

PERPETUITY IS FOREVER, ALMOST ALWAYS:
WHY IT IS WRONG TO PROMOTE AMENDMENT
AND TERMINATION OF PERPETUAL
CONSERVATION EASEMENTS

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*When a landowner makes a charitable gift of a conservation easement to a nonprofit organization or government entity and elects to seek a federal tax deduction, both landowner and easement holder are subject to federal tax laws and regulations governing the creation, monitoring, amendment, and extinguishment of the easement. A nonprofit easement holder is subject to federal laws governing nonprofit operations. The nonprofit and government holders are also subject to state laws governing the operations of nonprofit organizations and the administration of charitable and other public assets on behalf of the public. All of these laws affect and restrict the ability of nonprofit and government holders to amend and terminate perpetual conservation easements. Contrary to representations made in *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Conservation Easements*, 36 *Harv. Envtl. L. Rev.* 1 (2012), none of these laws can be ignored.*

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INTRODUCTION

Although it gathers wide ranging information and citations, Jessica Jay’s article, *When Perpetual Is Not Forever: The Challenge of Changing Condi-*

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tions, Amendment, and Termination of Perpetual Conservation Easements,¹ ignores governing law and facts and makes mistakes in analysis leading to flawed conclusions. Most notably, *The Challenge* ignores the primacy of federal law and federal requirements applicable to those who take federal tax deductions and relies on case law that does not support its thesis. *The Challenge* implies that conservation easement donors and government entities and land trusts accepting easement donations are free to ignore both federal tax requirements and the rules that govern administration of charities and charitable gifts.

The Challenge states that it is based on the assumed “unsettled nature of the law surrounding perpetual conservation easement amendment and termination.”² But the United States Internal Revenue Services (“IRS”) and the public face of the land trust community give little indication that the law of federally deductible easements is unsettled. Instead, the law is clear: Easements are solicited and granted in perpetuity, to be amended or terminated only in extraordinary circumstances and to be terminated only with court approval or through condemnation.³ Visit 100 or 500 land trust websites; the message on easement amendment and termination is virtually uniform: Both are described as extremely difficult or impossible. The websites are equally uniform in weaving promises out of the words “protect your land” and “forever.”⁴ The

¹ 36 HARV. ENVTL. L. REV. 1 (2012) [hereinafter *The Challenge*].

² *The Challenge*, *supra* note 1, at 4.

³ For example, a report from the Land Trust Alliance explains:

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

LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES 24 (2007).

⁴ See, e.g., *Land Conservation*, GALLATIN VALLEY LAND TRUST, <http://www.gvlt.org/land-conservation> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (“Each conservation easement is tailored for the property’s unique resources and for the landowner’s vision. The agreements run with title to the land and last in perpetuity. The Gallatin Valley Land Trust is responsible for making sure the easement’s terms are upheld through our stewardship program.”); *Frequently Asked Questions*, MONTANA ASS’N OF LAND TRUSTS, <http://www.montanalandtrusts.org/faqs/> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (“[C]urrent landowners who grant or otherwise convey a conservation easement want assurances their property will be protected not just through their lifetime, but permanently”); *Frequently Asked Questions About Conserving Your Land*, VERMONT LAND TRUST, <http://www.vlt.org/land-protection/frequently-asked-questions> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (“When you conserve your land, you . . . dedicate your property, forever, to being a part of Vermont’s rural, productive, and natural landscape. . . . As the holder of the conservation easement, our role is to ensure the terms of the conservation easement are honored by all future owners of your property.”); *Protect Your Special Place*, WEST VIRGINIA

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

I. FEDERAL LAW GOVERNS ALL LAND TRUSTS AS 501(c)(3) CHARITIES

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

Land trusts are formed under the law of a particular state and operate under that law and the law of other states in which they do business. State law controls such corporate matters as the minimum number of directors, annual meeting and filing requirements, and so on.⁸ To accept conservation easements entitled to enjoy federal tax deductions, however, a land trust must satisfy all applicable federal laws.⁹ Federal law is paramount when made applicable by Congress and pertinent facts. The Supremacy Clause so mandates.¹⁰ “The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”¹¹

LAND TRUST, at 3, available at http://www.wvlandtrust.org/pdfs/Land_Trust_Folder_Brochure_WEB.pdf (“It is the responsibility of the Land Trust to monitor easement compliance forever.”). For many more examples, put “perpetuity,” “forever,” and “land trust” or “conservation easement” into any search engine.

⁵ 26 U.S.C. § 501(c)(3) (2006). See generally MARION FREMONT-SMITH, *GOVERNING NON-PROFIT ORGANIZATIONS* (2004).

⁶ Treas. Reg. § 1.170A-14(c) (2009).

⁷ 26 U.S.C. § 170(h)(1)(B), (3); Treas. Reg. § 1.170A-14(c). The IRS can and will strip a land trust of its nonprofit status for violation of federal perpetuity requirements. See, e.g., IRS Priv. Ltr. Rul. 201110020 (Mar. 11, 2011).

⁸ E.g., Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 6–13 (2011).

⁹ See 26 U.S.C. § 170(h). See generally James J. Fishman, *Commentary: The Federalization of Nonprofit Regulation and Its Discontents*, 99 KY. L.J. 799 (2010) [hereinafter Fishman, *Discontents*].

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

¹¹ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005); see also *Gage v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). See generally Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000); Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2005); Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912 (2007).

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

1. when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,
2. when there is outright or actual conflict between federal and state law,
3. where compliance with both federal and state law is in effect physically impossible,
4. where there is implicit in federal law a barrier to state regulation,
5. where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, or
6. where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.¹²

To be tax exempt themselves and qualified to accept donated easements giving rise to federal income tax deductions for donors, land trusts must satisfy all federal requirements governing 501(c)(3) charities, including prohibitions on private benefit and private inurement and specific eligible donee requirements under section 170(h) and Treasury Regulation § 1.170A-14(c) (§ 1.170A-14 collectively as “Treasury Regulations”).¹³ A state cannot lawfully legislate to diminish requirements of sections 170(h), 501(c)(3), or 1.170A-14 for federally deductible donations. Federal tax requirements would be meaningless if states could eliminate federal tests for status as a 501(c)(3) charity or diminish Treasury Regulations requirements for receipt of federal tax deductions.

II. FEDERAL LAW GOVERNS KEY ASPECTS OF MOST CONSERVATION EASEMENTS

A conservation easement is “a restriction granted in perpetuity on the use which may be made of real property — including, an easement or other interest in real property that under state law has attributes similar to an easement”¹⁴ Whether a donor or transferor qualifies for federal charitable income tax deductions under section 170(h) is a matter of federal concern, and Congress has prescribed multiple requirements before an easement donation receives a federal tax deduction.¹⁵ To qualify for federal income tax deductions for the donor, an easement must (1) be perpetual, (2) be conveyed to and held

¹² *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355, 368–69 (1986) (adding numerals and paragraphing) (omitting multiple citations).

¹³ See generally James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Corporate Governance Initiative*, 29 VA. TAX REV. 545 (2010); Fishman, *Discontents*, *supra* note 9.

¹⁴ Treas. Reg. § 1.170A-14(b)(2) (2009).

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

by a “qualified conservation organization,” and (3) be “exclusively for conservation purposes.”¹⁶ Valid “conservation purposes” include (a) protection of a relatively natural habitat for wildlife and plants, (b) preservation of open space (including farmland or forest land when following a government conservation policy), (c) preservation of land for outdoor recreation by, or education of, the general public, and/or (d) preservation of historically important land or a certified historic structure.¹⁷ An easement is treated as conveyed “exclusively for conservation purposes” only if its conservation purpose is “protected in perpetuity.”¹⁸ Section 170(h) requires perpetuity twice: The easement must be granted in perpetuity (170(h)(2)) and the conservation purpose must be protected in perpetuity (170(h)(5)).

The Treasury Regulations, based largely on the legislative history of section 170(h),¹⁹ contain numerous additional requirements to ensure that the conservation purposes will be “protected in perpetuity.”²⁰ The opening of the Treasury Regulations explains that, although an income tax deduction is generally not allowed for donation of partial interests, an exception is made for conservation easements “*if the requirements of this section are met.*”²¹ To qualify for federal tax deductions, an easement must contain at least these express and true recitals:

- Grantee is a qualified organization under section 170(h) and Treasury Regulations § 1.170A-14(c), effectively, a § 501(c)(3) non-profit land trust or a government entity;
- The easement is granted in perpetuity (26 U.S.C. § 170(h)(2)(c), (h)(5)(A); Treas. Reg. § 1.170A-14(g)(1));
- The conveyance gives rise to an immediately vested property right (Treas. Reg. § 1.170A-14(g)(6)(ii));
- The easement runs with the land and binds successors and assigns (Treas. Reg. § 1.170A-14(g)(1));

¹⁶ Treas. Reg. § 1.170A-14.

¹⁷ See generally 26 U.S.C. § 170(h) (2006).

¹⁸ 26 U.S.C. § 170(h)(5)(A).

¹⁹ S. Rep. No. 96-1007 (1980).

²⁰ Requirements include:

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

“Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

²¹ Treas. Reg. § 1.170A-14(a) (2009) (emphasis added).

- Grantee has a right with reasonable notice to enter the property to determine compliance with easement terms (Treas. Reg. § 1.170A-14(g)(5)(ii));
- Grantee has a right to enforce the easement (Treas. Reg. § 1.170A-14(g)(5)(ii));
- Grantee has the right to require restoration of the property to its condition at the time of donation (Treas. Reg. § 1.170A-14(g)(5)(ii));
- The easement must be recorded in real property records of the county or counties where the property is located (Treas. Reg. § 1.170A-14(g)(1));
- Any mortgage or deed of trust must be subordinated to the easement (Treas. Reg. § 1.170A-14(g)(2));²²
- The easement must prohibit transfer except to another qualified donee that, as a condition of transfer, is required to carry out the conservation purposes (Treas. Reg. § 1.170A-14(c)(2));
- The easement must provide that, in the event of extinguishment of the easement or any sale, exchange, or involuntary conversion of the property (such as condemnation), the grantee must be entitled to a portion of the proceeds in a proportion based on the value of the easement to the value of the property as a whole at the time of the gift (Treas. Reg. § 1.170A-14(c)(2), (g)(6)(ii));²³
- The easement must prohibit surface extraction of minerals including sand and gravel (Treas. Reg. § 1.170A-14(g)(4));²⁴
- The easement must provide that owners will notify the grantee in writing before any exercise of a reserved right (Treas. Reg. § 1.170A-14(g)(5)(ii));
- The easement must identify the date and the preparer of baseline documentation that must be completed before the donation is made (Treas. Reg. § 1.170A-14(g)(5)(i));
- Baseline documentation must be accompanied by a signed statement by grantor and grantee that the baseline “is an accurate representation of the property at the time of the transfer” (Treas. Reg. § 1.170A-14(g)(5)(i)(D)); and
- The easement exclusively serves one or more conservation purposes set forth in section 170(h) and Treas. Reg. § 1.170A-14.

²² See *Kaufman v. Comm’r*, 136 T.C. 294, 310–11 (2011) [hereinafter *Kaufman II*], *vacated in part sub nom.* *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012). This requirement also applies to rights of first refusal, life estates, long-term ground leases, or other real property interests that could affect permanent land protection.

²³ See also *Carpenter v. Comm’r*, T.C. Memo 2012-1, at 7–11 (2012), *available at* <http://www.ustaxcourt.gov/InOpHistoric/carpenter.TCM.WPD.pdf>. See generally Nancy A. McLaughlin, *Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217 (2012) [hereinafter McLaughlin, *Protecting the Federal Investment*].

²⁴ See *Great Northern Nekoosa Corp. v. United States*, 38 Fed. Cl. 645, 660–61 (1997).

These requirements are vital to accomplishing the federal purposes in granting tax deductions for qualifying conservation easements.²⁵ *Commissioner v. Simmons* specifically held that a tax exempt organization would fail to enforce easement provisions “at its peril” and that the easements at issue were deductible because they would prevent in perpetuity any changes to the properties inconsistent with the conservation purposes.²⁶ In so holding, the court implicitly rejected the amici’s argument that swaps are permitted.²⁷

The deduction amount is determined by a “qualified appraisal,” prescribed in significant detail by federal law, typically comparing the value of the specific parcel before and after the easement.²⁸ Lack of a qualified appraisal mandated by federal law defeats the federal income tax deduction.²⁹ It would be impossible to appraise perpetual easements to determine deduction amounts if the easements could, as *The Challenge* argues, be modified, terminated, or swapped under changing state laws.

Congress imposed very strict requirements that must be met for easement donations to create federal charitable income tax deductions and other federal tax benefits. Had Congress wished, it could have authorized tax benefits for easements that satisfied requirements established by the states.³⁰ Instead, Congress imposed specific and strict federal requirements, ensuring that federal tax deductions are available only for designated federal conservation purposes and only if those purposes are protected in perpetuity.³¹

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

²⁵ The legislative history of 26 U.S.C. § 170(h) reflects the intent to limit the deduction to easements preserving “unique or otherwise significant land areas or structures” and to “those cases where the conservation purposes will in practice be carried out.” See S. Rep. No. 96-1007, at 9, 14 (1980). Congress intended to limit deductible contributions “to those transfers which require that the donee (or successor in interest) hold the conservation easement . . . exclusively for conservation purposes (*i.e.*, that they not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction . . . exclusively for conservation purposes.)” *Id.* at 14; see *Glass v. Comm’r*, 471 F.3d 698, 706–07 (6th Cir. 2006); see also Roger Colivaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 9-10 (2012) (estimating total revenue loss of \$3.6 billion from federal charitable income tax deductions provided to individual easement donors between 2003 and 2008).

²⁶ *Comm’r v. Simmons*, 646 F.3d 6, 10 (D.C. Cir. 2011).

²⁷ See Brief for National Trust for Historic Preservation et al. as Amici Curiae Supporting Appellee, *Comm’r v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011) (No. 10-1063), 2010 WL 6511476, at *17.

²⁸ See IRS, CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE (2012), available at http://www.irs.gov/pub/irs-utl/conservation_easement.pdf.

²⁹ *Whitehouse Hotel L.P. v. Comm’r*, 615 F.3d 321, 326 (5th Cir. 2010).

³⁰ *McLaughlin, Protecting the Federal Investment*, *supra* note 23, at 247–48 (noting that there is no mention in section 170(h), its legislative history, or Treasury Regulations regarding deference to state and local extinguishment procedures, even though some procedures existed at enactment of section 170(h) and drafting of the Treasury Regulations).

³¹ See 26 U.S.C. § 170(h)(2), (h)(5)(A) (2006).

There may be state income tax deductions in addition to or instead of federal deductions, and some states provide state tax credits for donated easements. Laws governing state deductions and credits may or may not incorporate a requirement for satisfaction of federal tax requirements for deductible easements.³² A state could elect to grant tax benefits to easement donations that do not satisfy federal requirements for conservation easements.³³ Moreover, states may authorize creation and transfer of mitigation easements and purchased easements that do not satisfy federal requirements.³⁴ These may have perpetuity requirements of their own, however, often coextensive with federal requirements.³⁵ States may develop laws governing conservation easements for which *state* tax benefits are available. States cannot alter the requirements for federal tax deductions.³⁶

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

³² *E.g.*, COLO. REV. STAT. § 39-22-522(2) (2011) (state tax “credit[s] shall only be allowed for a donation that is eligible to qualify as a qualified conservation contribution pursuant to section 170(h) of the internal revenue code, as amended, and any federal regulations promulgated in connection with such section”).

³³ States, like landowners, need not accept federal restrictions and receive federal financial benefits. *See, e.g.*, *Quern v. Mandley*, 436 U.S. 725, 735–36 (1978) (noting that states need not participate in federal welfare programs); *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923) (“[T]he powers of the state are not invaded, since the statute imposes no obligation but simply extends an option which the state is free to accept or reject.”); *see also* George D. Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 AM. U. L. REV. 279, 279–80 (1979).

³⁴ For a discussion of state statutes authorizing creation or acquisition of conservation easements and the requirements of federal tax law, *see* Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2: Comparison to State Law*, 46 REAL PROP. T. & EST. L.J. 1, 19–62 (2011) [hereinafter *National Perpetuity Standards, Part 2*].

³⁵ In *County of Colusa v. California Wildlife Conservation Board*, the County of Colusa successfully challenged a state-acquired conservation easement purporting to convert agricultural land into wildlife habitat based on statutory and contractual requirements for land to remain in agriculture. 52 Cal. Rptr. 3d 1, 3–7, 145 Cal. App. 4th 637 (Cal. Ct. App. 2006). In *Stonegate Family Holdings, Inc. v. Revolutionary Trails, Inc.*, the Boy Scouts sold a perpetual conservation easement to the state, providing for certain public access rights. 900 N.Y.S.2d 494, 500 (2010), *appeal denied*, 939 N.E.2d 809 (N.Y. 2010); *see also* Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,612 (Nov. 28, 1995), *available at* <http://water.epa.gov/lawsregs/guidance/wetlands/mitbankn.cfm> (“The wetlands and/or other aquatic resources in a mitigation bank should be protected in perpetuity with appropriate real estate arrangements (*e.g.*, conservation easements, transfer of title to Federal or State resource agency or non-profit conservation organization).”).

³⁶ The power to tax is the power to destroy. *See* *Flint v. Stone Tracy Co.*, 220 U.S. 107, 167 (1911); *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819). State power to determine what deductions are permitted to reduce federal taxes would similarly be the power to destroy. *See generally* *McCray v. United States*, 195 U.S. 27 (1904).

III. THE CHALLENGE FAILS TO ACCOUNT FULLY FOR GOVERNING FEDERAL LAW

A fundamental problem in *The Challenge* is its failure to take into account the primacy of federal law as it relates to tax-deductible conservation easements. *The Challenge* addresses several “different legal regimes [that] guide their creation, implementation, enforcement, modification, and termination,”³⁷ as though the legal regimes were all of equal force and relevance. In doing so, *The Challenge* confuses the issues significantly.

Property owners donating and land trusts accepting easements for which federal tax deductions will be sought cannot elect whether to follow state law, the Uniform Conservation Easement Act, the Restatement (Third) of Property: Servitudes, the Land Trust Standards and Practices, or procedures voluntarily adopted by land trusts instead of applicable federal law. All of these sources³⁸ must be consistent with federal law, must be deemed inapplicable, or must otherwise fall aside if an easement is entitled to a federal deduction.³⁹ If there is governing federal law, then no other law or secondary source can control the availability of federal tax deductions conflicting with that federal law. To be eligible for a federal tax deduction, an easement must comply with section 170(h) and the Treasury Regulations, and easement provisions satisfying such requirements must be enforceable under state law. For example, to enjoy a federal income tax deduction, the easement must prohibit transfer except to another eligible donee that agrees to enforce the easement.⁴⁰ The fact that the state enabling statute is silent on that requirement does not mean that the federal restriction-on-transfer provision included in the easement deed to satisfy federal tax law requirements can be ignored.⁴¹ Federally deductible conservation easements are restricted charitable gifts — “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations.”⁴²

In many respects, state law, the Restatement (Third) of Property: Servitudes, and the Uniform Conservation Easement Act (“UCEA” or “the Uniform Act”) are fully consistent with federal law. The UCEA is most readily recog-

³⁷ *The Challenge*, *supra* note 1, at 3.

³⁸ The term “sources” is used because the Restatement, Uniform Laws, and Standards and Practices are not law at all unless adopted as law by Congress or state legislatures or courts. The first two are highly respected and worthy of deference because they reflect combined efforts of judges, scholars, and practicing attorneys. But they are not law.

³⁹ See, e.g., Josh Eagle, *Notional Generosity: Explaining Charitable Donors’ High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47, 56 (2011).

⁴⁰ Treas. Reg. § 1.170A-14(c)(2) (2009).

⁴¹ But see *The Challenge*, *supra* note 1, at 26–31.

⁴² *Carpenter*, T.C. Memo 2012-1, at 6 (restricted gift and charitable trust are used synonymously and are subject to the same rules) (citing *Kaufman II*, 136 T.C. at 306–07); see also *National Perpetuity Standards, Part 2*, *supra* note 34, at 70 (“Absent enforceability under state law, the provisions included in a conservation easement deed to satisfy the various federal tax law requirements would constitute mere window dressing, and the conservation purposes of the contributions would not be ‘protected in perpetuity’ as mandated by Congress.”).

nizable as consistent with federal law when its language is properly understood. The UCEA provides, for example, that “a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.”⁴³ This language was clearly never intended to impose substantive law in conflict with federal law but rather to address procedural mechanics.⁴⁴ Thus, conservation easements must be in writing, notarized, recorded, and otherwise processed in the same manner as other easements in the state when they are created, conveyed, assigned, modified, and so on. There is no hint in the UCEA that the Uniform Act was intended to do more.⁴⁵ Any intent to do more with respect to federally deducted easements is barred by federal law.

In fact, to prevent any confusion on this point, the UCEA commentary expressly states that the UCEA “leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts,” and restricted charitable gifts such as conservation easements are enforced in the same manner as charitable trusts.⁴⁶ When those seeking greater freedom to amend and terminate conservation easements began to cite the UCEA as evidence that charitable principles do not apply,⁴⁷ the drafters revised the comments to clarify their intent and defeat that

⁴³ UNIFORM CONSERVATION EASEMENT ACT § 2(a) (2007), available at http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf.

⁴⁴ The UCEA was designed to address “historical legal impediments to the acquisition of lesser interests, such as easements, restrictions and covenants, and equitable servitudes. These restrictions appear artificial and archaic in light of current policies, and the Uniform Conservation Easement Act provides the means to eliminate them in a simple, straightforward fashion.” UCEA Summary, available at [http://www.uniformlaws.org/ActSummary.aspx?title=Conservation Easement Act](http://www.uniformlaws.org/ActSummary.aspx?title=Conservation+Easement+Act).

⁴⁵ See Eagle, *supra* note 39, at 60 (“Although the Uniform Conservation Easement Act suggests that conservation easements of lesser duration would constitute recognized property interests as a matter of state property law, the donation of such easements will not give rise to a federal tax deduction.”).

⁴⁶ UCEA § 3 cmt. The Comment to section 2 explains, with emphasis added:

The Act enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity. See Section 3(b). The latitude given the parties is consistent with the philosophical premise of the Act. However, there are additional safeguards; for example, easements may be created only for certain purposes intended to serve the public interest and may be held only by certain “holders.” These limitations find their place comfortably within similar limitations applicable to charitable trusts, which may be created to last in perpetuity, subject to the power of a court to modify or terminate the trust pursuant to the doctrine of *cy pres*. See comment to Section 3. *Allowing the parties to create such easements also enables them to fit within federal tax law requirements that the interest be “in perpetuity” if certain tax benefits are to be derived.*

⁴⁷ See, e.g., ROBERT H. LEVIN, A GUIDED TOUR OF THE CONSERVATION EASEMENT ENABLING STATUTES 18–20 (2010), available at <http://www.landtrustalliance.org/policy/cestatutesreportnoappendices.pdf>; C. Timothy Lindstrom, Hicks v. Dowd: *The End of Perpetuity?*, 8 WYO. L. REV. 25, 39–41 (2008); see also *National Perpetuity Standards, Part 2*, *supra* note 34, at 41 (recounting how in *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 17, 2010), the Wyoming Attorney General sued, objecting to the county’s termination of a perpetual easement, landowners argued at trial that there was “nothing special” about a conservation easement

argument.⁴⁸

The Challenge questions the wording of the UCEA comments, misunderstanding the intent of the Uniform Act and the purpose of its comments.⁴⁹ For example, *The Challenge* criticizes the UCEA's placement of information on cypres and charitable trust principles in the comments instead of in the UCEA text.⁵⁰ The UCEA had a very limited and focused purpose, and its drafters intentionally did "not address a number of issues which, though of conceded importance, are considered extraneous to its primary objective of enabling private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land and buildings without the encumbrance of certain potential common law impediments"⁵¹ The comments to UCEA section three explain:

The Act does not directly address the application of charitable trust principles to conservation easements because: (i) the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the Act is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes.⁵²

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

when it comes to modification or termination and cited Wyoming's UCEA for the proposition that conservation easements can be modified or terminated "in the same manner as other easements").

⁴⁸ UCEA Commissioners' Prefatory Note § 3 cmt. ("[B]ecause conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose — *i.e.*, the protection of the land encumbered by the easement for one or more conservation or preservation purposes — the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements."). The UCEA is intended to be applied and construed to make the law uniform among all states that have adopted it. Accordingly, courts are especially likely to rely upon UCEA comments to guide their interpretation. "Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws." *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993). See generally Nancy A. McLaughlin & W. William Weeks, *Hicks v. Dowd, Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010) [hereinafter *Setting the Record Straight*].

⁴⁹ *The Challenge*, *supra* note 1, at 26–31.

⁵⁰ *Id.*

⁵¹ UCEA Commissioners' Prefatory Note. The UCEA validates easements created in many contexts (*e.g.*, donation, purchase, exaction), containing various terms (term of years, terminable upon satisfaction of certain conditions, and perpetual) and, thus, laws governing administration of charities and charitable gifts will apply with different force to different types of conservation easements.

⁵² UCEA § 3 cmt.; see *Setting the Record Straight*, *supra* note 48, at 83–84.

The UCEA is fundamentally designed to fulfill a procedural goal. “The UCEA does not itself impose restrictions or affirmative duties. It merely allows the parties to do so within a consensual arrangement freed from common law impediments, if the conditions of the Act are complied with.”⁵³ Thus, the UCEA itself was never intended to impose or restrict applicability of substantive charitable trust principles. The comment to section four declaring that the UCEA “leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts,”⁵⁴ specifically negates the argument that the UCEA’s silence may be interpreted to defeat application of charitable trust principles.

The Challenge’s representation that restricted gift principles do not apply to conservation easements is a serious error, particularly given the UCEA drafters’ clear intent that those principles do apply and the Tax Court’s holding in *Carpenter v. Commissioner* that tax-deductible easements constitute restricted gifts. Land trusts accept donated easements subject to donor restrictions and prohibitions applicable to the specific acres under easement. There can be no lawful transfer of that easement away from the specific donated acres without violation of donor intent and federal law. If a land trust is forthright and states its intent to retain the right to transfer a conservation easement in whole or part, that very statement defeats federal tax deductions even if the donor might have agreed to grant discretion to the land trust.⁵⁵

The Restatement (Third) of Property: Servitudes reflects that modification and termination of perpetual conservation easements held by government entities and charitable organizations are governed by special rules based on charitable trust principles. Those rules apply regardless of how easements are acquired. The drafters explain: “Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes.”⁵⁶ Despite recognizing the Restatement as a relevant “legal regime,” *The Challenge* criticizes the Restatement as inconsistent with *The Challenge*’s own erroneous interpretation of the Treasury Regulations as permitting termination of an easement if its purpose is protected elsewhere (*i.e.*, a swap).⁵⁷ That interpretation is expressly rejected by the IRS,⁵⁸ implicitly rejected by the D.C. Circuit in *Simmons*,⁵⁹ and inconsistent with section 170(h) and the Treasury Regulations as explained below. The Restatement does not support *The Challenge*’s interpretation, which is inconsistent with the concept

⁵³ UCEA § 3 cmt.

⁵⁴ *Id.* § 4 cmt; *see also id.* § 3 cmt.

⁵⁵ *Carpenter*, T.C. Memo 2012-1, at 18–19 (easements extinguishable by parties’ mutual agreement, even if subject to a standard such as impossibility, fail as a matter of law to comply with perpetuity requirements of section 170(h)); *see Simmons*, 646 F.3d at 11 (noting that easements found deductible “will prevent in perpetuity any changes to the properties inconsistent with conservation purposes”).

⁵⁶ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 cmt. a (2000).

⁵⁷ *The Challenge*, *supra* note 1, at 4, 17–25; *see infra* Part VIII.

⁵⁸ *E.g.*, IRS, *supra* note 28, at 16; IRS Form 990 Schedule D Instructions, *available at* <http://www.irs.gov/pub/irs-pdf/i990sd.pdf>; IRS General Information Letter (Mar. 5, 2012), 2012 TNT 66–25 (swaps are forbidden unless they comply with extinguishment regulation).

⁵⁹ *Simmons*, 646 F.3d at 9.

of a perpetual conservation easement. *The Challenge* also fails to address relevant provisions in the Restatement (Third) of Trusts⁶⁰ and Uniform Trust Code,⁶¹ both of which affirmatively endorse application of charitable trust principles to conservation easements.

The Challenge's efforts to treat the Land Trust Alliance Standards and Practices as a legal regime also fail.⁶² The Standards and Practices were not drafted by or for attorneys. They are designed, as stated in their Introduction, to be "ethical and technical guidelines" or "guiding principles" to be voluntarily adopted in whole or part.⁶³ Accordingly, the Standards and Practices are not a legal regime and cannot constitute or supersede laws. The Standards and Practices expressly mandate compliance with law,⁶⁴ specifically with federal tax law as it relates to deductible easements⁶⁵ and with applicable charitable trust laws.⁶⁶

The Alliance's Amending Conservation Easements report recognizes that some amendments occur and adopts conservative principles to guide decisions relating to amendment.⁶⁷ This secondary analysis also cannot be considered law and cannot contravene federal law. The report is instructive, however, as it recognizes the following significant limitations on easement amendment or termination, which are ignored in *The Challenge*:

⁶⁰ See RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (2003).

⁶¹ See UNIFORM TRUST CODE § 414(d) (2010), available at http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf (provisions allowing for modification or termination of certain "uneconomic" trusts do not apply to conservation easements); *id.* § 414 cmt. ("[C]reation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the 'trustee' could constitute a breach of trust."); see also Nancy McLaughlin & Mark Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 4 UTAH L. REV. 1561, 1593-94 (2008).

⁶² See *The Challenge*, *supra* note 1, at 4-5 (treating Practices as one of "four different legal regimes"); *id.* at 31-33 (citing Standard 11 as authorizing amendment or termination of easements without third-party approval or judicial proceedings).

⁶³ As stated in the Introduction, "there are many ways for a land trust to implement the practices, depending on the size and scope of the organization." LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES i (2004), available at <http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf>. "The Land Trust Alliance encourages all land trusts to implement *Land Trust Standards and Practices* at a pace appropriate for the size of the organization and scope of its conservation activities." *Id.*

⁶⁴ *Id.* at 2 ("The land trust complies with all applicable federal, state and local laws.").

⁶⁵ *Id.* at 8 ("For land and easement projects that may involve federal or state tax incentives, the land trust determines that the project meets the applicable federal or state requirements, especially the conservation purposes test of I.R.C. §170(h).").

⁶⁶ *Id.* ("All projects conform to applicable federal and state charitable trust laws. If the transaction involves public purchase or tax incentive programs, the land trust satisfies any federal, state or local requirements for public benefit.").

⁶⁷ See generally LAND TRUST ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES (2007), available at http://learningcenter.lta.org/attached-files/0/65/6534/Amendment_Report_Final_web.pdf [hereinafter AMENDING CONSERVATION EASEMENTS]. The following bulleted list of limitations on easement amendment can be found on pages 16 and 23 of this report.

- Land trust governance documents, including articles of incorporation, bylaws and IRS tax-exemption approval documents[;]
- Internal Revenue Code [(“Code”)] and Treasury Regulations requirements for perpetuity and prohibitions on private inurement and private benefit[;]
- State and federal laws governing nonprofit management and the administration of restricted charitable gifts and charitable trusts[;]
- State laws on fraudulent solicitation,[⁶⁸] misrepresentation to donors,[⁶⁹] consumer protection and the like[;]
- State laws regulating the conduct of fiduciaries depending on the circumstances of easement creation, relationships with donors and obligations undertaken by the land trust[;⁷⁰]
- State and local laws governing land use, conveyances and the like[; and]
- Contractual and other obligations to easement donors, grantors, funders and others[.⁷¹]

Finally, *The Challenge* devotes considerable space to discussing provisions based on state law, a proposed Vermont law, and a Montana procedure voluntarily adopted by land trusts that is not proposed as law.⁷² This entire analysis starts from the faulty premise that state law or voluntary procedures offer a co-equal legal regime to federal law, and that a donor and land trust need only satisfy state requirements, as opposed to federal tax law requirements, when seeking and holding a federal tax deduction.⁷³

Federal law mandates that there shall be no deductions for non-perpetual easements and that land trusts shall ensure the perpetual existence of donated conservation easements. There is frankly nothing a state can enact that could lawfully diminish the perpetuity required for easements receiving a federal tax deduction. Likewise, no state can lawfully authorize a 501(c)(3) land trust to terminate or amend federally deducted easements more freely than permitted by

⁶⁸ See, e.g., LESLIE RATLEY-BEACH, *MANAGING CONSERVATION EASEMENTS IN PERPETUITY* 205 (2009); CONSERVATION LAW CLINIC, *LEGAL CONSIDERATIONS REGARDING AMENDMENT TO CONSERVATION EASEMENTS* 7 (2007).

⁶⁹ See, e.g., *Maryland Env'tl Trust v. Gaynor*, 780 A.2d 1193 (Md. 2001), *rev'd*, 803 A.2d 512 (Md. 2002).

⁷⁰ E.g., CAL. BUS. & PROF. CODE § 17510.8 (“[T]here exists a fiduciary relationship between a charity or any person soliciting on behalf of a charity, and the person from whom a charitable contribution is being solicited. The acceptance of charitable contributions by a charity or any person soliciting on behalf of a charity establishes a charitable trust and a duty on the part of the charity and the person soliciting on behalf of the charity to use those charitable contributions for the declared charitable purposes for which they are sought. This section is declarative of existing trust law principles.”).

⁷¹ See *AMENDING CONSERVATION EASEMENTS*, *supra* note 67, at 16, 23.

⁷² *The Challenge*, *supra* note 1, at 43–61.

⁷³ This faulty premise is embodied in the fabric of *The Challenge*, including its treatment of “four different legal regimes” each with “different treatment of amending and terminating perpetual conservation easements.” *The Challenge*, *supra* note 1, at 5. Once donors elect to take federal tax deductions, the donors must comply with federal tax law requirements as well as any additional requirements imposed by state law. Donors are not free to ignore federal law and look only to another “legal regime” unless expressly adopted into federal law.

the Code and Treasury Regulations. There are a few limited and specific instances in which the Treasury Regulations defer in part to state law, such as payment of compensation upon condemnation.⁷⁴ These instances are the exceptions that prove the rule that compliance with federal law is prerequisite to federal tax deductions and to continuing recognition as a 501(c)(3) charity.

The Challenge also simply ignores the constitutional and other barriers to the retroactive application of new state legislation, policies, or regulations to alter the terms of existing perpetual conservation easements.⁷⁵ Although perhaps understandable that this critical issue might not be fully discussed, it should not have been ignored in an article that urges states to “consider crafting new or modifying existing legislation, policies, or regulations to address easement termination and amendment.”⁷⁶

The Challenge next discusses a few court decisions as reflecting a common law governing conservation easements.⁷⁷ The first, *Bjork v. Draper*, is identified as an amendment case although it significantly involved an extinguishment — removal of a portion of land encumbered by an easement in exchange for substitution of an equally sized parcel of new land — for which “judicial proceedings in a court of competent jurisdiction” were expressly required by the easement itself.⁷⁸ The amendments and extinguishment were held “invalid because they conflicted with the express provisions of the easement.”⁷⁹ *Bjork* does not support a new common law under which conservation easements may be amended or terminated. Just the opposite is true.

The second cases discussed by *The Challenge*, *Hicks v. Dowd*, and its successor, *Salzburg v. Dowd*, uphold federal tax law, charitable trust principles, and perpetuity. In *Hicks*, the Wyoming Supreme Court dismissed the case, holding that Hicks, who resided in a county that held a conservation easement and who objected to its termination by the county without a court proceeding,

⁷⁴ Treas. Reg. § 1.170A-14(c)(2) (2009) (referring to qualified organizations); *id.* § 1.170A-14(g)(6)(ii); see Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1950 (2008).

⁷⁵ See, e.g., *Kapiolani Park Preserv. Soc’y v. City and Cnty. of Honolulu*, 751 P.2d 1022, 1027 (Haw. 1988) (“Gifts to trustees or to eleemosynary corporations, accepted by them to be held upon trusts expressed in writing or necessarily implied from the nature of the transaction, constitute obligations which ought to be enforced and held sacred under the Constitution. It is not within the power of the Legislature to terminate a charitable trust, to change its administration on grounds of expediency, or to seek to control its disposition under the doctrine of cy pres.”) (quoting *In re Opinion of the Justices*, 131 N.E. 31, 32 (1921)); *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1324 (8th Cir. 1991) (“Okla. Stat. tit. 15, § 178 is an unconstitutional impairment of contracts insofar as it is applied to insurance contracts entered before the statute became effective.”). Although *Kapiolani* refers to charitable trusts, “the law governing enforcement of charitable gifts is derived from the law of charitable trusts.” Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 997 n.2 (Conn. 1997); see also *Carpenter*, T.C. Memo. 2012-1, at 12.

⁷⁶ *The Challenge*, *supra* note 1, at 43.

⁷⁷ For a different interpretation of these cases and a discussion of other cases and controversies involving modification and termination of easements, see *National Perpetuity Standards, Part 2*, *supra* note 34, at Part III.

⁷⁸ *Bjork v. Draper*, 886 N.E.2d 563, 567 (Ill. App. Ct. 2008) [hereinafter *Bjork I*], *appeal denied*, 897 N.E.2d 249 (Ill. 2008), *appeal after remand*, 936 N.E.2d 763 (Ill. App. Ct. 2010) [hereinafter *Bjork II*], *appeal denied*, 943 N.E.2d 1099 (Ill. 2011).

⁷⁹ *Bjork II*, 936 N.E.2d at 768 (citing *Bjork I*, 886 N.E.2d at 574).

lacked standing to enforce a charitable trust. The court invited the Wyoming Attorney General, as supervisor of charitable trusts, “to reassess his position.”⁸⁰ The Wyoming Attorney General then asserted in *Salzburg* that the easement, for which the donors had received a sizable federal tax deduction, constituted a restricted charitable gift or charitable trust that could not be terminated without court approval in a *cy pres* proceeding as provided in the easement deed.⁸¹ The case settled, reinstating the easement in full force, subject to court-sanctioned amendments acknowledging that the Dowds lacked control over or liability for mineral extraction and permitting transfer of the easement to another qualified holder if the Scenic Preserve Trust became unable to continue.⁸² These amendments acknowledged points that were undeniably true without amendment and were approved by the court in any event.⁸³ Nothing in the resolution of this dispute supports diminution of federal perpetuity requirements.

Most troubling, *The Challenge* inaccurately identifies two recent cases as rejecting application of principles governing restricted charitable gifts or charitable trusts to perpetual conservation easements.⁸⁴ Neither case reached that result. In the first, *Carpenter v. Commissioner*, the Tax Court held that, while the easements at issue were not formal charitable trusts under Colorado law, they were “restricted gifts,” namely, “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations.”⁸⁵ Charitable gifts made for specific purposes are charitable trusts in some states, and in others restricted gifts. The substantive rules governing these gifts (including requirements that the recipient administer the gift following the donor’s precise directions and limitations) apply equally to all such gifts.⁸⁶ Accordingly, use of different terminology in different jurisdictions is a distinction without a differ-

⁸⁰ *Hicks v. Dowd*, 157 P.3d 914, 921 (Wyo. 2007).

⁸¹ *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Wyo. Jud. Dist. Feb. 17, 2010), available at <http://www.docstoc.com/docs/47716227/Download-Stipulated-Judgment-Salzburg-v-Dowd—IN-THE-DISTRICT>.

⁸² *The Challenge*, *supra* note 1, at 39 (describing settlement).

⁸³ See *Salzburg*, Civ. No. CV-2008-0079.

⁸⁴ *The Challenge*, *supra* note 1, at 10 n.50, 22 n.120 (citing *Carpenter*, T.C. Memo 2012-1, at 12); *Long Green Valley Ass’n v. Bellevalle Farms*, No. 0228, 2011 WL 5975081 (Md. Ct. Spec. App. Nov. 30, 2011), *reconsidered & remanded*, 2012 WL 468245 (Md. Ct. Spec. App. Feb. 14, 2012), *reconsidered & remanded*, 46 A.3d 473 (Md. Ct. Spec. App. 2012), *cert. granted*, 52 A.3d 978 (2012).

⁸⁵ *Carpenter*, T.C. Memo 2012-1, at 12. A 2012 Tax Court opinion by Judge Haines who wrote *Carpenter* refers to extinguishment by judicial proceeding as a “specific requirement” of the Treasury Regulations. *Mitchell v. Comm’r*, 138 T.C. No. 16, 2012 WL 1109342, at *9 (Apr. 3, 2012).

⁸⁶ *Compare Chattowah Open Land Trust, Inc. v. Jones*, 636 S.E.2d 523, 524–27 (Ga. 2006) (devise of testator’s residence and surrounding acreage to a land trust to maintain property in perpetuity exclusively for conservation purposes within Internal Revenue Code § 170(h) unambiguously created a charitable trust, and testator’s failure to use words “trust” or “trustee” did not alter the outcome, “as the strict use of these terms is not required to establish a trust.”), with *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997–98 (Conn. 1997) (although gift may not create a formal trust, “equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation” (quoting *Lefkowitz v. Lebensfeld*, 68 App.Div.2d 488, 494–95, 417 N.Y.S.2d 715 (1979))) (alteration and internal quotation marks omitted).

ence.⁸⁷ Moreover, in *Kaufman v. Commissioner*, a regular opinion binding on all Tax Court judges, the Tax Court recognized that the extinguishment regulation “appears to be a regulatory version of the doctrine of cy pres.”⁸⁸ *The Challenge*’s failure to acknowledge that *Carpenter* held that the tax-deductible easements constituted restricted charitable gifts is a misleading omission.

The second case that *The Challenge* misinterprets is *Long Green Valley Ass’n v. Bellevale Farms*. Representing that *Long Green Valley* reflects that charitable principles do not apply to perpetual conservation easements is inappropriate as that case involved a purchased, expressly non-perpetual easement. Moreover, *The Challenge* cites the first, withdrawn opinion of the Maryland court.⁸⁹ That court expressly reconsidered its opinion, first at the request of the Maryland Attorney General and then at the request of plaintiffs. Its revised opinions affirmatively preclude applying its holding to perpetual easements.⁹⁰ The court held:

In sum, this case involves a conservation easement purchased for what we understand to be the grantor’s asking price, and which expressly provides that it may be terminated after twenty-five years upon satisfaction of certain conditions. We think it unnecessary to our result, and express no opinion as to how the principles generally applicable to charitable trusts would apply to expressly perpetual conservation easements conveyed in whole or in part as charitable gifts, or purchased under other statutes or provisions.⁹¹

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

IV. FEDERAL LAW MANDATES PERPETUITY FOR DONATED EASEMENTS

A conservation easement transaction is voluntary. Owner and land trust each decide whether the benefit of the transaction is worth the burden, and they negotiate terms not prescribed by law. Owners give up some rights of ownership in the land, such as the right to subdivide, and land trusts accept a perpet-

⁸⁷ McLaughlin, *Protecting the Federal Investment*, *supra* note 23, at 230–34.

⁸⁸ *Kaufman II*, 136 T.C. at 306–07. As a Tax Court opinion (unlike a memorandum opinion), *Kaufman II* is binding upon all Tax Court judges. Tax Court Rule 152; *see also* McLaughlin, *Protecting the Federal Investment*, *supra* note 23, at 272 n.174.

⁸⁹ *The Challenge*, *supra* note 1, at 23 n.120, 62 n.376, 63 n.381.

⁹⁰ *Long Green Valley Ass’n v. Bellevale Farms*, 46 A.3d 473, 494 (Md. Ct. Spec. App. 2012), *cert. granted*, 52 A.3d 978 (2012) (“[A]ssuming, without deciding, that an agricultural preservation easement purchased by MALPF or the State for the benefit of MALPF qualifies as a ‘conservation easement,’ we are not persuaded that the charitable trust doctrine *must* be applied to purchased, non-perpetual agricultural preservation easements, nor even that it *should* be.”) (emphasis in original).

⁹¹ *Long Green Valley Ass’n*, 46 A.3d at 502.

ual obligation to monitor and enforce the restrictions. By doing so, land trusts further their charitable mission to protect land from development and harm. In addition to any state property tax benefit, and state tax deductions or credits, owners typically receive potential estate and gift tax benefits,⁹² and either publicly subsidized funds⁹³ or income tax benefits.⁹⁴ Finally, owners gain the security of knowing that their land is protected. For owners who love their land, the last benefit is frequently the most significant.⁹⁵

Conservation easement restrictions imposed by land trusts are routinely intended and normally required to be perpetual. *The Challenge* specifically states its intent to address perpetual easements in particular.⁹⁶ *The Challenge* acknowledges: “The defining characteristic of all qualifying easement gifts is that they are perpetual, ostensibly to provide public benefit forever.”⁹⁷ Although lesser restrictions are legally possible in many states, the effort to negotiate term easements is substantially the same as that for perpetual easements, and funding sources are limited. Very few land trusts expend effort on restrictions that are not perpetual.⁹⁸

Donated easements enjoying federal tax deductions are required by federal law to be perpetual,⁹⁹ and the IRS has been increasingly vigilant in enforcing these requirements.¹⁰⁰ Purchased easements generally follow the same tem-

⁹² Potential estate tax benefits are triggered because the land value is diminished by easement restrictions. See 26 U.S.C. §§ 2031(c), 2055 (2006).

⁹³ Mitigation conservation easements are often purchased, as are some agricultural easements, and federal or state funds are frequently used. See, e.g., CAL. FISH & GAME §§ 2098-2100 (West 2010); *Conservation and Mitigation Banking*, CAL. DEPT. OF FISH & GAME, available at <http://www.dfg.ca.gov/habcon/conplan/mitbank/> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library); *SERVICES — Purchase Conservation Easements*, WYOMING LAND TRUST, <http://wyominglandtrust.org/services-purchase-CE.shtml> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library).

⁹⁴ 26 U.S.C. § 170(h) (2006); Treas. Reg. § 1.170A-14 (2009). Deductions may be substantial, exceeding \$10 million in some instances.

⁹⁵ Stephen J. Small, the attorney who helped draft the Internal Revenue Service regulation allowing for tax benefits for qualified easement donations, is repeatedly quoted for the statement: “Most people who donate conservation easements do so for three reasons: they love their land; they love their land; they love their land.” E.g., *Fundraising*, ATTLEBORO LAND TRUST, http://www.attleborolandtrust.org/work_fundraising/fundraising.htm (last visited Jan. 24, 2013) (on file with the Harvard Law School Library); Christopher West Davis, *Pushing the Sprawl Back: Landowners Turn to Trusts*, N.Y. TIMES, Oct. 12, 2003, <http://www.nytimes.com/2003/10/12/nyregion/pushing-the-sprawl-back-landowners-turn-to-trusts.html>.

⁹⁶ *The Challenge*, *supra* note 1, at 4.

⁹⁷ *The Challenge*, *supra* note 1, at 6 (footnote omitted).

⁹⁸ See *Land Conservation: The Case for Perpetual Easements*, VERMONT LAND TRUST (Jul. 2007), available at <http://www.vlt.org/news-publications/other-publications/201>; Paul Mitchell, *Protecting the Future Forever: Why Perpetual Conservation Easements Outperform Term Easements*, UNIV. OF GA. LAND USE CLINIC (Oct. 1, 2006), available at <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1002&context=landuse>.

⁹⁹ 26 U.S.C. § 170(h)(2)(C), (5)(A); Treas. Reg. § 1.170A-14(b)(2); IRS Conservation Easement Audit Techniques Guide, *supra* note 28 (“Conservation easements are not in perpetuity if they can be abandoned or terminated.”).

¹⁰⁰ See, e.g., *Carpenter*, T.C. Memo 2012-1, at 18–19 (easements extinguishable by mutual agreement of the parties, even if subject to a standard such as impossibility, fail as a matter of law to comply with perpetuity requirements of section 170(h)); IRS CONSERVATION EASEMENT AUDIT

plates as donated easements, also affirmatively requiring perpetuity in accordance with funders' requirements. There may be legal requirements for perpetuity in purchased easements, such as mitigation easements and easements funded by entities that insist on perpetuity for a public purpose.¹⁰¹

In all these instances, the fact that a state law or some secondary source may indicate that a conservation easement might be less than perpetual is irrelevant when a federal tax deduction is taken. Federal law mandates perpetuity for donated easements, and the easements themselves, funding requirements, and other documents usually require perpetuity in other circumstances.¹⁰²

Federal tax law mandates that recipients of federal tax-deductible conservation easements must have a commitment to protect the conservation purpose of the donation and the resources to enforce the conservation restrictions.¹⁰³ The IRS Audit Guide suggests using a range of information to assess land trust commitment, including the land trust's website, tax returns, property monitoring reports, interviews with donors and staff, and observation of the land.¹⁰⁴ The Guide states: "Monitoring reports are a good source to verify whether the taxpayer is in compliance with, and the donee organization is enforcing, the terms of the easement. In some cases, donee organizations have allowed changes after the donations that were in violation of the terms of the easement."¹⁰⁵

The importance of continuing commitment to perpetuity is emphasized in Instructions for Schedule D (Form 990): "For purposes of maintaining its tax exemption, the recipient tax exempt organization must protect the perpetuity

TECHNIQUES GUIDE, *supra* note 28; IRS Form 990 Schedule D Instructions, *supra* note 58; IRS General Information Letter, *supra* note 58.

¹⁰¹ See generally Paul Doscher, Terry M. Knowles & Nancy A. McLaughlin, *Amending or Terminating Conservation Easements: Conforming to State Charitable Trust Requirements: Guidelines for New Hampshire Easement Holders*, SOC'Y FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS (2010), available at <http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf>; *FAQ, Agricultural Land Conservation Program*, YORK CNTY. PENNSYLVANIA, <http://yorkcountypa.gov/property-taxes/agricultural-preservation-board/application-information/faq.html> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library).

¹⁰² Multiple federal requirements in section 170(h) and the Treasury Regulations establishing that federal law preempts and applies uniformly to tax-deductible easements to mandate perpetuity regardless of state law are detailed exhaustively in Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473 (2010) [hereinafter *National Perpetuity Standards, Part 1*]. See also *National Perpetuity Standards, Part 2*, *supra* note 34 (comparing state provisions addressing transfer, release, and termination of easements to federal requirements: in order to be eligible for federal charitable income tax deductions for easement donations, donors must satisfy both federal tax law requirements and any additional requirements imposed by state law).

¹⁰³ 26 U.S.C. § 170(h)(3); Treas. Reg. § 1.170A-14(c)(1); see C. TIMOTHY LINDSTROM, A GUIDE TO THE TAX ASPECTS OF CONSERVATION EASEMENT CONTRIBUTIONS 19 (2007), available at <http://www.conservatontaxcenter.org/plnpro/taxguide2007.pdf> ("An organization that allows easement terminations or amendments in a manner that is inconsistent with the conservation purposes of the easement fails to qualify as an 'eligible donee' because it demonstrably lacks 'the commitment to protect the conservation purposes of the donation' as required by the Regs.'").

¹⁰⁴ IRS CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE, *supra* note 28.

¹⁰⁵ *Id.*

requirement of the conservation easements it holds.”¹⁰⁶ Apparently because semantic games were used to avoid earlier reporting obligations, the Instructions now declare that:

[A]n easement is *modified* when its terms are amended or altered in any manner. . . . An easement is *transferred* if, for example, the organization assigns, sells, releases, quitclaims, or otherwise disposes of the easement whether with or without consideration. An easement is *released*, *extinguished*, or *terminated* when it is condemned, extinguished by court order, transferred to the land owner, or in any way rendered void and unenforceable, in each case whether in whole or in part. . . .

The[se] categories . . . are not to be considered legally binding or mutually exclusive. For example, a modification may also involve a transfer and an extinguishment, depending on the circumstances. Use of a synonym for any of these terms does not avoid the application of the reporting requirement. For example, calling an action a “swap” or a “boundary line adjustment” does not mean the action is not also a modification, transfer, or extinguishment.¹⁰⁷

The IRS thus makes it clearly incorrect to argue, as *The Challenge* does, that an easement is not extinguished when its restrictions are transferred from one parcel to another. Schedule D’s instructions expressly provide: “An easement is also *released*, *extinguished*, or *terminated* when all or part of the property subject to the easement is removed from the protection of the easement in exchange for the protection of some other property or cash to be used to protect some other property.”¹⁰⁸

An IRS general information letter ends the issue. Asked “whether a contribution of an easement is deductible under section 170(h) of the Code if it is made subject to the condition that the easement can be swapped,” the IRS answered, “except in the very limited situations of a swap that meets the extinguishment requirements of section 1.170A-14(g)(6) of the Regulations, the contribution of an easement made subject to a swap is not deductible under section 170(h) of the Code.”¹⁰⁹ The term “swap” was defined

as an agreement to remove some or all of the originally protected property from the terms of the original deed of conservation easement in exchange for either the protection of some other property or the payment of cash. . . . [T]he goal of a swap is generally to free all or a portion of the originally protected property from the easement’s restrictions so that such property can be put to previously prohibited

¹⁰⁶ IRS Form 990 Schedule D Instructions, *supra* note 58.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Many might think the IRS had been adequately clear, but at least one land trust (which wishes to be anonymous) now refers to “reconfigurations” in lieu of the other terms, as though a thesaurus could excuse violation of federal law.

¹⁰⁹ IRS General Information Letter, *supra* note 58.

uses. . . . [T]he transaction may be characterized by the parties as an amendment, modification, adjustment, or migration.¹¹⁰

Swaps condemned by the IRS are effectively identical to transfers proposed in *The Challenge*.¹¹¹ Finally, one commentator has explained the fundamental flaw in the argument that swaps are or should be permissible under section 170(h):

If swaps were permissible, the owner of the land and the holder of the easement could, on the day following the donation or any time thereafter, agree to remove ten, fifty, or even one hundred percent of the original land from the protection of the easement in exchange for the protection of some other land, and the new land and the provisions governing its protection would not have to meet the threshold conservation purposes tests or any of the other requirements in section 170(h) and the Treasury Regulations.¹¹²

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

V. PERPETUITY IS A SACRED PROMISE TO DONORS, TAXPAYERS, AND THE PUBLIC

Conservation easement donors are principally motivated by a desire to protect the specific land they love.¹¹³ Land trusts promise protection forever;¹¹⁴ the Treasury Regulations contemplate protection until “continued use of the property for conservation purposes” has become “impossible or impractical” due to changed conditions. Easement donors believe they have achieved the most permanent protection of their land possible.¹¹⁵ There is overwhelming

¹¹⁰ *Id.* (internal quotes omitted); see also *The Challenge*, *supra* note 1, at 45, 64–68, 72–76.

¹¹¹ The apparent difference is that the swap discussed by the IRS could possibly be disclosed in the original easement, whereas there is no apparent transparency about transfers proposed in *The Challenge*. See *The Challenge*, *supra* note 1, at 7 n.28, 25 n.128.

¹¹² *National Perpetuity Standards, Part 1*, *supra* note 102, at 520–21.

¹¹³ *E.g.*, *News & Publications, Retired Judge Makes Case for Conservation*, W. RESERVE LAND CONSERVANCY (Mar. 8, 2010), <http://www.wrlandconservancy.org/news-2010-03-08.htm> (on file with the Harvard Law School library) (quoting donor: “I love the land, the beauty of the woods and the wildlife. I am determined to preserve it in its natural state for posterity. This easement with Western Reserve Land Conservancy has made that possible.”); Jessica Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441, 455 (2000) (“Landowners genuinely may be motivated to protect their environmentally unique property and devoted to the promise of preserving their land in its present state for perpetuity.”).

¹¹⁴ *E.g.*, Ruth Ansell, *A Conservation Easement Is Forever* (unpublished manuscript), [http://www.bedfordlandtrust.org/Articles/article.conservation.easement%20\(1\).pdf](http://www.bedfordlandtrust.org/Articles/article.conservation.easement%20(1).pdf) (last visited Jan. 24, 2013) (on file with the Harvard Law School Library).

¹¹⁵ This consistent belief is manifest in donor statements on hundreds of land trust websites. The Land Trust Alliance offers a letter for landowners to send to their congressional representa-

evidence that easement donors donate expressly to protect their specific land as close to forever as possible.¹¹⁶

There is no evidence that easement donors donate to protect abstract “conservation purposes,” that they contemplate that their easement is like a taxicab that can replace passengers (conservation land),¹¹⁷ or that swaps or exchanges were contemplated by Congress, Treasury, or taxpayers as posited by *The Challenge*.¹¹⁸ To the contrary, donors are motivated to protect their own specific land.¹¹⁹ Section 170(h) and the Treasury Regulations also contemplate perpetual protection of the specific parcel of land encumbered by the tax-deductible conservation, unless continued use of that specific property for conservation purposes becomes impossible or impractical due to changed conditions.¹²⁰ Having acquired an easement based on promises of perpetuity, land trusts are

tives to support tax incentives stating, in part: “Recently, I decided to protect my land from development for my children and generations to come by donating a conservation easement to [*name of land trust*].” Land Trust Alliance, Template Landowner Thank You Letter to Co-sponsors, <http://www.landtrustalliance.org/policy/tax-matters/documents/12-ty-donors-to-reps.doc> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library).

¹¹⁶ *E.g.*, *20 Years, 20 Voices; Two Decades of Conversation About Conservation*, INLAND NW. LAND TRUST, http://www.inlandnwlandtrust.org/finds.php?find_id=553 (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (“While development of the land would have been financially rewarding, it was not the right thing to do.” — John Magnuson, conservation easement landowner, Dec. 2005; “Not one house on the lake. Developers and realtors have called us for years, wanting to put houses around the Owens Lakes, but we just didn’t want to see anything happen to the lakes.” — Vickie Hershey, Dec. 2000); *see also* Nancy McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations — A Responsible Approach*, 31 *ECOLOGICAL L.Q.* 1, 41–50 (2004) (summarizing multiple surveys).

¹¹⁷ *See The Challenge*, *supra* note 1, at 7 n.28 (taxicab metaphor); *see also, e.g.*, *Conserved Lands, Earle Family Farm Conservation Easement*, UPPER SACO VALLEY LAND TRUST, http://www.usvlt.org/categories/conserved/easements/earle_farm_easement.html (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (quoting Nancy Earle: “We have owned the land for over half a century and are really attached to it. We love the land and don’t ever want to see it cut up and developed.”).

¹¹⁸ *The Challenge*, *supra* note 1, at 45, 64–68, 72–76.

¹¹⁹ *E.g.*, *In Their Own Words, Landowners’ Stories of Protecting Their Land*, GATHERING WATERS CONSERVANCY, at 11, available at <http://www.gatheringwaters.org/assets/documents/special-publications/ITOW.pdf> (“Though I am as ever powerless to know what lies ahead except for one thing — this farm will remain as we love it.”); *id.* at 13 (“Prior to the easement, I had nightmares of houses in my ‘front yard’ after I died! At least we’ve been able to insure that this will not happen as long as civilization exists.”); *id.* at 33 (“Our land can never be further developed — ever; it gives us comfort.”).

¹²⁰ *See, e.g.*, Treas. Reg. § 1.170A-14(g)(5)(i) (2009) (baseline documentation that must be provided to donees “is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights”). This regulation contemplates perpetual protection of conservation interests associated with the particular property encumbered by the easement, not conservation interests in general. The extinguishment regulation provides an exception to the general rule that conservation interests associated with the particular property identified in the easement must be “protected in perpetuity,” and that exception applies in very limited circumstances (*i.e.*, when it can be established to the satisfaction of a judge that continuing to protect the conservation values of that property has become “impossible or impractical” due to changed conditions). Treas. Reg. § 1.170A-14(g)(6)(i) (extinguishment regulation); *see also* Treas. Reg. § 1.170A-14(c)(2) (prohibiting donee from selling, trading, or otherwise transferring the easement, whether or not for consideration, except to another eligible donee who agrees to continue to enforce the easement or in the context of an extinguishment that complies with extinguishment and proceeds regulations).

obligated to fulfill those promises by federal tax law, by charitable trust principles, by fiduciary duty to donors, by the terms of the conservation easement, and by practical reality that future donations will dry up if promises are known to be breached.¹²¹

Taxpayers also have a strong interest in the perpetuity of conservation easements that they have subsidized through income tax deductions enjoyed by donors. Easements represent a significant segment of charitable gifts in total dollars even though donated by comparatively few taxpayers, so all taxpayers bear a financial burden in the creation of easements. Congress and taxpayers would never have supported multi-billion dollar investments in tax deductions¹²² for easements that lasted only three or ten or even fifty years.¹²³ Tax deductions and corresponding losses to the federal Treasury can be justified only if deductions “buy” permanent land protection through perpetual easements.¹²⁴ Indeed, federal tax law expressly forbids income tax deductions for donation of anything except perpetual easements.¹²⁵

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

Everyone recognizes that there are rare circumstances in which an easement or a portion of an easement may terminate. In one example, easement land abuts a two-lane road that is later widened, requiring taking of a strip of easement land for the road. The Treasury Regulations anticipate these circumstances and allow termination subject to the requirement that the land trust

¹²¹ See, e.g., Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1121 (1993) (“disregarding donor intent will have an adverse effect on charitable giving”). See generally Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43 (2008); Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 CHI-KENT L. REV. 977 (2010) (collecting many authorities).

¹²² See generally Roger Colinvaux, *Charity in the 21st Century: Trending Towards Decay*, 11 FLA. TAX. REV. 1 (2011).

¹²³ See generally McLaughlin, *supra* note 116 (describing federal tax incentives); DEBRA PENTZ, THE CONSERVATION RESOURCE CTR., STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS (2007), available at http://conservationtools.org/libraries/1/library_items/182-State-Conservation-Tax-Credits-Impact-and-Analysis (describing state tax incentives). See also Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROB. 1, 4–5 (2011).

¹²⁴ See generally Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29, 31–32, 43–47 (2011) (citing many authorities); Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. 883, 888–90 (2010); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 554–67 (2006); Douglas M. Humphrey, *The “Interior” Revenue Service: The Tax Code as a Vehicle for Third-Party Enforcement of Conservation Easements*, 37 B.C. ENVTL. AFF. L. REV. 425, 435–52 (2010).

¹²⁵ 26 U.S.C. § 170(h)(2)(C), (5)(A) (2006).

recovers and uses the proceeds in a manner consistent with the purposes of the original contribution, the original easement.¹²⁶ The land could be condemned without the easement, and eminent domain law provides substantial protection to donors and land trusts against a misuse of the condemnation process through public hearings, required findings of necessity, court proceedings, and jury trial. *The Challenge* takes this rare circumstance and expands its use to a host of vaguely identified situations in which land trusts would have flexibility to discard one easement to protect some other land.¹²⁷

Although Treasury Regulations limit termination to a “judicial proceeding,”¹²⁸ *The Challenge* suggests that a judicial proceeding is merely a safe harbor or just one option.¹²⁹ Judge Haines in *Carpenter* did not state that the extinguishment regulation is merely a safe harbor. Rather, he stated, “the extinguishment regulation provides taxpayers with a *guide, a safe harbor, by which to create the necessary restrictions* to guarantee protection of the conservation purpose in perpetuity.”¹³⁰ In context, “the necessary restrictions” are those in the extinguishment regulation: (1) a judicial proceeding, (2) a finding that continued use of the land for conservation purposes has become impossible or impractical, and (3) the holder’s use of its share of the proceeds “in a manner consistent with the conservation purposes of the original contribution.”¹³¹ In a subsequent regular Tax Court opinion binding on the Tax Court,¹³² Judge Haines refers to “the judicial proceeding requirement of section 1.170A-14(g)(6)(i)” as a “specific requirement.”¹³³

¹²⁶ Treas. Reg. § 1.170A-14(g)(6); *see, e.g.*, *Johnston v. Sonoma Cnty. Agric. Pres. & Open Space Dist.*, 123 Cal. Rptr. 2d 226, 237–39, 100 Cal. App. 4th 973 (Cal. Ct. App. 2002) (finding that the district’s conveyance of utility easement over easement land was proper without voter or legislative approval, as the conveyance was under threat of condemnation).

¹²⁷ *The Challenge*, *supra* note 1, at 7–16, 73–76.

¹²⁸ Treas. Reg. § 1.170A-14(g)(6)(i); *see* Lindstrom, *supra* note 103, at 31 (“[T]he Regs do not contemplate that an easement may be terminated other than by judicial action in a manner more or less consistent with the charitable trust doctrine.”).

¹²⁹ *The Challenge*, *supra* note 1, at 11.

¹³⁰ *Carpenter*, T.C. Memo 2012-1, at 18 (emphasis added).

¹³¹ *Id.* at 3 (quoting Treas. Reg. § 1.170A-14(g)(6)). In *Carpenter*, Judge Haines expressly referred to footnote 7 in *Kaufman II*. *Carpenter*, T.C. Memo 2012-1, at 12 (citing *Kaufman II*, 136 T.C. at 307 n.7). In that footnote, the Tax Court declined to rule on “whether the language establishing the restriction [in the conservation easement deed] must incorporate provisions requiring judicial extinguishment (and compensation) in all cases.” *Kaufman II*, 136 T.C. at 307 n.7. Presumably an easement that is silent regarding extinguishment but is extinguishable under state law only in a judicial proceeding, upon a finding of impossibility or impracticality, and with payment of proceeds to the holder to be used for similar conservation purposes, would be deductible. The Tax Court noted in footnote 7 that a rule mandating that the easement deed incorporate provisions requiring judicial extinguishment is suggested by the “restriction on transfer” regulation, Treas. Reg. § 1.170A-14(c)(2), which provides that a donee may not transfer a conservation easement except (i) to another eligible donee who agrees to enforce the easement or (ii) in the context of an extinguishment that complies with Treas. Reg. § 1.170A-14(g)(6) (extinguishment and proceeds regulations). *See* McLaughlin, *Protecting the Federal Investment*, *supra* note 23, at 248–54.

¹³² Tax Court Rule 152; *see also* Mary Ann Cohen, *How to Read Tax Court Opinions*, 1 HOUS. BUS. & TAX. L.J. 1, 5 (2001).

¹³³ *Mitchell v. Comm’r*, 138 T.C. No. 16 at 9 (2012).

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

(1) the significant public investment in conservation easements and the conservation and historic values they protect; (2) the enormous economic value inherent in the development and use rights restricted by conservation easements; (3) the political, financial, and other pressures that may be brought to bear on both governmental and non-profit holders to release or terminate conservation easements; (4) the increasing scarcity of undeveloped land; (5) the high stakes involved in the termination of a conservation easement; and (6) the necessity of according a certain amount of deference to the intent of conservation easement donors so as not to chill future conservation easement donations.¹³⁴

Many easements expressly provide, as in *Bjork*, that court approval is required for extinguishment.¹³⁵ Donors are often informed by land trusts that easements cannot be extinguished without court action.¹³⁶ Equity is also a significant concern. As one commentator explains,

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

¹³⁴ McLaughlin & Machlis, *supra* note 61, at 1580; see McLaughlin, *Protecting the Federal Investment*, *supra* note 23, at 258–62 (explaining reasons underlying extinguishment and proceeds requirements in the Treasury Regulations); see also Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers To Modify or Terminate Conservation Easements*, 29 J. LAND RES. & ENVTL. L. 281, 291–309 (2009).

¹³⁵ See, e.g., *Michigan Model Conservation Easement*, § 13, available at <http://landtrust.org/ProtectingLand/MichModelEasementTextVersion.htm>; *Conservation Easement Paragraph Databank*, BEST BEST & KRIEGER, 85–87 (“Paragraph Ten”) (Oct. 27, 2009), available at <http://www.bbklaw.com/?t=40&an=3775&format=xml>.

¹³⁶ *Conservation Easements FAQ*, GATHERING WATERS CONSERVANCY, <http://www.gatheringwaters.org/about-land-trusts/conservation-options-for-landowners/conservation-easements/conservation-easements-faq/> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (“It is very difficult to extinguish a conservation easement. Conservation easements are designed to protect natural resources in perpetuity. They can be extinguished only by a judge and only in very specialized circumstances.”).

requirements at the time of the donation of tax-deductible conservation easements, but leave the subsequent transfer and extinguishment of such easements to the vagaries of the state enabling statutes.¹³⁷

VI. GOOD DRAFTING SOLVES MANY ISSUES OF CHANGING CONDITIONS

Change is the one true constant. All easements must be drafted recognizing possible future changes in every aspect of land and people. Careful drafters address not only current land and conditions but also foreseeable future changes that may occur. Thus, expanding urban uses on nearby properties must be considered in how easement land may be affected. Lands in a flood plain need an easement that addresses floods and droughts. Climate change should be considered in drafting all or substantially all easements. In areas subject to tornados or earthquakes, easements should address resolution of land management disputes after such events. Agricultural easements must address changes in farming techniques, crops, water availability, and the like. Potential changes over time need to be addressed in any well-drafted easement, and the land trust community has long understood the importance of doing so.¹³⁸

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

VII. CHANGED CIRCUMSTANCES RARELY SUPPORT AMENDMENT OR TERMINATION

The IRS explains: “Conservation easements should not be amended except in limited circumstances such as to correct a typographical error in the original easement document However, if a remote future event, like an earthquake, can extinguish the easement, the donation would nevertheless be treated as in perpetuity.”¹³⁹ The only other IRS example of a possible proper

¹³⁷ *National Perpetuity Standards, Part 2*, *supra* note 34, at 68; *see also id.* at 69 (“Federally subsidized perpetual conservation easements should be no more easily transferable or terminable in Montana or Michigan than in Maine or Minnesota.”).

¹³⁸ *See* JESSICA JAY, DRAFTING CONSERVATION EASEMENTS 7 (2010), available at <http://www.conservationalaw.org/publications/13-DraftingGuidance.pdf> (stating that easement drafters should “continue to emphasize that changed conditions surrounding the property are not justification for the easement’s termination, only the total loss of all conservation values may justify termination, and even then, allow for substitution of new purposes for the public’s benefit instead”).

¹³⁹ IRS, *supra* note 28, at 16 (citing Treas. Reg. § 1.170A-14(g)(3) (2009)).

case for extinguishment of part or all of an easement is condemnation.¹⁴⁰ Conservation easements are perpetual transfers of property rights from an owner to an eligible donee, which are advertised as perpetual by land trusts, required by the IRS to be perpetual, and intended by the donor to be perpetual.

Many changed circumstances are foreseeable events or alterations that could and should have been foreseen. The whole purpose of a conservation easement is to remain binding despite changes in circumstances, such as enhanced profitability of land for development. Land may become more or less valuable with or without particular permitted uses. An easement's bar against a valuable use is not a basis for amendment but a reason for the easement's existence. Tax deductions or credits may not be available as parties had expected with no effect on easement permanence.¹⁴¹ Parties to transactions routinely take the risk that tax consequences may differ from what was anticipated, but that event does not justify undoing even ordinary transactions, much less perpetual ones. These are risks in any transfer of property rights. Discovery of valuable mineral rights does not support revocation of other types of deeds transferring a parcel in fee, so there is no reason that discovery of mineral rights on easement land that cannot be mined because of the easement should warrant termination of the easement. Development opportunities may arise after the easement is recorded that were not contemplated before. Perpetuity means that it does not matter how valuable the land would be or may become without the easement's restrictions. The Restatement (Third) of Property: Servitudes explains: "If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the

¹⁴⁰ Treas. Reg. § 1.170A-14(i)(6). See generally AMENDING EASEMENTS: THE QUESTION OF ACCOMMODATING CHANGE IN THE CONSERVATION EASEMENT HANDBOOK: MANAGING CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS (Janet Diehl & Thomas S. Barrett eds., 1988).

¹⁴¹ As a result, *Walter & Otero Cnty. Land Trust*, Order, No. 05-CV-96 (Colo. Jud. Dist. Ct. June 21, 2005), a case described in *The Challenge*, see *The Challenge*, *supra* note 1, at 40–42, is wrongly decided. See, e.g., Remarks of Steven T. Miller, Commissioner, Tax Exempt and Government Entities, IRS (Mar. 28, 2006), available at http://www.irs.gov/pub/irs-tege/miller_speech_3_28_06.pdf ("[U]pon learning that the tax credit was not marketable, as expected, the donors petitioned for the return of the easement. This situation gives us grave concern, because it too violates the requirement that easements be granted in perpetuity."); Lindstrom, *supra* note 103, at 18 ("Many people wonder if they can provide in their easement that the easement terminates if the tax benefits are denied for some reason, or if the tax benefits turn out to be less than anticipated. Of course the answer is that they cannot make such a provision because it violates the requirement that the easement be granted in perpetuity."). Perpetuity of easements cannot be contingent on any event occurring after donation, such as whether donors receive desired tax benefits. "If the contribution is a conditional gift, the taxpayer cannot take a deduction." IRS, *supra* note 28, at 12. Land trusts may not make assurances relating to tax deductions. LAND TRUST ALLIANCE, LAND TRUST STANDARDS AND PRACTICES Practice 10(C) (2004), available at <http://www.landtrustalliance.org/training/sp/lt-standards-practices07.pdf> ("The land trust does not make assurances as to whether a particular land or easement donation will be deductible, what monetary value of the gift the Internal Revenue Service (IRS) and/or state will accept, what the resulting tax benefits of the deduction will be, or whether the donor's appraisal is accurate."). For extended discussion of *Walter & Otero County Land Trust*, see *National Perpetuity Standards, Part 2*, *supra* note 34, at 32–35.

power to terminate the servitude so that some other productive use may be made of the land."¹⁴²

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

VIII. CONSERVATION EASEMENTS ARE NOT TAXICABS

In proposing expansion of land trusts' ability to amend and terminate easements, *The Challenge* uses an analogy in which the easement is a taxicab carrying its conservation purposes through time so that perpetuity is satisfied if conservation purposes endure even if the taxicab is taken to a junkyard and destroyed.¹⁴³ This analogy is unsupported in law and deeply offensive to easement donors. Donors who made personal and financial sacrifices relying on promises of perpetuity cannot hear the taxicab analogy without powerful negative reactions.¹⁴⁴

The analogy is based on misreading Treasury Regulations that are not in the Code. The analogy fails because the Code mandates perpetuity, and Treasury Regulations cannot diminish or alter the Code.¹⁴⁵ In fact, the two can and must be construed consistently by applying the same perpetuity requirements. *The Challenge* claims that, because the Treasury Regulations allow an easement to be terminated under specific circumstances, "the Regulations emphasize perpetuating an easement's purposes over time, as opposed to perpetuating the deed of the easement itself."¹⁴⁶ But the Treasury Regulations authorize extinguishment only in very limited circumstances, namely, if a "subsequent unexpected change in the conditions surrounding the property . . . make[s] [it] impossible or impractical"¹⁴⁷ to continue to use the property for conservation purposes *and* only with judicial oversight and a payment of a designated mini-

¹⁴² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 cmt. a (2000).

¹⁴³ *The Challenge*, *supra* note 1, at 7 n.28.

¹⁴⁴ The author is such a donor and has observed intense negative reactions by other donors.

¹⁴⁵ A regulation may not amend a statute, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936), or add to the statute "something which is not there," *United States v. Calamaro*, 354 U.S. 351, 359 (1957). See also *Iglesias v. United States*, 848 F.2d 362, 367 (2d Cir. 1988) (citing many authorities).

¹⁴⁶ *The Challenge*, *supra* note 1, at 7.

¹⁴⁷ Treas. Reg. § 1.170A-14(g)(6)(i) (2009). "Impractical" means much more than "inconvenient." See RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d ("Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved."). See generally Robert L. Birmingham, *Why Is There Taylor v. Caldwell? Three Propositions About Impracticability*, 23 U.S.F. L. REV. 379 (1989); Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the Wisdom of Solomon*, 135 U. PA. L. REV. 1123 (1987). Circumstances and events that were foreseeable when entering into the easement, such as climate change, expanding development pressure, and rising land values, are insufficient. See, e.g., Note, *The Doctrine of Impossibility of Performance and the Foreseeability Test*, 6 LOY. U. CHI. L.J. 575 (1975).

mum proportionate share of proceeds to the holder to be used to accomplish similar conservation purposes.¹⁴⁸ The Treasury Regulations also expressly mandate that holders be prohibited from transfers except (1) to another eligible donee that agrees to enforce the easement or (2) in an extinguishment compliant with federal extinguishment and proceeds regulations.¹⁴⁹ No Regulation supports the interpretation that perpetuation of easement purposes on entirely different land is an acceptable alternative to perpetuity of the easement. The requirement for perpetuity, repeated in the Code and Treasury Regulations, argues powerfully to the contrary.

The taxicab analogy undermines the purpose of perpetual easements and jeopardizes use of easements as a land protection tool. Easement donors (and restricted use fee land donors) typically grant their property interests to land trusts because the donors love and wish to protect *their* land forever.¹⁵⁰ Tax deductions are an incentive and a benefit, but they do not begin to compensate for lost land value.¹⁵¹ Instead, the true easement value is the knowledge that the land will be protected long after the current owner/donor is dead. The taxicab analogy posits that the land trust can freely renege on promises to protect Aunt Sally's farm if the board of directors in a future year finds another property more appealing. If Aunt Sally is typical of donors and knew about the taxicab analogy, she very likely would not have donated.¹⁵² Donors who learn of this and similar arguments for flexibility by a minority of the land trust community are outraged and feel betrayed.¹⁵³ Mere existence of the taxicab analogy places future easement donations at risk because prospective donors who realize that an easement donated to protect their specific land could be swapped at the

¹⁴⁸ Treas. Reg. § 1.170A-14(g)(6)(i).

¹⁴⁹ See *supra* note 131 and accompanying text.

¹⁵⁰ Representations land trusts make to donors regarding permanent protection of *their* land support this conclusion. Land trusts do not solicit easement donations on their websites or in promotional materials by stating that land trusts will be free to swap or trade a landowner's easement when some ostensibly "better" conservation opportunity comes along. Land trusts represent that they are undertaking the obligation to protect each donor's specific land "in perpetuity" or "forever." Many such land trust representations are collected in footnotes in this Article.

¹⁵¹ McLaughlin, *supra* note 116, at 45–46 ("[F]ederal tax incentives compensate the typical easement donor for only a modest percentage of the reduction in the value of his or her land resulting from an easement donation. Any charitable donation that requires a significant financial sacrifice must be motivated by factors other than, or in addition to, the anticipated tax savings.").

¹⁵² See, e.g., *id.* at 45 ("[T]he surveys indicate that for most easement donors, a strong personal attachment to and concern about the long-term stewardship of their land is the primary factor motivating their donations, while tax incentives generally play a subsidiary or supplemental role."); *Land Conservation: The Case for Perpetual Easements*, VERMONT LAND TRUST (2007), <http://www.vlt.org/news-publications/other-publications/201> (last visited Jan. 24, 2013) (on file with the Harvard Law School Library) (noting with regard to Vermont Land Trust easements, "[a]lthough the tax and financial benefits were usually important considerations, the owner's primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends").

¹⁵³ Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031, 1050–51 (2006) (describing how donor gave up an easier life for herself for promise of permanent protection of her land and deceased donor's daughter expressed her "'sense of outrage and betrayal'" at a proposed subdivision on easement land (quoting daughter's letter)).

whim of a future land trust board would not donate.¹⁵⁴ Moreover, substantial federal investment would not be protected as Congress intended because the requirements of 170(h) and the Treasury Regulations would not have to be satisfied as to the new protected parcel or easement burdening that parcel.

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

CONCLUSION

Conservation easements are challenging to draft and to hold. Each one provides lessons to the land trust and drafters in how to do the next one better. States are, of course, free to establish easement purchase and tax incentive programs that allow easements to be terminated pursuant to state-created processes and procedures, and some have done so. Land trusts are also free to raise funds to purchase easements that expressly grant the land trusts the right to amend or terminate the easements as land trusts see fit or upon satisfaction of conditions of their choice, subject to whatever requirements are imposed by state law, and assuming land trusts negotiate with the grantor for this discretion and memorialize discretion in the easement deed (instead of representing that the easement is perpetual).

States and land trusts that wish to enjoy federal tax incentives for easement donations must satisfy federal tax law requirements. Congress has mandated that federally deductible conservation easements be "granted in perpetuity," their conservation purposes "protected in perpetuity," and the holders not have the right to sell, release, or otherwise transfer such easements except as provided in the extinguishment regulation. Conservation easements protect beloved farms and forests, vineyards and vernal pools across America because donors believe the promise of perpetuity. If that promise is dishonored, donors' trust will have been betrayed, the public's subsidy forfeited, and our great-grandchildren will all lose.

¹⁵⁴ According to a 2005 nationwide survey conducted by Zogby International, *Charitable Donating Survey, American Adults*, ZOGBY INT'L (Nov. 22, 2005), available at <http://www.cehe.org/resources/ZogbyResults.pdf>, (i) 97% of the respondents said they consider it a "very" or "somewhat" serious matter "if charities are spending money donated to them on unauthorized projects," *id.* at 27, while 78.7% said they would "definitely" or "probably" stop giving to any nonprofit organization that accepted contributions for one purpose and used the money for another, *id.* at 12, (ii) 72.4% said that, when a nonprofit uses money "for a purpose other than the one for which it was given," the nonprofit's managers "should be held legally or criminally liable for acting in a fraudulent manner," *id.* at 18, and (iii) 97.4% said that respecting a donor's wishes was "very" or "somewhat" important to the "ethical governance of nonprofit charitable organizations," *id.* at 21.