

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

5-10-2021

Conservation Easements as a Tool for Nature Protection

William Snape

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Environmental Law Commons](#), [Property Law and Real Estate Commons](#), and the [Tax Law Commons](#)

Conservation Easements as a Tool for Nature Protection

by William J. Snape III, Laura Harris, and Theresa Geib



William J. Snape III



Laura Harris



Theresa Geib

William J. Snape III is an assistant dean and professor at the American University Washington College of Law (AU WCL), co-director of the AU WCL's Program on Environmental and Energy Law, and senior counsel at the Center for Biological Diversity. Laura Harris received an LLM in international

legal studies from AU WCL, and Theresa Geib is a JD candidate at AU WCL. The authors thank Christi Cardoza, Denaya Holland, and Alicia Martinez for their significant research and analysis. They also thank Harry Segal and Alex Albrecht for their contributions and insights.

In this article, the authors examine the effectiveness of conservation easements in protecting wildlife and natural habitats and argue that the federal tax deduction for easement donations is a valuable piece of the overall national conservation effort.

I. Conservation Easements Matter

The conflict between proponents of land and water conservation and those promoting traditional, natural-resource intensive development is a well-known story.¹ One side sees the economic development of land and water as a fundamental right, while the other side values preservation of wildlife, ecosystems, and biological diversity as at least an equal right. This article examines the intersection of these two viewpoints: the active conservation of land and water resources on private land² through conservation easements that extend the long-standing property law notion of easements to the modern situation in which a landowner commits to maintain and conserve the property in a specific condition, usually for a financial benefit.³

Public lands set aside for conservation are popular in the United States.⁴ While not all public

¹ Aldo Leopold, *A Sand County Almanac: And Sketches Here and There* 204 (1949) (describing the stakes involved with the "battle" between development and conservation: "The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.").

² Most federal environmental statutes do not directly regulate private real property land use. The two notable exceptions — section 9 of the Endangered Species Act and section 404 of the Clean Water Act — are defined narrowly and rarely enforced to the limit by the applicable federal agency. See, e.g., *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (affirming the definition of "harm" under the Endangered Species Act to restrict logging activities that may destroy the habitat or breeding grounds of an endangered species on private property); and *Rapanos v. United States*, 547 U.S. 715 (2006) (allowing the federal government to regulate dredging and filling of wetlands on private property if the wetlands are "waters of the United States").

³ See generally Jesse Dukeminier et al., *Property* 832-834 (2018) (explaining the history and function of conservation easements).

⁴ For example, as of this writing, 423 units, 85.1 million acres, are managed by the National Park Service, with five new sites on the horizon. See National Park Service, "Recent Changes to the National Park System" (last updated Jan. 21, 2021). Public lands are also protected by other government agencies, such as the Bureau of Land Management and the U.S. Forest Service. These and other government agencies manage more than 610 million acres of public lands. Recently, public lands are more popular than ever. The National Park Service has registered more than 14 billion visits since 1904. See National Park Service, "Visitation Numbers" (last updated Feb. 25, 2021).

land and water designations are for the protection of wildlife and habitats per se, all these lands receive protection for a variety of natural resource, cultural, or historic reasons.⁵ In addition to public lands, more than 60 million acres of private land and water in the United States receive protection, much of it through conservation easements.⁶ Because approximately 60 percent of all land in the United States is owned by private parties, no one disagrees that private land is an important part of the overall U.S. conservation puzzle.⁷

Conservation easements exist at both the federal and state level; however, the focus of this article is on conservation easements encouraged by Congress through the enactment of section 170(h).⁸ This section allows landowners to claim a federal tax deduction if they donate an easement to a qualifying organization, such as a nonprofit land trust.⁹ Easement property often has restrictions that limit its future development without transferring ownership of the land. The land trusts ensure that the restrictions in the conservation easement deed are honored in perpetuity. Unlike protected public land, land

protected by conservation easements continues to increase at a steady rate.¹⁰

Recently, some conservation easements have been scrutinized and challenged.¹¹ Several easement donations have received criticism for a lack of conservation value.¹² Other easement donations are criticized because of the corporate and financial structures of the donors.¹³ This leads to and may further contribute to the more general problems of donation valuation¹⁴ and whether and to what extent the IRS approval of overvalued appraisals from easement donors is leading to fraudulent or unfair transactions that drain the treasury.¹⁵

In consideration of these issues, we asked a fundamental threshold question — how effective are conservation easements at protecting wildlife and important habitats? Because financial data concerning tax returns and parcels of land and water are confidential, this article does not analyze the cost effectiveness of the federal tax easement system. But our examination of several hundred conservation easements leads us to conclude that the federal tax deduction for conservation easements is a valuable piece of the overall national conservation puzzle.¹⁶

⁵ See, e.g., Forest Service Organic Act of 1897, 16 U.S.C. section 473 (“To improve and protect the forest . . . [and] for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber”); National Forest Management Act of 1976, 90 Stat. 2949 (codified as amended at section 1600) (providing for diversity of plant and animal communities based on suitability and capability of the land area); Federal Land and Policy Management Act, 43 U.S.C. section 1701 (defining the Bureau of Land Management’s mission as maintaining multiple uses and sustained yield); National Wildlife Refuge System Improvement Act of 1997 (codified as amended at 43 U.S.C. sections 668dd-668jj) (creating a strong and singular wildlife conservation mission to maintain the biological integrity, diversity, and environmental health of the refuge system).

⁶ In contrast to a traditional easement, which generally allows a person to “use another’s land” for a specific purpose, a conservation easement generally restricts the economic actions a landowner may take to advance conservation goals. Conservation easements created under section 170(h) must be donated for any of the four conservation purposes designated in the statute. See section 170(h) and *infra* Table 6.

⁷ NatureServe, “Map of Biodiversity Importance” (2021).

⁸ Section 170(h). Not all of the four acceptable bases for a tax deduction are for natural resource or wildlife conservation (e.g., historic conservation). Thus, by definition, not *all* legitimate conservation easements under section 170(h) have a direct natural resource or wildlife conservation value, though there frequently exist coextensive benefits, which are beyond the scope of this article.

⁹ *Id.*; see also Nancy McLaughlin, “Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements,” 37 *Va. Tax Rev.* 1 (2017).

¹⁰ The number of easements recorded by the IRS has risen steadily since 2012, reported at 4,767 in 2015, 4,518 in 2016, 6,502 in 2017, and 14,095 in 2018. Congressional Research Service, “Charitable Conservation Contributions: Potential for Abuse?” IN11141 (Nov. 1, 2019). See generally IRS, “SOI Tax Stats — Individual Noncash Charitable Contributions” (last updated Feb. 24, 2021).

¹¹ McLaughlin, “Trying Times: Conservation Easements and Federal Tax Law,” University of Utah College of Law (Sept. 9, 2020).

¹² See, e.g., Bob Lord and Chuck Collins, “Donald Trump’s Abuse of the Conservation Easement Tax Loophole Shows How the Tax Code Favors the Ultrarich,” *MarketWatch* (Oct. 21, 2020); and Samuel D. Brunson, “Trump and Conservation Easements,” *Nonprofit Law Prof Blog* (Oct. 5, 2020).

¹³ See, e.g., Joint Committee on Taxation, “Report on S. 170” (July 9, 2019); and Timothy Lindstrom, “The Syndication of Conservation Easement Tax Deductions,” *Land Trust Alliance* (2015) (identifying the potential for syndicated easements to become tax shelters or sham donations).

¹⁴ See, e.g., William E. Ellis, “The Anatomy of Overvalued Syndicated Conservation Easements,” *Tax Notes Federal*, Oct. 26, 2020, p. 583.

¹⁵ See Adam Looney, “Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Easement,” *Brookings Institution* (Dec. 20, 2017).

¹⁶ Randi Spivak, “Biden Executive Order Pushes for Protection of 30% of America’s Land, Ocean,” *Center for Biological Diversity* (Jan. 27, 2021).

II. This Conservation Easement Study

Looking at the value of conservation easements in protecting biological diversity, including wildlife and habitats, a team of researchers at the American University Washington College of Law studied 201 conservation easements across the country. The study's focus was on the biological baseline reports (BBRs) prepared for all conservation easements. Produced by outside experts, the BBRs provide details, including maps and photographs, of all the resources (broadly defined) on the property and lay out the conservation purposes that will define the conservation easement.

The preliminary results of this study were published in August 2019.¹⁷ This first look included 175 BBRs. Each BBR was rated on: (1) the unique or important resources found within the conservation easement; (2) the significance of protecting those natural resources from environmental degradation; and (3) the easement's stated purpose. The BBR provisions of each easement for wildlife, habitat, climate change, monitoring, and various economic uses were reviewed and assigned a grade: "1" if the documentation indicated that the easement was outstanding; "2" if the documentation indicated that it was acceptable; and "3" if the documentation indicated that it was inadequate to meet the conservation goals.

The preliminary results showed that 64 percent of the BBRs reviewed were outstanding in quality, 35 percent were acceptable, and only 1 percent were in some form inadequate. In addition to the grades for conservation, 81 percent of the BBRs kept important natural resources unexploited, 80 percent had active habitat management regimes, 70 percent had monitoring and compliance plans, and 38 percent allowed no economic use at all.

The study, again, did not include any analysis on the tax value of the proposed land donations or any investigation into the type of donor landowners and donee land trusts involved. We

focused on whether private land conservation easements significantly contribute to wildlife and habitat protection and whether this tool is as (roughly) effective as federal and state statutes designating public land protections.

III. Conservation Value of Easements

Throughout the remainder of 2019 and 2020, the study expanded to a database of 201 conservation easements and followed up with a closer, more detailed look at the BBRs and other related available documents. Also, the team conducted outside research to understand some of the details in the BBRs and, in some cases, the land surrounding the conservation easement. Despite the expanded scope, the study's goal remained the same: to concentrate on the terms and stated purposes of the conservation easement and determine if the elements in the BBRs would meet the conservation goals.

The final results modified the initial findings but still revealed that conservation easements effectively contribute to conservation, particularly the protection of wildlife and habitats.

Table 1. Overall Grades — Assessment Includes Wildlife, Habitat, and Other Factors

Overall Rating	Number of BBRs	Percentage of BBRs
1. Fully meets conservation goals	119	59.2%
2. Adequately meets conservation goals	82	40.8%
3. Inadequately meets or sets conservation goals	0	0%
Total	201	100%

IV. Where, When, How Big?

A. Year of Establishment

The BBRs spanned from 2002 to 2018. The majority of easements reviewed, 184 of 201, or 91.5 percent, were established between 2013 and 2018.

¹⁷ William J. Snape III, "Private Land and Water Conservation: Examining Conservation Easements," *Tax Notes Federal*, Aug. 26, 2019, p. 1405.

Table 2. When Were the BBRs Completed?

Year	Number of BBRs	Percentage of BBRs
2002	1	0.5%
2005	1	0.5%
2007	1	0.5%
2010	1	0.5%
2011	1	0.5%
2012	6	3%
2013	16	7.9%
2014	31	15.4%
2015	25	12.4%
2016	49	24.4%
2017	54	26.9%
2018	9	4.5%
(blank)	6	3%
Total	201	100%

B. Acreage

Our study found a wide variety of donation sizes, ranging from thousands of acres to just 10 acres. The study also found no correlation between the size of the donation and the potential value of the conservation easement.

Table 3. Size of Donation

Maximum acreage (largest donation)	3,223 acres
Average acreage	379 acres
Median acreage	179 acres
Minimum acreage (smallest donation)	10 acres

C. States

The conservation easements in this study are distributed over 17 states. They are predominantly located in 11 states in the Southeast, representing 192, or 95.5 percent, of the BBRs studied. Nine easements, or 4.5 percent, are located in the West and Midwest.

Table 4. State Distribution of BBRs in This Study

State	Number of BBRs	Percentage of BBRs	Total Acres Donated
Ala.	22	10.9%	4,683
Calif.	1	0.5%	557
Fla.	8	4%	3,295
Ga.	117	58.2%	39,657
Ill.	1	0.5%	102
Ky.	1	0.5%	180
La.	2	1%	1,184
Miss.	2	1%	274
N.C.	8	4%	1,784
Nev.	1	0.5%	812
Okla.	1	0.5%	80
Ore.	1	0.5%	61
S.C.	9	4.5%	3,438
Tenn.	16	7.9%	13,469
Texas	4	2%	2,020
Va.	2	1%	1,297
W.Va.	5	2.5%	2,823
Total	201	100%	75,716

D. Landowners – Donors

One piece of information gathered was donor type. However, the assessment did not undertake to determine an easement's value based on its donor type, and differences between these types of donors were beyond the scope of this study. A notable observation was that most BBRs in the study were of syndicated owners. But the study found no correlation between the assigned rankings and any of these donor types.

Table 5. BBRs Prepared for Limited Liability Company Property Owners or Individual/Family Landowners

Donor Business Entity Type	Number of BBRs	Percentage of BBRs
LLC	172	85.6%
Limited liability limited partnership	1	0.5%
LLP	1	0.5%
Limited partnership	1	0.5%
Unknown ^a	26	12.9%
Total	201	100%
^a Of the 26 “unknown” donor types, four appeared to be individual landowners, but the actual number of individuals versus syndicated donors in our data set was not confirmed.		

E. Land Trusts – Donees

The tax regulations require the conservation easement holder to be a “qualified organization,” a government agency or charitable organization, capable of holding the land in trust. Nine land trust organizations hold most of the 201 conservation easement donations in this study.

F. Easement Authorization Type

To claim a tax deduction under section 170(h), Congress has required donations for any of the four following conservation purposes: (1) outdoor recreation or education for the general public; (2) protection of habitat; (3) preservation of delineated open space; or (4) historic preservation. Table 6 contains a breakdown of the easements’ conservation purposes.

Table 6. Conservation Easement Authorization Type – Conservation Purposes

Authorization Under Section 170(h)	Number of BBRs
(1) Outdoor recreation, education	18
(2) Natural habitat/wildlife	175
(3)(a) Scenic enjoyment	133
(3)(b) Federal, state, or local government policy	187
(4) Historic area or structure	29

While many of the easements listed more than one of these conservation purposes in the BBRs, this study focused solely on whether the easements’ provided value in promoting the conservation of natural habitat and wildlife. The evaluation of an easement reflects the analysis of the easement’s potential to effectively preserve land based on the following four elements:

- natural habitat and wildlife;
- present and future economic uses of the easement;
- consideration of the effects of climate change on the easement; and
- monitoring and compliance mechanisms.

This study did not focus on easements with conservation purposes primarily for historic areas or outdoor recreation unless they affected the easement’s effectiveness to protect natural habitats and wildlife.

V. Habitat and Wildlife Value

More than 87 percent of the BBRs reviewed in our study indicate that the easement’s primary purpose is to protect habitats for wildlife. The preservation goals were similar across the easements, despite the variety of ecosystems or size of the donation.

The following two tables display the rankings for habitat protection and wildlife conservation. The grades assigned are “1” if the protections are outstanding, “2” if they are average, and “3” if they are deficient. The three issues considered were: (1) if the purpose of the easement appears to be at least in part for wildlife or habitat; (2) if the easement appears to conserve wildlife or protect habitat; and (3) whether the wildlife conservation or habitat protection value is independently validated in the easement by a government agency or scientific association.

Table 7. Habitat Protection Ranking

Grade	Number of BBRs	Percentage of BBRs
1	148	73.6%
2	47	23.4%
3	6	3%
Total	201	100%

Together, the 195 BBRs ranked 1 and 2 suggest that of the conservation easements in this study, 97 percent have included potentially effective protections for natural habitats.

Table 8. Wildlife Conservation Ranking

Grade	Number of BBRs	Percentage of BBRs
1	107	53.2%
2	84	41.8%
3	10	5%
Total	201	100%

Our overall grading of the BBRs for wildlife conservation produced 107, or 53.2 percent, with superior protection in place. Together, BBRs rated 1 and 2 account for 191, or 95 percent of the study's easements. When BBRs listed wildlife protection as a core value, over half provided management plans and lists of species to protect, including but not limited to endangered or threatened species, at both the federal and state levels. In the BBRs, five primary themes emerged: (1) the promotion of healthy forests; (2) the preservation of water quality; (3) the protection of threatened or endangered species; (4) the preservation of unique habitats; and (5) the establishment or extension of wildlife migration corridors. Almost all the easements that listed a conservation authorization under section 170(h)(iii)(II) or federal, state, or local government policy also included a section in the BBR listing state priority habitats under that state's wildlife or environmental action plan. Table 6 has the number as 187 of our 201 BBRs.

A. Promote Healthy Forests

Government protection should be thrown around every wild grove and forest on the mountains, as it is around every private orchard, and the trees in public parks. To say nothing of their value as fountains of timber, they are worth infinitely more than all the gardens and parks of towns.¹⁸

One of the primary goals of most of the easements is to protect existing old-growth

forests. These habitats are important for countless species of wildlife. In the southeastern United States — the location for most of the conservation easements in this study — the old-growth forests are made up primarily of oak, hickory, and pine. Hemlock and chestnut are also prevalent in the more mature forests.

Approximately 71.6 percent of the easements allow for the removal of trees and shrubs to maintain healthy, sustainable forests. These require a detailed forest management plan to be developed in line with the easement's conservation values. The easement holder, often a land trust, is responsible for creating and managing the land management plans. Still, several details in the BBRs call for a range of management schemes, from the minimal removal of dead trees to controlled burns and commercial logging activities.

B. Preserve Water Quality

Wetlands, marshes, freshwater springs and ponds, and streams were all documented in the BBRs. These ecosystems are vital habitats for all wildlife species because they provide water, shelter, and food for both land and aquatic wildlife. These areas are considered high-biodiversity habitats.

Wetlands are a key habitat for amphibians. Several state-listed species, including salamanders and rare species of fish, are examples of the biological diversity highlighted for protection. The conservation easements studied all have strong water conservation provisions. Water quality and water integrity are key components to any successful wildlife habitat. In terms of habitat, the most frequent protection required was to expand riparian buffers along streams and rivers, in most cases from 50 to 100 feet. The buffers protect streams and rivers by filtering runoff water, decreasing sedimentation, and sustaining the banks from erosion.

Species of concern in these habitats include endemic fish species, mussels, and snails. One easement described the only known population of the federally threatened trispot darter in a few areas in three southern states. The easements in this area directly seek to protect this critical habitat, listing the habitat and the species as a high priority for the easement.

¹⁸ John Muir, *John of the Mountains, The Unpublished Journals of John Muir* 350-351 (1979).

C. At-Risk Species

Approximately 20 percent of the easements claimed that the property, in whole or in part, has the potential for some rare or endangered species to come about. These land sections were selected for the easement not because the species are present but because of the potential for wildlife to return. Many BBRs indicated that some species of wildlife were previously located in the easement area or found nearby. The easements stress that creating or maintaining species-specific habitats will encourage wildlife to return to these areas.

Although highlighted as an important value of the easements, we found few endangered or listed species present on the easement lands. There were a few key indicators, species that reveal the health environment, and a few state-listed species, as follows:

- whooping crane (federally endangered);
- gray bat (federally endangered);
- Indiana bat (federally endangered);
- sage grouse (removed from federal protection);
- various fish species: trout, trispot darter (federally threatened);
- various amphibian species: salamanders, frogs, gopher frog;
- various reptile species: turtles, snakes, gopher tortoise (threatened);
- wood stork;
- barn owl; and
- American alligator.

For example, 13 easements in Georgia have an excellent habitat for the gopher tortoise, and the tortoise is present on those easements. This land animal is a keystone species; others rely on it for survival.¹⁹ The easements call for protection of the sandy, sunny flatlands and dry prairies where the gopher tortoise will build long burrows and feed on the ground vegetation. Many other species use these burrows for shelter as well.

¹⁹ Reed F. Noss and Allen Y. Cooperrider, *Saving Nature's Legacy: Protecting and Restoring Biodiversity* 7-8 (1994) (explaining the value of keystone species in supporting a whole community of different species).

D. Preserve Unique Habitats

Three other habitats were documented in the BBRs for special protection because of their unique qualities and scarce habitats. These are the dry prairies, caves, and rock outcroppings.

1. Dry prairies.

Grasses and small shrubs dominate the dry prairies — land that does not contain a water source such as a river or a stream. These are considered high priority state habitats in the southern United States and are a key component of the conservation easement plans, both for wildlife and state-listed plants. Several rare species are found in the dry prairies, including several species of owl and a grasshopper sparrow, unique to this habitat. The easement plans include required maintenance, such as mowing, of these areas to keep potential wildfires that can sweep through the prairie at bay.

2. Caves.

Caves are a priority habitat for shelter and food for hundreds of species. Many bat species, particularly the federally endangered gray bat and the Indiana bat, are found in caves. The BBRs also note that the caves are sources of groundwater and are critical habitats for unique species found only in these environments. The easements seek to protect the entrances to the caves and sensitive interiors from cave explorers and other threats.

3. Rock outcroppings.

Steep rock ridges and sandstone cliffs are found in approximately 12 percent of the study's easements. These environments are characteristic of drier plants and trees and support a high number of rare species of plants, many of which provide a food source for the wildlife that call these habitats home. These habitats are also designated as important in the state environmental protection plans.

E. Wildlife Migration Corridors

One of the primary reasons for the decline of many species is the disappearing habitat. Fragmented habitats isolate small populations, also leading to extinction. One of the desired goals of the conservation easements in this study is to connect easements with other protected lands to

create a corridor for wildlife on a larger expanse of land. The expanded habitat provides for the natural migration of species through the seasons and will support a larger, more viable population in the ecosystem.

More than 15 percent of the study's easements report that they are adjacent to other protected lands, including other easements, Bureau of Land Management land, and state-protected land. More than 10 percent of the easements recorded were proximate (under five miles) to other conservation lands. One BBR stressed that connectivity and proximity enhance the conservation value of an easement exponentially because the habitat supports a larger diversity and is more sustainable for wildlife.

VI. Economic Uses and Easements

The present and future economic activity of the land was an important component of the BBRs' overall ranking. Our analysis found four primary economic uses: agriculture, forestry, grazing, and limited development, which includes building homes, roads, and recreational structures.

Table 9. Economic Activity on the Easement

Current Economic Use	Number of BBRs	Percentage of BBRs
Agriculture	39	19.4%
Forestry	63	31.3%
Grazing	17	8.5%
Limited development	25	12.4%
No use ^a	79	39.3%
Other	38	18.9%
^a Ten of these BBRs report "no use" and some other use. For example, four of the properties are listed as "limited development" in addition to "no use." In these cases, future development that is deemed consistent with the conservation values of the easement could (and would) be allowed in the conservation area with prior approval from the land trust. Four BBRs allow possible future forestry activities within the conservation area, and two easements protect existing farms.		

This study also looked at prohibited uses on the easements. With a few exceptions, commercial agriculture, logging, and surface mining were not allowed.

A. Sustainable Activities

While approximately 28 percent of the easements list agriculture or grazing as current land use, more than 70 percent have reserved the right for future agricultural use. With one or two exceptions, the easements prohibit industrial agriculture operations, and a few easements that were former commercial sites are now placed under conservation. All these easements reserve the right to build small farm buildings, residences, and access roads.

Grazing made up the smallest economic use of the easements, found in 17, or 8.5 percent, of the BBRs. Both agriculture and grazing can theoretically fit in with conservation purposes as they prevent further development or urbanization of an area, but the intensity or type of agriculture or grazing is key.²⁰ Similar principles apply to forestry.²¹

B. Limited Development

Twenty-five, or 12.4 percent, of the conservation easements allowed for some development on the land. Maps and photographs in the BBRs showed the areas designated for the conservation easement and areas reserved by the landowner for potential future development. Reserved rights to build residential homes, farm buildings, and access roads were the most common.

Another key element in this analysis was whether the conservation easement allowed valuable resources to remain in the ground. In the eastern United States, the mountainous land extending along the Fall Line contains huge deposits of granite, limestone, kaolin, shale, sand, oil, and gas. A few easements in the study were former quarries, now exhausted or abandoned. Our analysis revealed 148 easements, 73.6 percent, committed to keeping these valuable resources in the ground. However, for 53 easements, 26.4 percent, either they do not prohibit the extraction or

²⁰ Jennifer Schieltz and Daniel Rubenstein, "Evidence Based Review: Positive Versus Negative Effects of Livestock Grazing on Wildlife. What Do We Really Know?" 11 *Envtl. Res. Letters* 113003 (2016). See also Christine Glaser, Chuck Romaniello, and Karyn Moskowitz, "Costs and Consequences: The Real Price of Livestock Grazing on America's Public Lands," Center for Biological Diversity (Jan. 2015).

²¹ See generally William S. Alverson, Walter Kuhlman, and Donald M. Waller, *Wild Forests: Conservation Biology and Public Policy* 136-150 (1994) (indicating the positives and negatives of multiple use theories in forest environments).

the landowner retains mineral ownership rights with the potential for future removal. Also, nine easements have contract language that reserves the right to remove gas and oil from the easement area by horizontal drilling on an adjacent piece of land owned by the donor.

VII. Climate Change and Easements

Land conservation programs will play a critical role in our response to climate change.²² There is strong support in the community for mitigation and adaptation measures to be effectively incorporated into land management programs, including conservation easements.²³ But there is potentially a roadblock, as a statutory requirement of conservation easements is to maintain the land in its state at the time of the donation in perpetuity. Future changes to the management or even boundaries of the easement may not be permitted under the terms to qualify for a conservation easement tax deduction, despite being required to effectively manage potential climate change issues. These future changes are often written into conservation easement documents as potential future amendments, and several have been challenged by the IRS.²⁴ Known as “extinguishment clauses,” either Congress or the IRS must clarify changes that are acceptable to an easement based on changed conditions of the land or water in question.²⁵

It was important to include consideration of climate change in this study, as the goals of conservation easements align with the goals of climate change mitigation practices — to protect natural habitats and preserve biodiversity. A 2011

study of conservation easements found that over half of land trusts managing conservation easements recognized that climate change would hurt the conservation goals of their easements, and 22 percent could already see the effects of climate change in their conservation easements.²⁶ At the time of the study, few of the BBRs mentioned climate change and its effects and most did not contain mechanisms to address the changes.

Of the 201 BBRs reviewed in our study, 135, or 67.2 percent, addressed climate change. In many cases, the requirements placed on the land trust organizations were open-ended and used broad terms, providing no guidance but directing the creation of management plans to address future effects of climate change. Our results found that BBRs recognized that conservation could promote ecosystem resilience and foster adaptation to climate change. For example, the BBRs discussed how the easements would protect watersheds for clean water, attenuate flooding events, provide ecological corridors to assist with species movement in response to changing habitats, and preserve existing habitats.

As part of the climate change discussion, the BBRs recognized that untouched forests absorb a high volume of carbon, and some of the BBRs focused on potential future markets for carbon credits. The data show that 57.7 percent of the easements discuss carbon sequestration for carbon offsets. Most of the easements grant landowners the right to retain carbon credits. They also include the rights to build alternative energy structures on the easement, with the approval of the conservation easement holder.

VIII. Monitoring

An essential part of measuring the overall value of a conservation easement is to monitor the easement over time. As such, the monitoring mechanisms are essential components in baseline documentation. While monitoring and compliance plans and performance are the responsibilities of the qualified organization

²² Sarah Cline and Sahan T.M. Dissanayake, “Special Issue on Climate Change and Land Conservation and Restoration: Advances in Economics Methods and Policies for Adaptation and Mitigation,” 47 *Agric. & Res. Econ. Rev.* 195-196 (2018).

²³ Jessica Owley et al., “Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools,” 95 *Denv. L. Rev.* 727, 736 (2018).

²⁴ *Id.* at 777; see also *Pine Mountain Preserve LLLP v. Commissioner*, 978 F.3d 1200, 1212 (11th Cir. 2020) (reversing and remanding a Tax Court decision on whether an amendment in a conservation easement violates the “protected in perpetuity” requirement); *PBBM-Rose Hill Ltd. v. Commissioner*, 900 F.3d 193, 207 (5th Cir. 2018) (concluding faulty extinguishment clause failed perpetuity test); and *Coal Property Holdings v. Commissioner*, 153 T.C. 126, 139 (2019) (concluding faulty extinguishment clause failed perpetuity test).

²⁵ Senate Finance Committee, “Questions for the Record, Responses by Dr. Yellen,” at 61 (Jan. 21, 2021) (statement of Treasury Secretary Janet Yellen about the need for IRS-approved extinguishment clause language).

²⁶ Owley et al., *supra* note 23, at 748.

receiving the conservation easement,²⁷ the initial baseline documentation will outline the time and terms for accessing the property.

Our study identified keywords and terms that appeared in baseline documentation to determine whether there are any future planned monitoring or compliance mechanisms. We looked for detailed information on forest plans and management recommendations. Also, we looked at the quantity and quality of additional data, such as maps, photographs, and species inventory lists. A conservation easement with a robust accompanying baseline report was more likely to yield a robust monitoring program. The availability of accurate and complete data at the time of donation made future monitoring easier.

Our findings revealed that 138 BBRs, or 68.7 percent, had some indication of future monitoring and compliance plans or contained sufficient data to establish an effective monitoring system. However, these provisions are not required and are dependent on the donee land trust to make the information available to the public. Also, there are no requirements for public access to these easements, which raises significant environmental justice concerns.

IX. Summary and Recommendations

Based on the final data and results of the study, our initial conclusion that conservation easements contribute to wildlife and habitat conservation objectives is supported. Conservation easements are valuable tools that allow agreements between a landowner and land trust to set aside land for protection — land that might otherwise be sold for development, urbanization, or commercial enterprises. Conservation easements are valuable mechanisms under which — if the BBRs and contracts are written to effectively address the conservation values the easement is trying to protect — natural habitat and wildlife will win lasting protection. While Congress could clarify valuation and other public interest considerations, the IRS possesses significant administrative authority to

correct some of the problems identified over the last decade. These reforms include the following:

- The IRS should immediately issue guidance, and perhaps rulemaking, on how it will analyze and enforce donations of conservation easements in terms of (1) transparent and improved appraisal processes of the donations; (2) transparency of and requirements for biological baseline reports, including public monitoring to ensure that the donation has an adequate conservation purpose; and (3) creation of a “safe harbor” provision to help landowners decipher the proper extinguishment clause language to use in easement deeds.
- Instead of focusing solely on syndicated conservation easement donations, Congress and the IRS should examine the overall structure of conservation easement creation, including accurate and transparent appraisals, examine independent affirmance of the conservation value of each conservation easement, and perhaps most importantly, clarify the IRS’s new role as a de facto federal land agency.
- While most section 170(h) conservation easements appear legitimate, the potential for abuse is high, and the public should only be paying for conservation easements through the tax code that tangibly increase conservation, help mitigate the existential threats of climate change, and address inequity and environmental justice. It seems sensible to desire greater involvement by the U.S. Geological Service, along with the IRS, in evaluating and monitoring these easements²⁸ as part of this country’s larger goal to protect and conserve more land and water by 2030 and beyond.²⁹ ■

²⁸ See U.S. Geological Service, “Major Update for America’s Inventory of Parks and Other Protected Areas” (July 9, 2019). (A new version of the Protected Areas Database of the United States, or PAD-US, has major federal, state, and easement updates, an easier-to-use data structure, new web services, and mapping capabilities.)

²⁹ See, e.g., Center for Biological Diversity, “Biden Executive Order Pushes Protection of 30% of America’s Land, Oceans” (Jan. 27, 2021). (A year ago, the center launched “Saving Life on Earth,” a plan that calls for a \$100 billion investment to save species and the creation of new national monuments and parks, wildlife refuges, and marine sanctuaries so that 30 percent of U.S. lands and waters are fully conserved and protected by 2030 and 50 percent by 2050.)

²⁷ See reg. section 1.170A-14(c)(1) (specifying that a qualified organization must protect the conservation purposes of the donation and enforce the restrictions of the conservation easement).

SECTION 501(C)(3) — CHARITIES

Organization Is Denied Exemption

The IRS denied an organization's application for tax-exempt status after finding the organization serves private interests by raising money to help a specific individual and the individual's family.

Full Text Citations: LTR 202117014; *Doc 2021-17867*; 2021 TNTF 84-48

IRS Revokes Organization's Tax-Exempt Status

The IRS revoked the tax-exempt status of an organization that didn't verify that it met the section 501(c)(3) operational test.

Full Text Citations: LTR 202117015; *Doc 2021-17868*; 2021 TNTF 84-47

IRS Denies Organization Tax-Exempt Status

The IRS denied tax-exempt status to an organization established to provide education on health and balanced living because it is not operated exclusively for exempt purposes but primarily operates for the private benefit of its founder.

Full Text Citations: LTR 202117023; *Doc 2021-17876*; 2021 TNTF 84-50

Exempt Status Denied to Organization Offering Therapy to Vets

The IRS denied tax-exempt status to an organization that provides veterans and first responders with therapy not typically covered by insurance, finding that it failed to show that it operates exclusively for exempt purposes and that its net earnings inure to its founder and owner.

Full Text Citations: LTR 202118022; *Doc 2021-18910*; 2021 TNTF 89-51

Fundraising Group Denied Tax-Exempt Status

The IRS denied tax-exempt status to an organization conducting fundraising for the revitalization and redevelopment of a municipality's central business district, finding that it failed to establish it is operated exclusively for charitable purposes or is lessening the burdens of government.

Full Text Citations: LTR 202118021; *Doc 2021-18909*; 2021 TNTF 89-52

SECTION 501(C)(4) — SOCIAL WELFARE ORGANIZATIONS

Political Organization Denied Tax-Exempt Status

The IRS denied tax-exempt status under section 501(c)(4) to an organization because it is not operated exclusively for the promotion of social welfare, finding that its activities constitute indirect participation in political campaigns on behalf of or in opposition to any candidate for public office.

Full Text Citations: LTR 202120016; *Doc 2021-21054*; 2021 TNTF 99-32

SECTION 501(C)(6) — BUSINESS LEAGUES

Aspiring Business League Denied Exemption

The IRS denied tax-exempt status to an organization seeking exemption as a business league after concluding the organization has been formed to benefit its members' business interests rather than to promote the common business interests of a particular industry or trade.

Full Text Citations: LTR 202117016; *Doc 2021-17869*; 2021 TNTF 84-46

SECTION 4942 – TAXES ON FAILURE TO DISTRIBUTE INCOME**Foundation Given More Time to Pay Out Set-Aside Funds**

The IRS approved a private foundation's request to set aside funds intended for the conversion of a newly purchased building into an art museum, citing several intervening factors including the COVID-19 pandemic that resulted in a reevaluation of the project.

Full Text Citations: LTR 202118024; *Doc 2021-18912*; 2021 TNTF 89-53

SECTION 4945 – TAXES ON TAXABLE EXPENDITURES**IRS Approves Foundation's Scholarship Grant Procedures**

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202117018; *Doc 2021-17871*; 2021 TNTF 84-51

IRS Approves Foundation's Scholarship Grant Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202117019; *Doc 2021-17872*; 2021 TNTF 84-52

IRS Approves Foundation's Scholarship Grant Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202117020; *Doc 2021-17873*; 2021 TNTF 84-53

IRS Approves Foundation's Scholarship Grant Procedures

The IRS approved a private foundation's procedures for awarding scholarships to students and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202117021; *Doc 2021-17874*; 2021 TNTF 84-54

IRS Approves Foundation's Scholarship Grant Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202117022; *Doc 2021-17875*; 2021 TNTF 84-55

IRS Approves Foundation's Scholarship Grant Procedures

The IRS approved a private foundation's procedures for awarding scholarships to students and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202118023; *Doc 2021-18911*; 2021 TNTF 89-54

IRS Approves Foundation's Grant Program

The IRS ruled that a private foundation's grants to foreign charitable organizations will be qualifying distributions, won't constitute taxable expenditures, and won't result in self-dealing.

Full Text Citations: LTR 202119002; *Doc 2021-19808*; 2021 TNTF 94-25

IRS Approves Foundation's Educational Grant Procedures

The IRS ruled that a private foundation's procedures for awarding educational grants meet the requirements of section 4945(g)(3) and, therefore, expenditures made under those procedures will not be taxable.

Full Text Citations: LTR 202119009; *Doc 2021-19815*; 2021 TNTF 94-26

IRS Approves Foundation's Scholarship Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202120017; *Doc 2021-20834*; 2021 TNTF 99-38

IRS Approves Foundation's Scholarship Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

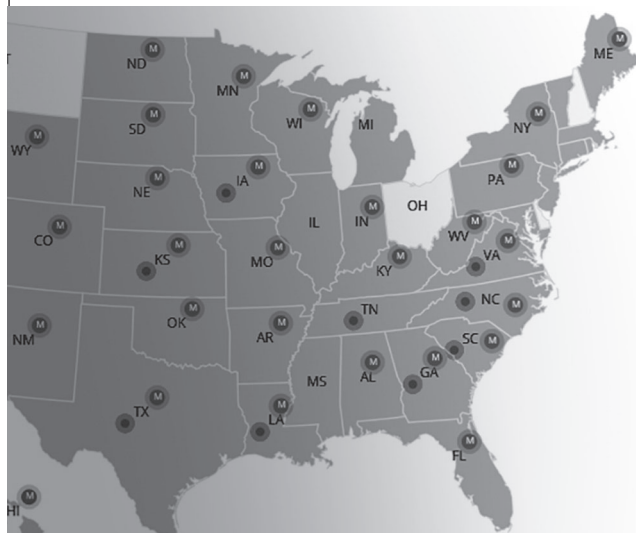
Full Text Citations: LTR 202120019; *Doc 2021-20835*; 2021 TNTF 99-40

IRS Approves Foundation's Scholarship Procedures

The IRS approved a private foundation's procedures for awarding scholarships and found that the awards will neither constitute taxable expenditures nor be taxable to the recipients if used for qualified tuition and related expenses.

Full Text Citations: LTR 202120018; *Doc 2021-21055*; 2021 TNTF 99-39 ■

taxnotes®



Need nexus info? Get Nexus Tracker.

Check out our state nexus tool featuring an interactive map and state-by-state comparison table, included with all *Tax Notes State* and *Tax Notes Today State* subscriptions.

taxnotes.com/nexus-tracker

**Tax Notes gives you
the inside track.**