

SJ Quinney College of Law, University of Utah

## Utah Law Digital Commons

---

Utah Law Faculty Scholarship

Utah Law Scholarship

---

9-15-2021

### **Building Better Conservation Easements for America the Beautiful**

K. King Burnett

John D. Leshy

Nancy McLaughlin

Follow this and additional works at: <https://dc.law.utah.edu/scholarship>



Part of the [Land Use Law Commons](#)

---

# HARVARD ENVIRONMENTAL LAW REVIEW

September 15, 2021

## BUILDING BETTER CONSERVATION EASEMENTS FOR AMERICA THE BEAUTIFUL\*

K. King Burnett,<sup>1</sup> John D. Leshy,<sup>2</sup> & Nancy A. McLaughlin<sup>3</sup>

### INTRODUCTION

In January 2021, the Biden Administration endorsed the goal of protecting 30% of the nation's lands and waters by 2030 to conserve biodiversity and help curb greenhouse gas emissions.<sup>4</sup> The Administration's initial report on this "America the Beautiful" initiative, issued in May, indicates that federally-deductible conservation easements are likely to play an important role in its implementation.<sup>5</sup> This essay addresses whether and how such easements should be counted in this process.

This matter is of great importance. Donations of conservation easements, by which landowners receive generous federal tax deductions if they restrict the use of their properties in perpetuity in the interest of conservation, cost American taxpayers billions of dollars annually in foregone revenue. In addition, growing reports of abuse and other developments raise serious questions about the effectiveness of deductible easements in achieving durable conservation outcomes.

This essay outlines the fundamental problems plaguing the deductible conservation easement program. It compares practices regarding deductible conservation easements with the protocols employed in various government

---

\* Available online at <https://harvardelr.com/2021/09/15/building-better-conservation-easements-for-america-the-beautiful/>.

<sup>1</sup> [K. King Burnett](#) is a life member and past president of the Uniform Law Commission and served on the drafting committee for the Uniform Conservation Easement Act.

<sup>2</sup> [John D. Leshy](#) is the Emeritus Distinguished Professor of Law at the University of California, Hastings College of the Law. He was Solicitor (general counsel) of the Interior Department throughout the Clinton Administration.

<sup>3</sup> [Nancy A. McLaughlin](#) is the Robert W. Swenson Professor of Law at the University of Utah. S. J. Quinney College of Law. She has published more than thirty articles as well as book chapters and reports on conservation easements.

<sup>4</sup> Exec. Order No. 14008 of January 27, 2021, 86 Fed. Reg. 7619, 7627 (Feb. 1, 2021) [hereinafter Executive Order], <https://perma.cc/UFA8-CDKK>.

<sup>5</sup> See U.S. DEPT. OF THE INTERIOR, U.S. DEPT. OF AGRIC., U.S. DEPT. OF COM., COUNCIL ON ENVTL. QUALITY, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021), 6, 8–9, 10–12, 15, 17–18, 21 [hereinafter AMERICA THE BEAUTIFUL], <https://perma.cc/Z6J4-4X3M> (emphasizing the need to encourage voluntary conservation efforts on privately-owned lands). This report also notes that the U.S. Geological Survey's Protected Area Database (PAD) contains "useful, but incomplete, information about the conservation status of," among other things, "private lands subject to conservation easements." *Id.* at 17.

conservation easement purchase programs. It concludes with specific suggestions for making deductible easements an effective tool for achieving the America the Beautiful goal. Simply accelerating the pace of conservation easement donations is not enough—"to achiev[e] durable outcomes that meaningfully improve the lives of Americans,"<sup>6</sup> better conservation easements need to be built.

## I. THE DEDUCTIBLE CONSERVATION EASEMENT PROGRAM: SCOPE AND PROBLEMS

Federal law gives landowners generous tax deductions if they donate easements restricting the use of their properties in perpetuity in the interest of conservation to government entities or nonprofit organizations.<sup>7</sup> Billions of dollars of federal tax revenue are foregone each year as a result of these deductions. According to a former Treasury Department official, deductible conservation easements "rank among the largest federal environmental and land management programs in the [entire U.S.] budget," with the amount of revenue foregone each year approaching the annual budget of the National Park Service.<sup>8</sup> A Bipartisan Investigative Report that the Senate Finance Committee released in August 2020 examined just one category of deductible conservation easements and estimated they may have cost taxpayers more than ten billion dollars in foregone revenue over an eight-year period.<sup>9</sup> In effect, the American taxpayer is purchasing land conservation with these foregone revenues. How much value the taxpayer is receiving in return is an important question. The answer is even more important when lands subject to deductible conservation easements are counted toward the America the Beautiful goal.

A related development is the spotlight that has been trained on the structure and enforcement of the nation's tax laws. This interest is driven by, among other things, the search for more revenue to stem budget deficits and growing concern

---

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

<sup>7</sup> See I.R.C. § 170(h); Treas. Reg. § 1.170A-14.

<sup>8</sup> See Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INSTITUTION (Dec. 20, 2017), <https://perma.cc/P8UB-TUJF> (pegging the revenue lost from the conservation easement deduction at between \$1.6 to 2.9 billion in 2016, including non-syndicated as well as the syndicated deals described further below); Brookings Experts, Adam Looney, Nonresident Senior Fellow-Economic Studies, Executive Director, Marriner S. Eccles Institute, University of Utah, BROOKINGS INSTITUTION, <https://perma.cc/X37L-7RDJ> (last visited Aug. 2, 2021).

<sup>9</sup> See S. COMM. ON FINANCE, 116TH CONG., BIPARTISAN INVESTIGATIVE REP. ON SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS 2–3 (Comm. Print 2020) [hereinafter SENATE BIPARTISAN INVESTIGATIVE REPORT], <https://perma.cc/3D72-ZTBT>. See also, Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2017, 6:30 AM EST), <https://perma.cc/44N7-RA4H>.

about the unprecedented level of wealth and income inequality in our society, coupled with reports that the nation's wealthy pay fewer taxes than the average person.<sup>10</sup> An additional concern, highlighted in a recent report on land conservation incentives in the state of Virginia, is that—in the words of the state's Secretary of Natural Resources—“continuing to give huge tax breaks to a largely White landowning class ... is not a 21st-century land conservation policy, and it's certainly not equitable.”<sup>11</sup>

Growth in the popularity of federally-deductible conservation easements has also been accompanied by a rising concern about abuses of the relevant tax code provisions. In 2003 and 2004, the *Washington Post* published a series of articles describing abuses and questionable benefits of deductible conservation easements.<sup>12</sup> Thereafter, the Land Trust Alliance, the trade association of land trusts, took steps to address some of the problems.<sup>13</sup> In 2006, Congress modestly tightened requirements for one narrow category of deductible easements (façade easements) and modified appraisal and penalty provisions to try to deal with problems of overvaluation, but at the same time also made the deduction more generous, especially for farmers and ranchers.<sup>14</sup> None of these measures were

---

<sup>10</sup> See, e.g., Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021, 5:00 AM EDT), <https://perma.cc/ZGV8-H5K9>. Internal Revenue Service audit and enforcement funding has declined sharply in recent years. See Alan Rappeport, *Tax Cheats Cost the U.S. \$1 Trillion Per Year, I.R.S. Chief Says*, N.Y. TIMES (Apr. 13, 2021), <https://perma.cc/LN4B-9JV9> (IRS enforcement ranks fell by 17,000 over the last decade). President Biden proposed nearly doubling this funding over the next decade. See Jim Tankersley & Alan Rappeport, *Biden Seeks \$80 Billion to Beef Up I.R.S. Audits of High-Earners*, N.Y. TIMES (Apr. 27, 2021, updated July 7, 2021), <https://perma.cc/YQ4Q-8VBT>.

<sup>11</sup> Sarah Vogelsong, *Study Questions Virginia Support for Conservation Easements*, THE VIRGINIA MERCURY (August 25, 2021) (quoting Matthew Strickler, Virginia Secretary of Natural Resources), <https://perma.cc/E7BP-CA8G> (last visited Aug. 26, 2021). Virginia's program is closely tied to the federal deduction program because it gives state tax breaks to easement donors meeting the requirements for the federal deduction.

<sup>12</sup> See, e.g., Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST (Dec. 21, 2003), <https://perma.cc/WD3W-CYUL> (describing, among other things, overvaluation, developers receiving deductions for easements on “unusable” portions of subdivisions, and surveys showing violations and alterations of easement restrictions); Joe Stephens, *For Owners of Upscale Homes, Loophole Pays*, WASH. POST (Dec. 12, 2004), <https://perma.cc/XF3V-DHUG> (describing how facade easements often do no more than duplicate restrictions imposed by local law).

<sup>13</sup> See *infra* note 55 and accompanying text, discussing the Land Trust Accreditation Commission.

<sup>14</sup> See, e.g., I.R.C. § 170(b)(1)(E)(iv)–(v); § 170(f)(11); § 170(h)(4)(B). See also Nancy A. McLaughlin, *Trying Times: Conservation Easements and Federal Tax Law 4-13* (Sept. 9, 2020) (unpublished outline), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3691101](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691101) (describing developments in the deductible conservation easement context). Façade easements are placed on historic structures to preserve their historic characteristics.

particularly effective in curbing abuses,<sup>15</sup> and so the Obama Administration included suggestions for reform in each of its Revenue Proposals for fiscal years 2013 through 2017, but no reforms have yet been enacted.<sup>16</sup>

In recent years, an additional form of abuse has proliferated and gained notoriety—so-called “syndicated donation transactions.” In these schemes, promoters promise wealthy investors large tax deductions when they purchase interests in entities owning tracts of land. The entities donate greatly over-valued conservation easements to nonprofit land trusts and the inflated tax deductions are then distributed to the investors. The Senate Finance Committee has condemned these tax-shelter transactions, characterizing them as vending machines that give an investor two dollar bills back for every dollar bill inserted.<sup>17</sup> The IRS has been using some of its scarce enforcement resources to try to curb this practice.<sup>18</sup> Legislation has been introduced in Congress to do the same,<sup>19</sup> supported by the Land Trust Alliance.<sup>20</sup>

While the IRS initiative and the proposed legislation are welcome, they are aimed at the practice of syndication, and the contemplated reforms would have little effect on the problem of overvaluation outside of the syndication context.<sup>21</sup> Even more important, the focus on syndications ignores other fundamental problems plaguing the deductible conservation easement program, including the following:

---

<sup>15</sup> See, e.g., *Belk v. Comm’r*, 774 F.3d 221, 225-228 (4th Cir. 2014) (deduction denied for golf course easement authorizing the parties to agree to change the land subject to the ostensibly perpetual easement); *Hoffman v. Comm’r*, 956 F.3d 832, 833 (6th Cir. 2020) (deduction denied for façade easement empowering the donor to make harmful changes whenever the donee fails to respond to a request within 45 days). See also generally *McLaughlin*, *supra* note 14 (discussing the voluminous case law in this context, which reveals various forms of noncompliance and abuse).

<sup>16</sup> See, e.g., DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2017 REVENUE PROPOSALS 213–216 (FEB. 2016), <https://perma.cc/TV88-FM48>.

<sup>17</sup> SENATE BIPARTISAN INVESTIGATIVE REPORT, *supra* note 9, at 2–3, 16–17, 24.

<sup>18</sup> *Id.* at 1–4.

<sup>19</sup> Press Release, U.S. Congressman Mike Thompson, Thompson Introduces Charitable Conservation Easement Program Integrity Act, (June 24, 2021), <https://perma.cc/9E6F-WNNE>.

<sup>20</sup> See Tax Shelter Legislation, LAND TRUST ALLIANCE, <https://perma.cc/87PV-X8WX> (last visited Aug. 2, 2021).

<sup>21</sup> See Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX. REV. 227, 228 (2016) (describing the persistent problem of overvaluation outside of the syndication context). See also, e.g., *PBBM-Rose Hill, Ltd. v. Comm’r*, 900 F.3d 193, 209–13 (5th Cir. 2018) (the court determined that a golf course conservation easement had a value of \$100,000, not the \$15.16 million the taxpayer had claimed).

- Because the Internal Revenue Code (Code) uses very general language in describing the conservation purposes that qualify for deductibility,<sup>22</sup> tax deductions are claimed for easements that provide little or no public conservation benefits. Extreme examples include easements placed on private golf courses in gated residential communities,<sup>23</sup> or on grassy areas between housing in real estate developments.<sup>24</sup>
- The Code and regulations have very lenient standards regarding who may qualify as an eligible donee/holder of a deductible easement.<sup>25</sup> Neither requires a donee/holder to have the financial resources, expertise, or will to monitor and enforce deductible conservation easements over their perpetual lives<sup>26</sup> so as to ensure that conservation benefits are realized.<sup>27</sup> Neither requires donee/holders to have any degree of independence from easement donors or successor landowners.

---

<sup>22</sup> For example, preserving land “for outdoor recreation by, or the education of, the general public,” and protecting “a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem” are qualifying conservation purposes. I.R.C. § 170(h)(4)(A)(i)–(ii).

<sup>23</sup> *See, e.g.,* Champions Retreat Golf Founders, LLC v. Comm’r, 959 F.3d 1033 (11th Cir. 2020), which concluded that the conservation easement qualified as protecting habitat, while a dissenting judge complained that more than 80% of the land covered by the easement was a “man-made golf course” that required tens to hundreds of thousands of gallons per day from a nearby river to irrigate its non-native grasses, and the course was coated with “potent chemicals,” including fungicides, herbicides, insecticides, and algacides, that created environmental hazards for nearby waters and otherwise undisturbed wetlands. *Id.* at 1042.

<sup>24</sup> *See* Adam Looney, *Charitable Contributions of Conservation Easements* 4, 6–7, 18–19 (Brookings Institution, May 2017), <https://perma.cc/63ND-84A2> (“[T]he scope of what qualifies as a valid purpose has expanded to include easements on properties that do not provide public benefits or do not further bona fide conservation policies . . .”). As another example, the Fifth Circuit held that a conservation easement on a golf course in a gated residential community furthered the statutory purpose of preserving “land areas for outdoor recreation by . . . the general public” even though the general public was denied access to a substantial portion of the property that the homeowners converted into a private park. *PBBM-Rose Hill, Ltd v. Comm’r*, 900 F.3d 193, 202 (5th Cir. 2018).

<sup>25</sup> Government entities and publicly-supported charities and supporting organizations qualify. *See* I.R.C. § 170(h)(1)(B), (3); SENATE BIPARTISAN INVESTIGATIVE REPORT, *supra* note 9, at 10.

<sup>26</sup> Deductible easements must be “granted in perpetuity” and their conservation purposes must be “protected in perpetuity.” I.R.C. §§ 170(h)(2)(C), (h)(5)(A).

<sup>27</sup> While the Treasury regulations require that eligible donees have “a commitment to protect the conservation purposes of the donation” and “the resources to enforce the restrictions,” an organization satisfies the commitment requirement if its organizational documents state that it has one or more conservation purposes, and the regulations do not require the donee to set aside funds for enforcement. *See* Treas. Reg. § 1.170A-14(c)(1). *See also* Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 2013 UTAH L. REV. 755, 759–760 (2013).

- The lenient standards for donee/holders of deductible easements, coupled with the money that can be made if easement restrictions are relaxed or eliminated, can make it difficult for donee/holders to insist on retaining the restrictions to fulfill the promise of permanently protecting conservation values. A recent decision by the U.S. Court of Appeals for the Eleventh Circuit has greatly increased this risk. It held that a deductible conservation easement is simply, in the court’s words, a “bilateral contract” that the parties—the owner of the land and the holder of the easement—“can always agree after the fact to amend...whether or not they expressly reserve that right,”<sup>28</sup> instead of being a perpetual gift, the terms of which are dictated by federal law and legally binding on the parties, which had always been the previous understanding.<sup>29</sup> Even if a deductible easement contains a clause that appropriately limits amendments,<sup>30</sup> this decision opens the way for the parties to agree to water down or even remove that clause.<sup>31</sup> This decision is particularly disturbing because the Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia, where syndications have proliferated and the amount of land covered by conservation easements has grown dramatically.
- The lack of transparency in the entire process makes it very difficult to gauge the conservation benefits conferred by deductible conservation easements. One recent study of a sample of 201 conservation easement donations illustrates this difficulty. It concluded that “conservation

---

<sup>28</sup> Pine Mountain Pres., LLLP v. Comm’r, 978 F.3d 1200, 1209 (11th Cir. 2020) (emphasis omitted).

<sup>29</sup> See *supra* note 26; Belk v. Comm’r, 774 F.3d 221, 227 (4th Cir. 2014) (“a charitable deduction may be claimed for the donation of a conservation easement only when that easement restricts the use of the donated property in perpetuity”); Carpenter v. Comm’r, T.C. Memo. 2012-1, at \*6 (deductible easements were restricted charitable gifts, or contributions conditioned on the use of the gifts in accordance with the precise directions and limitations in the deeds); Private Lands Conservation, Land Easements, THE NATURE CONSERVANCY, <https://perma.cc/A3F9-ZRDJ> (last visited Aug. 2, 2021) (a conservation easement “constitutes a legally binding agreement that limits certain types of uses or prevents development from taking place on the land *in perpetuity*”) (emphasis added); ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 7 (LAND TRUST ALLIANCE, 2d ed. 2005) (quoting former Land Trust Alliance President, Rand Wentworth: “For the many people who love their land, [a conservation easement] is the best way to ensure that it will be preserved *for all time*.”) (emphasis added).

<sup>30</sup> See Nancy A. McLaughlin, *Amendment Clauses in Easements: Ensuring Protection in Perpetuity*, 168 TAX NOTES FEDERAL 819, 821 (2020). See also IRS Chief Counsel Advisory AM 2020-001 (March 17, 2020) (providing a sample amendment clause).

<sup>31</sup> Moreover, although Treasury regulations provide that a deductible conservation easement can be formally extinguished only in a judicial proceeding, see Treas. Reg. § 1.170A-14(g)(6)(i); Belk v. Comm’r, 774 F.3d 221, 225 (4th Cir. 2014), an easement can be effectively extinguished by amending away all substantive restrictions in the deed.



easements contribute to wildlife and habitat conservation objectives,”<sup>32</sup> but it focused on the baseline condition reports prepared in connection with the donations, most of which involved syndications.<sup>33</sup> Even assuming the baseline reports were reliable and the properties had significant wildlife and habitat values,<sup>34</sup> determining whether the easements will provide genuine and lasting protection of those values would require, among other things, careful legal review of the individual easement deeds. The restrictions in easement deeds, and the rights the deeds reserve to the owners of the land, can vary widely. This study also did not address whether the easements limited the parties’ ability to modify or lift the easements’ restrictions and did not assess the resources or expertise of the donee/holders.<sup>35</sup> All this means that, as a measure of the effectiveness of the deduction program in achieving durable conservation goals, there is much less in this study than meets the eye.<sup>36</sup>

## II. ADDRESSING THE PROBLEMS

Along with chronic overvaluation, the foregoing problems need to be addressed if deductible conservation easements are to serve as an important tool for carrying

---

<sup>32</sup> William J. Snape, III et al., *Conservation Easements as a Tool for Nature Protection*, 171 TAX NOTES FEDERAL 875, 877, 884 (2021).

<sup>33</sup> *Id.* at 877–78. To be eligible for a deduction, the condition of the subject property at the time of the easement donation must be documented. See Treas. Reg. § 1.170A-14(g)(5)(i). This documentation, which typically includes maps and photographs, is generally referred to as a “baseline” report.

<sup>34</sup> The researchers reportedly did not visit the properties to verify the accuracy of the baseline reports. See William E. Ellis, *The Naked Truth About Conservation Easement Appraisals*, 171 TAX NOTES FEDERAL 1777, 1778 (criticizing the study on this and a number of other grounds).

<sup>35</sup> The study also did not address valuation issues, including the easements’ cost-effectiveness in terms of tax revenues foregone.

<sup>36</sup> Another study, which was funded by Ornstein-Schuler Investments LLC (an enterprise that sold interests in conservation easement syndications to investors), focused solely on whether high-priority species were present on a sample of 49 easement-encumbered properties in Alabama. See Peter Kareiva et al., *Documenting the Conservation Value of Easements*, CONSERVATION SCI. AND PRAC., e451, at 2, 11 (May 18, 2021). Despite the title of their study, the researchers concededly did not address whether the easements they studied halted habitat degradation or conversion, even while acknowledging that was key to determining the easements’ effectiveness in protecting land with high-priority species. *Id.* at 11. The researchers also admitted other limitations in their analytical method. *Id.* at 10. A recent audit of a sample of conservation easements in Virginia found a number of troubling problems, including easements containing no limits on the destruction of natural habitats, as well as extensive trash and debris on one easement-encumbered property. See OFF. OF THE ST. INSPECTOR GEN., COMMONWEALTH OF VA., DEP’T OF CONSERVATION AND RECREATION AND DEP’T OF TAX’N CONSERVATION EASEMENT/LAND PRESERVATION TAX CREDIT PERFORMANCE AUDIT 5, 7 (JUNE 2021), <https://perma.cc/4PP4-ZHSP>. See also Vogelsong, *supra* note 11.



out the America the Beautiful initiative. President Biden’s Executive Order committing to the initiative directs the executive branch to develop guidelines “for determining whether lands and waters qualify for conservation.”<sup>37</sup> In developing such guidelines, the Administration needs to try to ensure that deductible conservation easements are counted toward the America the Beautiful goal only if they are (a) limited to lands that have demonstrable conservation values; (b) drafted to protect those values; (c) durable—that is, subject to clear limits on how they may be modified post-donation; and (d) held only by entities that have the capacity and obligation to monitor and enforce compliance with their conditions.

A good place to start is to examine conservation easement programs that contain numerous safeguards—those that involve the purchase of easements by the U.S. government, principally the Agriculture Department. Under these programs, some of which date back many decades, the government has expended billions of dollars to purchase easements that restrict the use of many millions of acres in order to promote conservation objectives.<sup>38</sup> Although the specific terms vary, these federal easement purchase programs generally include the following safeguards:

- criteria for selecting the easements funded by the program,
- standardized minimum easement terms,
- mandatory appraisal practices designed to minimize overvaluations,
- specific limits on the rights that landowners may reserve on the easement-encumbered land,
- specific limits on whether and how the easements may be modified or terminated after they are purchased,
- specific protocols for monitoring and reporting, and
- where the purchased easement is held by an entity other than a federal agency,<sup>39</sup> a grant to the U.S. government of the right to enforce the easement.

Such safeguards could be applied to donated (as opposed to purchased) conservation easements in a variety of ways, singly or in combination.

Our principal recommendation is that the Biden Administration develop minimum requirements for a deductible easement to be counted as helping meet the

---

<sup>37</sup> Executive Order, *supra* note 4, § 216(a)(ii).

<sup>38</sup> See, e.g., Agricultural Conservation Easement Program, USDA NATURAL RESOURCES CONSERVATION SERVICE, <https://perma.cc/8RGX-6WAF> (last visited Aug. 2, 2021); Healthy Forests Reserve Program, USDA NATURAL RESOURCES CONSERVATION SERVICE, <https://perma.cc/66VC-2WUF> (last visited Aug. 2, 2021); Forest Legacy, USDA FOREST SERVICE, <https://perma.cc/BF7V-6EQY> (last visited Aug. 2, 2021).

<sup>39</sup> For example, through its Agricultural Conservation Easement Program (ACEP), the Natural Resources Conservation Service provides financial assistance to eligible partners, including qualifying land trusts, to enable them to purchase conservation easements. See *supra* note 38.

America the Beautiful goal. It could, for example, direct the Agriculture and Interior Departments to administer a screening process with that objective. While minimum requirements can feasibly be applied only to easements created after the requirements are announced, the Administration should consider developing a review process for existing easements to try to ensure that they also meet the America the Beautiful objectives.

The IRS could help by issuing guidance regarding compliance with existing federal tax law requirements, which might take the form of General Information Letters, Chief Counsel Advisories, or Notices.<sup>40</sup> Congress could help through legislation, by including additional safeguards in the statutory requirements for deductible easements, and by providing financial incentives (such as an enhanced deduction or a tax credit) for donated easements that meet America the Beautiful minimum requirements.<sup>41</sup>

### III. SPECIFIC MEASURES WORTH CONSIDERING

Careful study will, we believe, show numerous feasible ways the foregoing objectives can be achieved, both under existing law and with some adjustments by Congress. The following are some specific measures worth considering.

#### *A. Deed Terms*

There are huge disparities in how deductible conservation easements are drafted. One reason for this is the paucity of authoritative guidance. Standardization of certain key provisions in deductible easements would greatly facilitate taxpayer compliance, as well as consistency in easement administration, interpretation, and enforcement. This would foster better, more lasting conservation outcomes.

The USDA's Natural Resources Conservation Service has developed "minimum deed terms" for easements acquired pursuant to its Agricultural Conservation Easement Program (ACEP).<sup>42</sup> The IRS could similarly develop

---

<sup>40</sup> The IRS could adopt regulations to provide some safeguards, but IRS rulemakings typically take many years to complete, which conflicts with the America the Beautiful timetable. For example, proposed regulations regarding substantiation and reporting requirements for charitable contribution deductions were issued August 7, 2008, and final regulations were not issued until July 30, 2018—almost a decade later. *See* Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions, 73 Fed. Reg. 45,908 (Aug. 7, 2008) (proposed rulemaking); Substantiation and Reporting Requirements for Cash and Noncash Charitable Contribution Deductions, 83 Fed. Reg. 36,417 (July 30, 2018) (final regulations).

<sup>41</sup> Congress has enhanced the tax incentives in the past. *See supra* note 14 and accompanying text.

<sup>42</sup> *See* Farmland Information Center, Sample Documents, ACEP-ALE Minimum Deed Terms (Feb. 2020), AMERICAN FARMLAND TRUST [hereinafter ACEP Minimum Deed Terms], <https://perma.cc/2DP4-Y9FC> (last visited Aug. 2, 2021). For the Healthy Forests Reserve Program

minimum, or in this context, “sample,” deed terms that comply with federal tax requirements for deductible conservation easements.<sup>43</sup> A number of groups have recommended that the IRS do this.<sup>44</sup> Donors would not be required to use the sample terms but would be motivated to do so because it would reduce their risk of audit and litigation. The Biden Administration could count new easements for America the Beautiful only if they contain the sample deed terms. It also could count new easements only if they specifically prohibit certain activities, like industrial and commercial development, hazardous waste storage and disposal, and more than minimal residential development.

### *B. Durability*

As noted earlier, a recent decision by the Eleventh Circuit Court of Appeals creates grave doubt about the durability of deductible easements.<sup>45</sup> If a landowner and a donee/easement holder can agree to freely release or otherwise amend an easement’s restrictions, the conservation benefits purchased by the tax deduction can be illusory.<sup>46</sup> A federal easement program that is intended to produce durable conservation outcomes and that costs American taxpayers billions of dollars annually should not tolerate this result.

The Biden Administration should be sensitive to this problem in developing guidelines for determining whether to count deductible easements as helping to meet the America the Beautiful goal. While amendments may be appropriate in order to allow conservation easements to adapt to changing conditions over their perpetual lives, some oversight is necessary to protect the public interest, given the

---

Conservation Easement Deed, see Healthy Forest Reserve Program, USDA NATURAL RESOURCES CONSERVATION SERVICE, <https://perma.cc/33BK-LYWG> (last visited Aug. 2, 2021). These documents are not drafted to comply with federal tax law requirements.

<sup>43</sup> These include, for example, the restriction on transfer, no inconsistent use, and judicial extinguishment requirements. See Treas. Reg. § 1.170A-14(c)(2), (e)(2)-(3), (g)(6). For a list of possible sample deed terms, see W. William Weeks et al., *ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP. TR. & EST. L.J. 245, 260-61 (2019) [hereinafter *ABA Report*].

<sup>44</sup> See, e.g., *ABA Report*, *supra* note 43; NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 218–219 (2020), <https://perma.cc/8422-V3GL>. See also S. COMM. ON FINANCE, QUESTIONS FOR THE RECORD, HEARING ON THE NOMINATION OF DR. JANET YELLEN, RESPONSES BY DR. YELLEN 61 (JAN. 21, 2021), <https://perma.cc/M3V3-BB6K>. (Dr. Yellen endorsed the goal of providing more certainty through the issuance of taxpayer guidance).

<sup>45</sup> See *supra* note 28 and accompanying text.

<sup>46</sup> Mandating the use of the sample deed terms would be pointless if the parties were free to modify those terms post-donation.

financial and other pressures that can be brought to bear on donee/holders to agree to amendments.<sup>47</sup>

The IRS could address this problem by developing sample deed terms that place strict controls on post-donation amendments<sup>48</sup> and also confirm that the easement was conveyed as a perpetual charitable gift, the terms of which are intended to be legally binding on both the donor and the donee and their successors in interest. The Administration could also consider counting easements for purposes of the America the Beautiful goal only if they provide that the U.S. government be notified in advance of proposed amendments and granted a right of enforcement.<sup>49</sup> And of course Congress could address this problem by denying deductibility to easements that lack strict and binding controls on post-donation amendments.<sup>50</sup>

### *C. Eligible Donees*

As noted earlier, because the Code and the regulations have very lenient standards regarding who may qualify as an eligible donee/holder of a deductible easement, many donee/holders may lack the resources, expertise, or will to enforce deductible easements over their perpetual lives.<sup>51</sup> To address this shortcoming, Congress or the executive could require donee/easement holders to have adequate financial reserves, sufficient capacity to annually monitor the deductible easements they hold,<sup>52</sup> and independence from easement donors and subsequent owners of the encumbered lands.<sup>53</sup> Donee/holders could also be required to provide the U.S. with annual reports documenting that the owner and holder are in compliance with the

---

<sup>47</sup> The rules governing a land trust's tax-exempt status do not prevent a land trust from agreeing to weaken or even eliminate the restrictions in a conservation easement it holds, provided the land trust is adequately compensated and uses the compensation for its charitable purposes. *See, e.g.,* Colinvau, *supra* note 27, at 763 (“At the level of tax exemption, a generic commitment by the organization to an exempt purpose is what matters and not the purpose of the property held.”).

<sup>48</sup> *See supra* note 30 (citing sources, including an IRS Chief Counsel Advisory, providing sample deed terms that place strict controls on amendments).

<sup>49</sup> The U.S. government must approve amendments to ACEP easements and is granted a right of enforcement if the terms of an ACEP easement are not enforced by the grantee. *See* ACEP Minimum Deed Terms, *supra* note 42, at 1, 8–9, 10–11.

<sup>50</sup> *See supra* note 30 for sources discussing amendments and amendment clauses.

<sup>51</sup> *See supra* notes 25–27 and accompanying text.

<sup>52</sup> For large landscapes, satellite monitoring or other remote sensing might be used.

<sup>53</sup> For eligibility requirements for holders of ACEP easements, see TITLE 440-CONSERVATION PROGRAMS MANUAL, PART 528-AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP), SUBPART D § 528.32 (Feb. 2020), <https://perma.cc/UAE2-KWJC>.

easement terms. At least one federal easement purchase program includes these safeguards.<sup>54</sup>

The Biden Administration could also require, in order for deductible easements to count for the America the Beautiful initiative, that eligible donee/holders be accredited by the Land Trust Accreditation Commission.<sup>55</sup> There is, however, reason to believe that accreditation alone would provide insufficient protection. The Accreditation Commission was established by the Land Trust Alliance reactively, in response to the *Washington Post* series on problems with conservation easements and calls for reform.<sup>56</sup> It is a form of self-regulation, with the risks and limitations that that entails. In fact, as noted earlier, abuses of deductible easements have continued and even proliferated since the Commission was established.

#### *D. Accurate Appraisals*

The IRS could develop a standardized sample appraisal form along with instructions for deductible conservation easements.<sup>57</sup> Donors would not be required to use the sample form but would be motivated to do so because it would reduce their risk of audit and litigation. The Biden Administration could count new easements for America the Beautiful only if the donors use the sample appraisal form.

#### *E. Congress Could Adjust the Subsidy in Various Ways*

As noted earlier, President Biden's Executive Order calls for the development of guidelines "for determining whether lands and waters qualify for conservation."<sup>58</sup> The Administration could pro-actively identify particular landscapes and other priority areas that can help meet the America the Beautiful

---

<sup>54</sup> See, e.g., ACEP Minimum Deed Terms, *supra* note 42, at 8 (requiring the grantee to provide the U.S. with an annual monitoring report).

<sup>55</sup> See About the Commission, LAND TRUST ACCREDITATION COMMISSION, <https://perma.cc/5PM8-VZN8> (last visited Aug. 2, 2021).

<sup>56</sup> See *Land Trust Accreditation Ten-Year Impact Evaluation*, LAND TRUST ALLIANCE, <https://perma.cc/9JXP-8ZM7> (last visited Sept. 7, 2021) ("Fifteen years ago the land trust community was ill prepared to live up to the promise of perpetuity and was under legislative and regulatory threat. The Land Trust Alliance created the accreditation program and the Land Trust Accreditation Commission as a solution"); McLaughlin, *supra* note 14, at 5-6 (describing calls for reform following the Washington Post series); *supra* notes 12-13 and accompanying text.

<sup>57</sup> See *ABA Report* *supra* note 43, at 337-38 (recommending development of such a form and instructions, and explaining that they would guide appraisers through the appraisal process, reducing errors and producing a level of consistency unseen today).

<sup>58</sup> Executive Order, *supra* note 4, § 216(a)(ii).

goal. Considerable work has already been done on this subject outside the government.<sup>59</sup>

Congress could bolster existing federal conservation easement purchase programs in the identified priority areas. As already noted, those programs have some safeguards in place that help ensure genuine, durable protection of important conservation values and accurate valuation of the easements. Congress could also reduce or eliminate the deduction for donated easements in non-priority areas while providing additional safeguards in the statutory requirements for deductible easements.

### CONCLUSION

The American the Beautiful initiative has a clear goal: to achieve durable conservation outcomes that meaningfully improve the lives of Americans. This goal will not be accomplished if conservation easements of poor quality or uncertain durability are counted.

This essay has suggested a number of measures that could be implemented to help ensure that conservation easements counted toward the America the Beautiful goal will be (a) limited to lands that have demonstrable conservation values, (b) drafted to protect those values, (c) subject to clear limits on how they may be modified or terminated post-donation, (d) held only by entities that have the capacity and obligation to monitor and enforce compliance with their conditions, and (e) accurately valued.

While we concentrate in this essay on the America the Beautiful initiative, many of the proposals herein would improve administration of the conservation easement deduction program more generally, and the effectiveness of conservation easements as permanent land protection tools. The American people and taxpayers deserve no less.

---

<sup>59</sup> See, e.g., *Resilient and Connected Landscapes*, THE NATURE CONSERVANCY, <https://perma.cc/6AK5-XN86> (last visited Aug. 2, 2021) (identifying and mapping a proposed conservation network of representative climate-resilient sites designed to sustain biodiversity and ecological functions into the future under a changing climate). See also Lindsay Rosa & Jacob Malcom, *Getting to 30X30: Guidelines for Decision-Makers*, DEFENDERS OF WILDLIFE, (2020), <https://perma.cc/L4ZY-7VY7>.