of the Regulations.

¹³ IRS Gen. Info. Ltr. 2012-0017 (Mar. 30, 2012), available at <http://www.irs.gov/pub/irs-wd/12-0017.pdf>.

¹⁴ *Id.*

¹⁵ *See id.* In addition to IRS guidance, the law regarding swaps emerges with the Tax Court in *Belk v. Comm'r* finding that a perpetual easement's express allowance for substitution of protected land with unprotected land in the absence of impossibility or impracticality fails to meet the requirement of Code section 170(h)(2)(C) that qualified real property interests be subject to use restrictions granted in perpetuity, and therefore did not constitute a qualified conservation contribution. 140 T.C. 1, 17, 23 (2013). The court's distinction between perpetual use restrictions and perpetual conservation purposes under Code sections 170(h)(2)(C) and (5)(A), respectively, is certain to generate further discussion in this area.

¹⁶ *The Challenge*, *supra* note 1, at 64–68.

¹⁷ IRS Form 990 Schedule D Instructions, at 2, available at <http://www.irs.gov/pub/irs-pdf/i990sd.pdf>.

¹⁸ *Id.* ("The categories described in the preceding paragraph are provided for convenience purposes only and 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 action is not also a modification, transfer, or extinguishment.") (emphasis added).

Like the Code and Regulations, the Restatement remains unchanged in the months since the publication of *The Challenge*. The Restatement emphasizes and focuses on perpetuating the deed of a conservation easement placed on a property over its original conservation purposes, by allowing for the substitution of purposes when the original purpose becomes impossible or impracticable to achieve.¹⁹ Here, *The Challenge*'s metaphor of the original conservation easement "taxicab" drives through time, letting its defunct-purpose passengers out to make room for new purpose-passengers.²⁰ In contrast to the Code and Regulations, the deed itself is perpetuated over its original or then-current purposes, which are substituted for new purposes, such that the deed continues on through time. The deed and protection of the land it encumbers therefore is perpetuated over the original purposes by allowing the substitution of purposes until it is no longer feasible to promote *any* purpose, at which point the easement must be terminated. As shown in *The Challenge*, the Restatement therefore maintains the deed of easement on the land for as long as possible through the substitution of different purposes over time.

Between the Code and Regulations and the Restatement, either the original conservation purposes of the easement, or the original deed of easement, is perpetuated over time. In both cases, the public benefits of the original conservation easement are perpetuated, and in the case of the federal tax benefit, the federal taxpayers' interest in perpetual conservation is maintained. In contrast to the Restatement and the Code and Regulations, the recommended statutory language of the UCEA, also unchanged since publication of *The Challenge*, on its face and by its plain language, focuses on and emphasizes perpetuating neither the deed nor its purposes over time. By its plain language, the UCEA allows perpetual conservation easements to be modified in the same manner as other traditional servitudes and easements, with no constraints on the power of a court to oversee the same. The comments to the UCEA, however, conflict with the plain language of the uniform act by directing users to apply charitable trust doctrine as an overlay to this guidance.²¹ Here, *The Challenge*'s metaphor of the original conservation easement "taxicab" with its original purpose "passengers" could ostensibly be driven off a cliff with its original purpose passengers inside if the plain language of the easement perpetuates neither the purpose nor the deed over time.²²

¹⁹ See *The Challenge*, *supra* note 1, pt. I.B.

²⁰ *Id.*

²¹ See generally UCEA §§ 2 cmt., 3 cmt. (2007), available at https://www.law.upenn.edu/library/archives/ulc/ucea/2007_final.txt.

²² *The Challenge*, *supra* note 1, at 26–31. Despite assertions of *The Response* to the contrary, the UCEA comments do not state that this section is meant to apply only to the procedural aspects applicable to a conservation easement, such as a state's requirements to record. The comments in fact, state nearly the opposite: that *all* the laws of conventional easements apply directly to conservation easements because nothing in the UCEA says otherwise. The comments further state that the broad application of conventional easement laws to conservation easements is necessary to effect the goal of bringing conservation easements under a state's "formal easement rubric," including statutory and common law:

Of course, a state's own statutes, common law, or policy might direct a different result by providing additional guidance supplanting or bolstering the language of the UCEA to some other effect. Maine's revised act, for example, requires that amendments or terminations that materially detract from an easement's protected purposes be considered along with the public interest in a judicial action to which the attorney general is made a party.²³ In providing additional guidance, New Hampshire's policy generally directs easement holders and landowners to attorney general oversight of perpetual easement amendment, unless the easement contains an amendment clause.²⁴ Such laws and policies evolve well beyond the UCEA, while continuing to complement the Regulations' extinguishment language for donated easements.

Land Trust Standards and Practices also remain unchanged since *The Challenge's* publication. Standards and Practices, though not a formal legal regime (as acknowledged in *The Challenge*), comprise an important element of the legal framework guiding perpetual easements held by land trusts, and provide essential assistance for land trust decision-making regarding amendment and termination.²⁵ Standards and Practices emphasize and focus on land trust policies preventing impermissible private benefit and private inurement, and on creating net benefit or neutral impact outcomes as related to the amendment or termination of perpetual conservation easements.²⁶ Thus, under *The Challenge's* metaphor, Standards and Practices continue to act as a roadmap or owner's manual for the taxicab's owner, the easement's holder, in deciding what direction to go and how to proceed in the face of changed conditions or other circumstances involving amendment or termination.²⁷

Within the complex web of legal regimes operating as part of a broader legal framework discussed in *The Challenge*, it bears mentioning here that of all the foregoing regimes, only the Code and Regulations constitute the law.

Section 2(a) provides that, except to the extent otherwise indicated in the Act, *conservation easements are indistinguishable from easements recognized under the pre-Act law of the state in terms of their creation, conveyance, recordation, assignment, release, modification, termination or alteration.* In this regard, subsection (a) reflects the Act's overall philosophy of bringing less-than-fee conservation interests under the formal easement rubric and of extending that rubric to the extent necessary to effectuate the Act's purposes given the adopting state's existing common law and statutory framework. *For example, the state's requirements concerning release of conventional easements apply as well to conservation easements because nothing in the Act provides otherwise.* On the other hand, if the state's existing law does not permit easements in gross to be assigned, it will not be applicable to conservation easements because Section 4(2) effectively authorizes their assignment.

UCEA § 2 cmt. (2007) (emphasis added).

²³ *The Challenge*, supra note 1, at 46.

²⁴ See *The Challenge*, supra note 1, pt. II.B.2-3.

²⁵ See *The Challenge*, supra note 1, at 31 nn.159-60.

²⁶ *Id.* at 31-34.

²⁷ See *id.* at 31 n.159. Standards and Practices may be poised for updates in order to address, among other things, the complex interlay of issues surrounding the modification and termination of perpetual conservation easements in the face of changing conditions, climate, and public interests.

The Restatement, UCEA, and Standards and Practices, while intending to guide behavior and the creation of laws, do not have the weight of law or constitute laws. Further, in attempting to sort potentially inconsistent or conflicting legal regimes, it is instructive to order according to legal norms, hierarchically from the most to least democratically created.²⁸ The U.S. Constitution reigns supreme, federal statutes trump all but the Constitution, and federal administrative rules trump common law, when conflicts arise between these legal norms.²⁹

The Code, as the reigning statutory law in this context, therefore trumps all other norms for donated perpetual conservation gifts seeking federal tax benefits, save the U.S. Constitution. Congress crafts the Code for tax-exempt organizations and qualified conservation contributions; the Treasury Secretary and the IRS draft the Regulations interpreting and applying the Code; and the IRS administers and enforces the collection of taxes consistent with the Code and Regulations. As is the case with many of the legal aspects germane to the law of perpetual conservation easements, however, the Regulations fit incongruously within the ordering of the legal norms, and with the adoption of traditional administrative procedures. Though not promulgated in accordance with the Administrative Procedure Act, the Regulations are still treated with the force of law.³⁰ Judge-made doctrinal law of the Code and Regulations therefore will be on even footing with those norms, when conflict exists with competing or inferior legal norms.

While the legal regimes themselves remain unchanged since the publication of *The Challenge*, new judge-made doctrinal law has emerged to provide insight as to the Code and Regulations' application to perpetual conservation easements granted for federal tax deductions.³¹ The First Circuit's decision in *Kaufman*,³² overturning the Tax Court's decision, informs the Code and Regulations' perpetuity guidelines with regard to perpetuating an easement's purposes through the post-extinguishment dedication of proceeds to conservation purposes. The opinion further examines the reasonableness of the IRS's interpreta-

²⁸ Carlos E. González, *Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms*, 45 SANTA CLARA L. REV. 233, 241–42 (2005) (defining the legal norms and ordering them from most to least democratic); Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 448–49 (2001) (discussing the hierarchy and ordering of legal norms when conflicts between them arise).

²⁹ González, *Trumps*, *supra* note 28, at 252–53.

³⁰ Leslie Book, *A New Paradigm For IRS Guidance: Ensuring Input And Enhancing Participation*, 12 FLA. TAX REV. 517, 519–20 n.11, 540–42, 547–51 (2012) (describing the APA and administrative review, notice and comment periods typical for agency rules, and distinguishing the deference accorded the IRS, Code, and Regulations therefrom).

³¹ See *The Challenge*, *supra* note 1, at 34–50.

³² *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012). Subsequent to *The Challenge*'s publication, which refers in Part I to this and other Tax Courts' interpretation and application of the perpetuity requirement set out by the Code and Regulations, the Court of Appeals for the First Circuit overturned the Tax Court's decision in *Kaufman v. Comm'r*, 136 T.C. 294 (2011).

tion of its own Regulations, and addresses a holder's discretion to adapt or abandon a perpetual easement in response to changes occurring over time.³³

The court's analysis in overturning the Tax Court recognized the Code's requirement "that a donated 'restriction' on use be 'in perpetuity,'" citing Code sections 170(h)(2)(C) and (h)(5)(A).³⁴ The court pointed to the Regulations' further substantive requirements for a conservation contribution to be tax deductible, provisions which *The Challenge* discusses in Part I, including (g)(1), the "enforceable in perpetuity" requirement, (g)(2), the mortgage subordination requirement, (g)(3), the "remote future event" provision (which the Court observes adds a noteworthy qualification to the regulatory requirements), and (g)(6), the extinguishment provision.³⁵ The court set out the extinguishment clause verbatim as requiring: "[W]hen a change in conditions give [sic] rise to the extinguishment of a perpetual conservation restriction by judicial proceeding, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion."³⁶

The First Circuit, noting that the Tax Court relied entirely on the latter provision in making its determination to deny the Kaufmans a tax deduction, observed that although the requirement of section 1.170A-14(g)(6) was "unexplained" when first promulgated, the paragraph's purpose appears twofold in cases of extinguishment: first, to prevent taxpayer-landowners from reaping a windfall from proceeds, and second, to assure that the donee organization can use its proportionate share of the proceeds to advance the conservation or preservation cause elsewhere.³⁷ The court even briefly speculated that an easement holder's right to post-extinguishment proceeds, which "must be used to advance 'conservation purposes,'" might also be captured as part of the definition of those conservation purposes,³⁸ but then did not pursue this issue when the IRS disclaimed this broad reading. The court also agreed with the Kaufmans' point that the proceeds clause is only triggered if and when an easement is actually extinguished (and not, for example, when casualty losses occur, and the easement remains intact).³⁹

Regarding the consistency of uses allowed under an easement while it is still in place, the court expanded its analysis to include issues relating not only

³³ *Kaufman*, 687 F.3d at 23–25.

³⁴ *Kaufman*, 687 F.3d at 25.

³⁵ *The Challenge*, *supra* note 1, at 7–9; *Kaufman*, 687 F.3d at 25–26.

³⁶ *Kaufman*, 687 F.3d at 26 (citing Treas. Reg. § 1.170A-14(g)(6)(ii) (alterations omitted)).

³⁷ *Id.* at 26.

³⁸ *Id.* at 27 n.5.

³⁹ *Id.* at 26 n.3. The court notes in footnote 3 that proceeds only apply when an easement is actually terminated. "As the Kaufmans note, paragraph (g)(6) only applies when the easement is 'extinguished by judicial proceeding,' Treas. Reg. § 1.170A-14(g)(6)(I) (2009). Accordingly, paragraph (g)(6) does not necessarily entitle the donee organization to a share of casualty insurance proceeds *if the easement remains in place.*" *Id.* (emphasis added).

to proceeds and termination, but also to modification and enforcement of conservation easements, by addressing the flexibility and responsiveness required by and of a conservation easement and its holder over time.⁴⁰ The court noted that unless or until an easement is extinguished, its holder retains the authority and right to consent to a change or to abandon some or all of its rights regarding the easement, and must retain these rights, in order to accommodate changes necessary to effect the purpose of the easement, consistent with the purpose of the easement.⁴¹ Further, the court agreed with *Simmons*'s characterization of the likelihood an easement holder will abandon any of its easements as "remote" and rejected the IRS's assertion that such a remote possibility constitutes a defensible basis for disallowing a conservation easement tax deduction.⁴² An easement does not, therefore, have to include a provision preventing inconsistent uses in order to be perpetual or tax deductible, the Court reasoned, citing the D.C. Circuit's consideration and rejection of the same argument:

The clauses permitting consent and abandonment, upon which the Commissioner so heavily relies, have no discrete effect upon the perpetuity of the easements: Any donee might fail to enforce a conservation easement, with or without a clause stating it may consent to a change or abandon its rights, and a tax-exempt organization would do so at its peril. . . . [T]his type of clause is needed to allow a charitable organization that holds a conservation easement to accommodate such change as may become necessary to make a building livable or usable for future generations while still ensuring the change is consistent with the conservation purpose of the easement.⁴³

Both the *Kaufman* and *Simmons* courts therefore recognized the need for conservation easements and their holders to be flexible to respond to change, and to allow changes consistent with conservation purposes, in order to effect the protection of those conservation purposes over time. The court's reasoning and interpretation in *Kaufman* are consistent with the Code and Regulations' emphasis on perpetuation of conservation purposes (as opposed to perpetuation of a specific conservation easement deed) over time.⁴⁴

In rejecting the Tax Court's reasoning that the lender's prior claim on insurance proceeds undermines the proceeds clause of (g)(6), and by extension defeats the deductibility of the donation because the easement purposes could not be perpetually protected through the dedication of proceeds, the court asserted the impossibility of meeting the standard proposed by the IRS due to the super-priority of tax liens.⁴⁵ The court explained that no taxpayer could ever

⁴⁰ See *id.* at 26–27.

⁴¹ *Id.*

⁴² *Kaufman*, 687 F.3d at 28 (citing *Comm'r v. Simmons*, 646 F.3d 6, 10 (D.C. Cir. 2011)).

⁴³ *Id.*

⁴⁴ *Id.* at 23. By contrast, the court further found the IRS's own interpretation of the Regulations to be unreasonable, deeming it "an impromptu reading that is not compelled and would defeat the purpose of the statute," and did not accord it any deference. *Id.* at 27.

⁴⁵ *Id.* at 27.

overcome such a standard, and stated that “the IRS’s reading of its regulation would appear to doom practically all donations of easements, which is surely contrary to the purpose of Congress.”⁴⁶ The court shifted focus from reasonability of the Regulations’ interpretation of the Code, to reasonability of the IRS’s interpretation of the Regulations, concluding that it is unreasonable: “The language of paragraph (g)(1) nowhere suggests the stringent outcome that the IRS seeks to ascribe to it and the consequences of the reading would be to deprive the donee organization of flexibility to deal with remote contingencies.”⁴⁷

Despite its finding, the court noted that the IRS is not without remedies or recourse for the concerns it expresses regarding a holder’s abandonment versus protection of conservation purposes. Citing the IRS’s enforcement power: “In addition, the concern posited by the IRS is within its power to control: the IRS’s own regulations require that tax-exempt organizations such as the Trust be operated ‘exclusively’ for charitable purposes, 26 C.F.R. § 1.501(c)(3)-1, a requirement that the IRS can enforce against the Trust.”⁴⁸ The IRS enforcement authority is also addressed in Part III.B.2 of *The Challenge*, together with IRS options for providing guidance regarding amendment and termination of tax-deductible qualified conservation easements.

While federal doctrinal judge-made tax law continues to evolve surrounding the interpretation and application of the Code and Regulations to tax-deductible gifts of perpetual conservation easements and their 501(c)(3) holders, states continue to seek guidance for perpetual easements and their holders, per se, regardless of whether the easements are given for federal tax benefits, or held by federally tax-exempt non-profits.

II. UNDERSTANDING STATES’ COMMON LAW AND LEGISLATIVE OR POLICY APPROACHES FOR GUIDANCE AND UPDATE TO PART II

Part II of The Challenge studies emerging judge-made common law and evolving statutory law, regulations, and policies crafted by legislatures, regulators, administrators, and communities of holders to provide additional guidance in the midst of these different legal regimes.

No new state court cases addressing perpetual easement amendment or termination have emerged since *The Challenge*’s publication.⁴⁹ The issues re-

⁴⁶ *Id.*

⁴⁷ *Id.* at 28.

⁴⁸ *Id.*

⁴⁹ However, *Long Green Valley Ass’n v. Bellevale Farms, Inc.*, 46 A.3d 473, 502 (Md. Ct. Spec. App. 2012), *cert. granted*, 52 A.3d 978 (2012), added the following statement to a case cited in note 120 of *The Challenge* at the request of the Maryland Attorney General regarding charitable trust doctrine:

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

main complicated given that the Code and Treasury Regulations are completely silent as to amendment of perpetual conservation easements, state statutes may be silent, or decision-makers may use the UCEA language that easements can be amended or terminated consistent with state law in the same manner as a traditional easement.

Presumably, a state court contemplating terminating a perpetual easement granted as a qualified conservation contribution for which a tax deduction was taken would follow the Code and Regulations for donated conservation easements, and state statutory law for disposition of real property interests in conservation easements. As discussed in *The Challenge*, the court in *Bjork v. Draper*⁵⁰ looked both to the language of the deed of conservation easement and to the state's enabling act for perpetual conservation easements. There, the court concluded that the language of the deed in the context of the state law amounted to the deed permitting amendments by its own plain language and by implication of the state conservation easement enabling statute.⁵¹ The court also pointed out that furthering the easement's purposes over time might necessitate the deed's adaptation and amendment, with emphasis on promoting the deed's original purposes.⁵²

A court examining amendment of a non-donated perpetual conservation easement might face a tougher challenge with less guidance, however, by virtue of the transaction having no nexus with the charitable donation sections of the Code or Regulations. In accordance with legal norms, a court would look first to the deed of conservation easement for direction, then to the state's statutory law, and finally, to the state's common law. Regardless of whether or not the easement was donated for tax benefits, if the easement holder is a 501(c)(3) tax-exempt organization, a court could be guided by federal tax law requiring that an exempted entity's decisions be in furtherance of its tax-exempt purpose for the public's benefit, and not create private inurement or impermissible private benefit. However, this inquiry would be independent of Code section 170(h) and Regulations section 1.170A-14(g)(6)(ii).⁵³

As *The Challenge* points out, no instance of termination yet exists strictly applying either the Code and Regulations' perpetuation of a perpetual easement's original purposes or the Restatement's perpetuation of the original deed

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.

Id. The Court nonetheless continues to conclude its opinion with the statement that it is not persuaded by charitable trust provisions establishing standing: ". . . [W]e are not persuaded that appellants have standing under the third-party beneficiary or charitable trust theories . . ." *Id.* at 691.

⁵⁰ *Bjork I*, 886 N.E.2d 563, 563, 569, 572-75 (Ill. App. Ct. 2008).

⁵¹ See *The Challenge*, *supra* note 1, at 34-37.

⁵² *Id.* at 34-37.

⁵³ If the holder is not a federally tax-exempt organization, the easement was not granted for federal tax benefits, no guiding language is present in the deed or statutes, and no common law exists in the state, the court might look to the Restatement of Law for guidance.

with newly refurbished and substituted purposes.⁵⁴ The two termination cases we are aware of do not apply either calculus. Instead, the first case (*Otero*) terminated in seeming — though not actual — accordance with the Regulations' requirements, and the second case (*Salzburg*) reinstated through judicial proceedings an easement that the parties attempted to terminate themselves.⁵⁵ The issues remain the same. The role of the judiciary and third-party enforcement and oversight in Colorado after *Otero* continues to be unclear, though some guidance may be afforded as a result of a state audit of the tax credit program and likely resulting legislation aiming to curtail abuse and provide appropriate oversight of, among other things, tax credits, perpetual conservation easements presented for tax credits, certified easement holders, appraisers, and appraisals through a tax credit pre-approval processes.⁵⁶ And the role of the attorney general and state statutory law during perpetual easement termination in Wyoming after *Salzburg* continues to generate uncertainty, assuming the attorney general acts on behalf of the public in accordance with the state's common law charitable trust doctrine.⁵⁷ Thus, even in two states where courts have considered these complex issues, significant questions persist as to the process of perpetual easement termination.

States attempting to provide guidance for perpetual conservation easement amendment or termination by relying on common law or developing policies based on common law principles will need to be mindful of the ordering of legal norms because newly created or amended statutes may supersede such

⁵⁴ See *The Challenge*, *supra* note 1, pt. II.A.1; see also *supra* notes 44–46.

⁵⁵ See *id.*; *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 17, 2010); *Walter & Otero Cnty. Land Trust*, Order, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005).

⁵⁶ *Walter & Otero Cnty. Land Trust*, No. 05-CV-96; An Act Concerning the Resolution of a Disputed Claim for a State Income Tax Credit for a Donation of a Perpetual Conservation Easement That Includes a Process That Allows a Taxpayer to Waive an Expedited Administrative Hearing for the Purpose of Appealing Directly to a District Court, and Making an Appropriation Therefore, 2011 Colo. Leg. Serv. 193 (West) (codified at COLO. STAT. §§ 12-61-721, 39-21-113, 39-22-522, 39-22-522.5). See *Conservation Easement Tax Credit Dept. of Rev. Div. of Real Estate Performance Audit*, OFFICE OF THE COLO. STATE AUDITOR (Sept. 2012), available at [http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/\\$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf](http://www.leg.state.co.us/OSA/coauditor1.nsf/All/5F733A628FCF979A87257A94007374E8/$FILE/2171%20ConserEasemTaxCredit%20092612%20KM.pdf). Note, for example, the state's reserved interest in assignment clauses exercising a right to transfer an easement from a defunct, uncertified, unwilling, incapable, or unqualified entity to a certified entity in order to protect the public's investment in perpetual easements by perpetuating a tax-credit-generating conservation easement over time, as expressed in recommendation 10(b) of the state audit:

(b) utilizing assignment clauses in the deeds for tax-credit-generating conservation easements that reserve the State's right to require the transfer of the easement to another certified conservation easement holder when the original holder ceases to exist; is no longer certified; or is unwilling, unable, or unqualified to enforce the terms and provisions of the easement.

Id. at 6. Also, note the concern expressed over landowner and holder attempts to amend or dissolve conservation easements: "In addition to the issues we identified related to uncertified conservation easement holders, staff at the Office of the Attorney General reported that efforts by some landowners and conservation easement holders (even those that are certified) to subsequently amend or dissolve conservation easements pose additional risks." *Id.* at 72.

⁵⁷ *Salzburg*, Civ. No. CV-2008-0079.

pre-existing laws or policies. The Model Protection of Charitable Assets Act (“MPCAA”), for example, finalized with comments after publication of *The Challenge*, proposes to codify attorney general oversight of all charitable assets, including, as expressly stated in the comments, conservation and preservation easements, in order to remove such authority from the common law.⁵⁸ A state’s passage of the MPCAA therefore would create a statutory basis for attorney general authority and oversight of certain acts relating to perpetual conservation easements, possibly including amendment and termination. This authority, in accordance with the ordering of legal norms, would trump other conflicting policies and judge-made common law and is important to bear in mind for states addressing perpetual easement amendment and termination.

Aside from Vermont, no state discussed in *The Challenge* has changed its approach to addressing the amendment and termination of perpetual conservation easements since *The Challenge*’s publication. Massachusetts continues to use a public process, though no instances have been reported directly involving perpetual easement amendment or termination. Maine’s reformed easement enabling act setting forth the standard of materially impacting the conservation purpose or public interest has yet to be applied in any case. Montana’s policy has been adopted but not yet applied or tested, and New Hampshire continues to treat easements as charitable trusts with oversight and reporting of amendment or termination to the attorney general.⁵⁹ Colorado’s judicial and administrative options remain available only for easement donors denied tax credits, to which judicial actions the attorney general is made a party.⁶⁰

Meanwhile, Vermont passed portions of its proposed legislation and established a working group to examine the amendment provisions, consider approaches other than an administrative panel with public participation, and report back its findings in January 2013.⁶¹ The working group reported support for the legislation with two changes: first, the addition of an “internal review process,” where the easement holder provides notice and holds a public hearing to gauge public reaction before its final decision is made; and second, the ability of a holder to bypass the panel review process and seek judicial review, for any reason, including if there is concern that the panel review is not adequate in the case that an amendment results in a partial termination, or if the conservation easement terms require judicial review.⁶² In evaluating the proposal’s congruency with existing state laws and consistency with federal tax laws for qualified conservation contributions and qualified holders, the working group posed a question to the IRS regarding whether administrative review of an easement’s amendment or termination would satisfy federal requirements for

⁵⁸ See *The Challenge*, *supra* note 1, at 29–30.

⁵⁹ See *id.* at 47–53.

⁶⁰ See *id.* at 42, 57–61.

⁶¹ 2012 Vermont Laws No. 118 (S. 179) (May 9, 2012).

⁶² See VERMONT GEN. ASSEMBLY, EASEMENT AMENDMENT WORKING GROUP MEMORANDUM FROM ROBERT KLEIN TO MEMBERS OF THE GENERAL ASSEMBLY 12, 9–10 (2013), available at <http://www.leg.state.vt.us/reports/2013ExternalReports/285680.pdf>.

donated easements.⁶³ The IRS responded that state law may provide the means for easement termination, and in order for an easement to be federally tax-deductible, it must meet the requirements of Code section 170(h)(5)(A) and Regulations section 1.170A-14(g)(6)(ii).⁶⁴ The possible juxtaposition of state law administrative review with federal law judicial proceedings invokes the interplay of federal and state laws regarding easement amendment and termination.⁶⁵

III. UNDERSTANDING THE LEGAL FRAMEWORK, INTERPLAY OF FEDERAL AND STATE LAW(S); UPDATE TO PART III

Part III.B.1 of The Challenge examines options and next steps for addressing the overlap between these regimes, including waiting and seeing or doing something to interpret, amend, or create state law, policy, or regulations to assist in decision-making.

Perhaps the most perplexing and troubling of all the misunderstandings of *The Challenge* articulated by *The Response* is the suggestion that state laws created to guide and clarify perpetual land conservation decision-making somehow are rendered impotent under a federal supremacy structure. There is no question of the primacy of federal law with respect to federal tax collection or deductions — neither *The Challenge* nor this Article asserts otherwise. Of course Code section 170(h) and its attendant Regulations guide qualified conservation contributions granted for federal tax deductions. Of course Code section 501(c)(3) and its attendant Regulations guide tax exempt organizations, including those that hold perpetual conservation easements. Federal law guides easements donated for federal tax benefits and the behavior of tax-exempt holders of conservation easement, and federal law is superior over any state laws that may seek to regulate federal tax deductions or federally tax-exempt organizations. Both articles accept these principles of federal tax law as axiomatic and self-evident, and *The Response's* suggestions to the contrary are unsupported and without merit.

The principal focus of both articles is the more complex and difficult question of how to protect the integrity of perpetual conservation easements, and by extension of their holders, by examining legal paradigms for perpetual conservation easements per se, not only for those easements given for federal tax deductions or given to tax-exempt land trusts. Consider the recent example of a perpetual conservation easement purchased and held by a local government in Colorado, which was amended in part to allow residential building and in part to join four other easements together under one easement deed. This decision

⁶³ See General Information Letter from the IRS to Upper Valley Land Trust, Number 131378-12 (Sept. 18, 2012) (on file with the Harvard Law School Library).

⁶⁴ *Id.* The letter rightly provides information in the context of individual easement tax deductibility, as opposed to passing judgment on a state's proposed law.

⁶⁵ See *id.*

was guided not by federal tax law for deductible gifts or tax-exempt non-profit entities, or Land Trust Standards and Practices, but by the state's conservation easement statute, common law, and administrative rules.⁶⁶ Consider the U.S. Fish and Wildlife Service's ("USFWS") recent receipt of the largest perpetual conservation easement grant in its history on a 90,000-acre ranch in Colorado. This easement was not granted for federal tax benefits, nor is it held by a tax-exempt entity.⁶⁷ State law, federal statutes, and administrative laws pertaining to management of lands by the USFWS will provide guidance for the management of this conservation easement. In neither instance will federal income tax laws provide legal authority to guide the administration of these conservation easements in perpetuity.

While the Code and Regulations together with federal court decisions set forth the law of perpetual easements donated as tax deductible gifts or as held by tax-exempt entities, state conservation easement enabling statutes guide the disposition of real property for both donated and non-donated perpetual easements and provide a complement to federal laws, particularly in cases of amendment, where the Code and Regulations are silent.

It is a longstanding, undisputed legal principle that states can create their own guidance in the form of real property laws, as the UCEA itself intended that they would.⁶⁸ States are empowered to create their own laws and policies with regard to real property and its disposition.⁶⁹ As *The Challenge* discusses, as long as state laws are consistent with federal laws, and as long as they focus on protecting the perpetual nature of the grant — whether through *cy pres* proceedings in New Hampshire, or material detraction judicial examination in Maine, or proposed administrative processes in Vermont, or statutory safeguards in Montana — there is compliance with the law of federal tax deduct-

⁶⁶ Conrad Lattes & Janis Whisman, Presentation: Conservation Easements — To Amend or Not To Amend? (Sisk presentation) (Sept. 17, 2012) (on file with author); see Meg Waters, *Guest Opinion: County Commissioners Wrong on Conversation Easements*, BOULDER DAILY CAMERA, Mar. 18, 2012, http://www.dailycamera.com/guestopinion/ci_20191369/guest-opinion-county-commissioners-wrong-conservation-easements; John Fryar, *Boulder County Commissioners OK Combining Lyons-area Conversation Easements*, BOULDER DAILY CAMERA, Mar. 8, 2012, http://www.dailycamera.com/ci_20131972/boulder-county-commissioners-ok-combining-lyons-area-conservation; Laura Snider, *Neighbors: Change in Boulder County Easements Would Break Public Trust*, BOULDER DAILY CAMERA, Dec. 12, 2011, http://www.dailycamera.com/boulder-county-news/ci_19549733; Meg Waters, *Precedent-setting Decision on Conservation Easements Scheduled for Thursday*, THE BLUE LINE, Mar. 6, 2012, <http://www.boulderblueline.org/2012/03/06/precedent-setting-decision-on-conservation-easements-scheduled-for-thursday/>; Meg Waters, *Are Conservation Easements Valuable? Yes, Very*, THE BLUE LINE, Mar. 14, 2012, <http://www.boulderblueline.org/2012/03/14/are-conservation-easements-valuable-yes-very/>.

⁶⁷ Press Release, U.S. Dep't of Interior, America's Great Outdoors: Salazar, Ashe Announce Historic Conservation Easement in Sangre de Cristo Mountains (June 15, 2012), available at http://www.fws.gov/mountain-prairie/pressrel/2012/06152012_sangre_de_cristo.html.

⁶⁸ Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (established the principle that property interests are created by state law). Conservation easements are legally defined as real property interests by every legal regime, federal, and state law (save Illinois), and to refer to them as "contract rights" not only legally mischaracterizes them, it also undermines and confuses the applicability of their guiding laws. See *The Challenge*, *supra* note 1, pt. I(C).

⁶⁹ See *Roth*, 408 U.S. at 577.

ibility.⁷⁰ Furthermore, as *The Challenge* recommends, other states considering proffering such guidance should look closely to ensure consistency with federal laws for tax-deductibility and tax-exempt organizations.⁷¹

Moreover, doctrines of federalism instruct that where the federal government has not preempted states through its own lawmaking, states can pass their own laws.⁷² Levying taxes (or creating a deduction against taxes) represents a concurrent power shared by both state and federal governments.⁷³ Where federal law is silent as to donated perpetual conservation easement amendment and creates a “safe harbor” in judicial proceedings for donated perpetual easement termination, a state can still pass its own laws guiding perpetual conservation easement amendment and termination, for donated and non-donated easements, provided that the same are not preempted by and do not conflict with existing federal law.⁷⁴

Given that the Code and Regulations are silent as to perpetual easement amendment, the *Carpenter* court’s deference to state laws in determining *how* perpetual easements can be legally terminated remains instructive:

To determine whether the conservation easement deeds comply with requirements for the conservation easement deduction under Federal tax law, we must look to State law to determine the effect of the deeds. State law determines the nature of the property rights, and Federal law determines the appropriate tax treatment of those rights. . . . Specifically, we must look to State law to determine *how* conservation easements may be extinguished.⁷⁵

The Code and Regulations therefore do not preempt state laws defining *how* holders may protect their perpetual conservation easements in Maine, Massachusetts, Montana, Vermont, Colorado, or New Hampshire.

A state law or policy may ensure that the public benefits provided by the original conservation easement will be perpetuated in a modified easement that better serves the public interest, or if terminated, dedicated toward consistent purposes elsewhere. A state law or policy may protect the federal taxpayers’ investment in conservation easements held in “perpetuity” as required by the Regulations’ interpretation of the Code. Further, federal law does not prohibit the amendment of easements, even if the easement’s donor claimed a federal income tax deduction pursuant to the Code, as long as the state law governing

⁷⁰ See *The Challenge*, *supra* note 1, pts. II, III(B)(2).

⁷¹ *Id.*

⁷² U.S. CONST. amend. X establishes that powers not expressly granted to the federal government are reserved to the states.

⁷³ *Smith v. Turner*, 48 U.S. 283, 324 (1849) (“[T]he power of taxation is of vital importance to a State; that it is retained by the States; that it is not abridged by the grant of a similar power to the Union; that it is to be concurrently exercised; and that these are truths which have never been denied.” (citing *McCulloch v. Maryland*, 17 U.S. 316, 425 (1819))).

⁷⁴ See *Carpenter v. Comm’r of Internal Revenue*, T.C. Memo 2012-1, at 18 (2012) (citing *Kaufman II*, 136 T.C. at 307 n.7), available at <http://www.ustaxcourt.gov/InOpHistoric/carpenter.TCM.WPD.pdf>.

⁷⁵ *Id.* at 11 (emphasis added) (alterations omitted).

easement amendment and termination does not conflict with the requirements of federal law and ensures that the conservation purposes of the easement are protected in perpetuity.

Even if one equates the amendment of perpetual conservation easement terms with the termination or partial termination of that easement, which would then be subject to the termination provisions of the Regulations section 1.170A-14(g)(6)(i), the partial or total termination of a conservation easement through amendment is not prohibited by the language of the Regulations or the Code. Rather, the Code and Regulations require the perpetuation of conservation purposes over time, not the deed of conservation easement, through the dedication of proceeds consistent with the easement's original purposes.⁷⁶ The Regulations further create a safe harbor in judicial proceedings overseeing such termination. That safe harbor could apply solely to termination, or by extension of the concept that amendments might create partial terminations, also to amendments.⁷⁷

The fact that perpetual conservation easement amendments may be treated as terminations only further underscores the importance of state laws and policies providing guidance for holders considering such modifications. If the standard used by the Regulations is also the de facto standard for amendments under state law, then if it has become "impossible" or "impractical" to promote an easement's purpose, its amendment should be acceptable per se. If — like the Regulations — a state law or policy requires the perpetuation of conservation purposes for public benefit by dedicating the proceeds to purposes consistent with the original purpose, this too, should be acceptable, per se.

What if state law does not require judicial proceedings in amendment or termination of perpetual conservation easements? The plain language of the Regulations states that a holder can terminate a perpetual easement using judicial proceedings and protect conservation purposes in perpetuity.⁷⁸ This language has been interpreted by a federal tax court not to require that easements be terminated through judicial proceedings, but to recognize such termination as a "safe harbor."⁷⁹ *Carpenter* instructs further that mutual agreement by the parties to terminate an easement does not meet the perpetuity requirements of the Regulations.⁸⁰ The question then becomes whether some form of state law-based oversight for amendment and termination exists between judicial proceedings and mutual agreement to terminate perpetual conservation easements

⁷⁶ See *supra* notes 7–8 and accompanying text.

⁷⁷ See Treas. Reg. § 1.170A-14(g)(6)(i) (2009).

⁷⁸ See *id.*

⁷⁹ *Carpenter*, T.C. Memo 2012-1, at 18. Small forecasts these lines in the FEDERAL TAX LAW OF CONSERVATION EASEMENTS. "Additionally, there is [a] . . . theoretical question whether the authority of the IRS extends far enough to require that at some distant point in the future easements must be extinguished by judicial proceeding, rather than by mutual consent of the landowner and donee organization, for example." And ". . . the Service's concern is whether a gift qualifies for a deduction at the time it is made . . . not what the tax, civil, or criminal liabilities ought to be if something unexpected happens in two or twenty years." SMALL, *supra* note 3, at 16-4 to 16-5.

⁸⁰ *Carpenter*, T.C. Memo 2012-1, at 8.

donated for federal tax deductions, which meets the requirements of Regulations' section 1.170A-14(g)(6).

Treating amendments in the nature of termination for those amendments that change purposes or partially terminate an easement, and using judicial proceedings to manage such amendments, would be the most conservative and arguably consistent approach under current federal guidance. Additional state guidance then could be created consistent with state and federal law for amendments not in the nature of termination, and for all manner of holders and perpetual easements. A state concerned with donated easements and consistency with federal law could go so far as to create a bilateral approach for perpetual easements such that the parties to federally tax-deductible easements could reserve the right in their easements to avail themselves of judicial proceedings for termination (and amendments that change purposes or partially terminate), and parties to all other non-federally tax-deductible easements could opt for some other process consistent with their state law, such as administrative panel, government entity, attorney general, holder association, or holder review.

Further, the IRS and Treasury could address these issues as related to tax-deductible contributions and tax-exempt holders by applying the *Kaufman* court's vision of adjusting the language of the Regulations to clarify qualifications for conservation contributions donated for federal tax deductions, with specific regard to perpetual conservation easement amendment.⁸¹

IV. UNDERSTANDING AND UPDATE TO PART III — BALANCING THE GUIDANCE

Part III.B.2 of The Challenge examines options and next steps for addressing the overlap between these regimes, including doing something to make consistent the legal regimes and their guidance and doing something to inspire the IRS to provide its own guidance, defer to state law, or revise the Regulations specifically to address perpetual easement amendment.

The Challenge suggests that revising the Regulations to address perpetual conservation easement amendment would ameliorate states' need to craft additional guidance for easements donated for federal tax benefits. The IRS also can issue guidance addressing donated easement amendment, such as the Chief Counsel Opinion and general information letters noted here, although such guidance, while helpful in clarifying the general state of the law, has less weight than would the Regulations' actual revision.

⁸¹ The *Kaufman* court noted:

Without stifling Congress' aim to encourage legitimate easements, one can imagine IRS regulations that require appraisers to be functionally independent of donee organizations, curtail dubious deductions in historic districts where local regulations already protect against alterations, and require more specific market-sale based information to support any deduction. Forward looking regulations also serve to give fair warning to taxpayers.

Kaufman, 687 F.3d at 32.

In the meantime, the most consistent and conservative approach to amendment of perpetual conservation easements donated for federal tax deductions may be to treat the amendment that partially terminates or changes purposes as a termination, and to follow the Regulation's procedures for termination set out by section 14(g)(6). This is not to say, however, that valid state laws do not or cannot exist somewhere between mutual agreement to terminate and judicial proceedings, which complement and are consistent with the federal tax law of deductions for qualified conservation contributions.

However it is accomplished, through state laws, policies, revision to the Regulations, or the interpretation of amendments as terminations consistent with the Regulations, *The Challenge* and this Article seek guidance for perpetual conservation easements, to protect their integrity, and that of their holders. Such guidance holds the promise of orienting and providing direction for the taxicab, its owner, and its passengers along the collective journey of donors, holders, and purposes of perpetual conservation easements through time. Such guidance further holds the promise of equipping *all* participants in perpetual conservation easement transactions, regardless of non-profit or charitable gift status, with the mechanics and tools necessary for informed easement amendment and termination decisionmaking. Finally, such guidance holds the promise that ensuring the protection of land with perpetual conservation easements continues unabated, unfettered by uncertainty of process, and with confidence of purpose and integrity over time.

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