

CUSTOM-MADE CONSERVATION: RESOURCE-SPECIFIC CONSERVATION EASEMENT  
IMPLEMENTATION UN-PAVES THE PATH OF TAX ABUSE

*Abstract*

*Conservation easements (“CE”) are widely recognized as a double-edged sword. On one hand, CEs are praised because they protect, usually in perpetuity, millions of acres of non-federal land from development. However, CE policy is slated to undergo wide reform due to abuse of the generous tax benefits that are awarded to landowners who donate CEs. The Treasury Department has proposed specific changes to the portion of the Internal Revenue Code that governs CEs, yet there is little widespread consensus for proper reform measures. This Article theorizes that, unlike the vast majority of CEs managed by state and local land trusts for general conservation purposes, CEs administered to protect specific resources are far less often the object of abuse or litigation. For example, the United States Department of Agriculture (“USDA”) administers CE programs specifically designed to conserve agricultural land and forestland. Additionally, some conservation organizations implement CEs dedicated to that organization’s narrow focus on the preservation of certain flora, fauna, or ecosystems. This article argues that this resource-based specialization sparks more extensive front-end planning and builds greater institutional knowledge, which are keys to minimizing CE abuse and ensuring successful CE use over the long term. Thus, a resource-based approach should be incorporated into successful CE reform to avoid losing the CE as a vital conservation tool.*

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**INTRODUCTION<sup>1</sup>**

Conservation easements (“CE”) are an invaluable land conservation tool, but extensive and increasing litigation concerning the federal charitable income tax deduction available to landowners who donate CEs indicates the need for reform. These seemingly simple contract-like agreements between a volunteering landowner and a qualified conservation organization or government entity have proved their complexity in recent years and the governing principles need to adjust accordingly. New CE tax policy should account for the diverse nature of resources protected by CEs to ensure successful land preservation while minimizing litigation and abuse surrounding tax deductions.

Tax-deductible CEs are used to protect a wide variety of resources: farms, golf courses, historical building facades, forests, ranches, and recreational properties, just to name a few. Unlike many other federal resource protection tools, which are written with a specific resource in mind, the only directly applicable federal law governing tax-deductible CEs is Internal Revenue Code § 170(h) (“§ 170(h)”), which authorizes deductions for the donation of a wide variety of CEs.<sup>2</sup> In contrast, resource-specific management statutes dominate progressive federal environmental and natural resource law. For example, the National Forest Management Act governs the sustainable management of federally-held forest resources, the Clean Water Act controls abuse of water resources, the Clean Air Act does the same for air, and so on. This

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<sup>2</sup> Conservation purposes required to claim a § 170(h) tax benefit are defined by § 170(h)(4) to include: the preservation of land areas for outdoor recreation by or public education of the general public; the protection of relatively natural habitats of fish, wildlife, plants, or similar ecosystems; the preservation of open space – including farmland and forestland – for scenic enjoyment of the general public, or pursuant to a clearly delineated governmental conservation policy—in either case such open-space preservation must yield significant public benefit; the preservation of a historically important land area or a certified historic structure.”

specialization in environmental regulation suggests that different resources are most effectively controlled, regulated, or protected in different ways. The Clean Air Act's rules about hazardous air pollutants differ from its rules concerning more common air pollutants, and from the Clean Water Act's rules about water pollution. It is unrealistic to expect successful management of both air and water resources under a single set of rules. It likewise is unrealistic to expect successful governance of historical building facades using the same set of rules that govern forests. Still, on a national level, the federal tax incentive program for CE donations relies on a tax code section that applies the same rules to CEs protecting a broad array of resources.

This Article lays out a conceptual framework for building a resource-specific element into the federal tax incentive program for CEs. The first section briefly outlines the relevant background and legal principles concerning how § 170(h) generally functions today. Second, it gives an overview of the challenges that have arisen with the federal tax incentive program. Third, this Article discusses two U.S. Department of Agriculture ("USDA") programs that use resource-specific CEs as a tool to protect non-federal land. The fourth section looks at the CE acquisition methodology of charitable conservation organizations that have specified their mission according to specific resources they seek to protect. Last, it identifies the strengths of these CE implementation methods that can be used as guidelines to create resource-specific CE rules for the federal tax incentive program moving forward.

## I. RELEVANT BACKGROUND

Put simply, a CE is an agreement between a landowner and a qualified conservation organization or government body that restricts future activities on the subject land to protect the

land's conservation values.<sup>3</sup> In practice, this agreement functions more or less like a contract with the deed acting to bind the parties.<sup>4</sup> The landowner retains ownership of the land, but gives certain rights to restrict the use of the property, generally those that might impede conservation, to the easement holder.<sup>5</sup> However, unlike a typical contract, the public is the beneficiary of a CE and subsidizes the acquisition of CEs through tax incentive and easement purchase programs. Accordingly, a variety of other federal and state laws that protect the public interest also apply to CEs.<sup>6</sup> In addition, what CEs protect, how they protect it, and the sheer number of CEs are quickly increasing and adding to the complexity of this seemingly straightforward arrangement.

The primary federal tax incentive offered to landowners who donate CEs is the charitable income tax deduction under § 170(h),<sup>7</sup> which authorizes a deduction for the donation of a wide variety of CEs.<sup>8</sup> Typically, taxpayers are not eligible for tax benefits for donating only partial property interests, but the Internal Revenue Code makes an exception for “qualified conservation contributions.”<sup>9</sup> Under § 170(h), a landowner who donates a CE can claim a charitable income tax deduction provided the CE is “granted in perpetuity,”<sup>10</sup> to a “qualified organization,”<sup>11</sup> exclusively for one or more of four specified conservation purposes,<sup>12</sup> and the conservation purpose is “protected in perpetuity.”<sup>13</sup> A landowner may also claim a deduction for the donation

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<sup>3</sup> ELIZABETH BYERS & KAREN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d. ed. 2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Frederico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and Complicated Mosaic of Law*, 1 J. L. PROP. & SOC'Y 109, 134 (2015).

<sup>7</sup> ELIZABETH BYERS & KAREN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 12 (2d. ed 2005).

<sup>8</sup> *See supra* note 2.

<sup>9</sup> I.R.C. § 170(f)(3)(A), (B)(iii).

<sup>10</sup> *Id.* § 170(h)(1)(A), (2)(C).

<sup>11</sup> *Id.* § 170(h)(1)(B), (3).

<sup>12</sup> *Id.* § 170(h)(1)(C), (4).

<sup>13</sup> *Id.* § 170(h)(5).

component of a part sale, part gift (or “bargain sale”) of a CE.<sup>14</sup> The value of the CE for purposes of the deduction is generally equal to the difference between the fair market value of the land not encumbered by the easement and the fair market value of the land once encumbered.<sup>15</sup> Many states offer additional state tax benefits for CE donations.<sup>16</sup>

The Uniform Conservation Easement Act (“UCEA”) is a model conservation easement enabling statute that has been adopted in some form by almost half of the states in state enabling statutes.<sup>17</sup> The main thing the UCEA recommends that states do in their enabling statutes is enact provisions that override traditional common law impediments to the long-term validity of CEs, which are often held in gross.<sup>18</sup> However, state enabling statutes vary because they do not have to follow the UCEA or meet any national criteria. A state can enact laws that make it impossible to comply with portions of § 170(h). For example, in *Wachter v. Commissioner*<sup>19</sup>, the Tax Court held that the donation of the CEs in question, which were governed by North Dakota law mandating a maximum duration of 99 years for any easement, did not qualify for a deduction under § 170(h) because they were not “granted in perpetuity.”

The UCEA also specifies conservation purposes of a CE, limits the organizations that can hold a CE, and provides provisions for authorizing third party enforcement of CEs.<sup>20</sup> However, the UCEA does not offer guidance regarding how to craft resource-specific CEs or how to value

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<sup>14</sup> See, e.g., *Browning v. Commissioner*, 109 T.C. 303, 1 (1997) (holding that Plaintiffs’ were entitled to claim a charitable contribution for the bargain sale of an easement to the county government.)

<sup>15</sup> Treas. Reg. § 1.170A-14(h)(3)(i).

<sup>16</sup> ELIZABETH BYERS & KAREN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 11–12 (2d. ed. 2005).

<sup>17</sup> Uniform Law Commission, *Legislative Fact Sheet- Conservation Easement Act*, available at [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation %20Easement%20Act](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act)

<sup>18</sup> *Id.*

<sup>19</sup> 142 T.C. 140 (2014).

<sup>20</sup> Dana Joel Gattuso, *Conservation Easements: The Good, The Bad, and the Ugly*, NAT’L CENTER FOR PUBLIC POLICY RESEARCH (May 2008), available at <http://www.nationalcenter.org/NPA569.html>

the economic and conservation values of CEs depending on the resource in question. Thus, the UCEA attempts to achieve uniformity within the CE system and related tax benefit, and to provide states, localities, and land trusts with guidance on CE implementation but, like § 170(h), the UCEA does not offer guidance on different types of CEs that are implemented with different resources in mind or create a true national implementation system. Thus, the UCEA mirrors the issues that exist with § 170 (h) in that, though it provides guidance on how to coordinate with federal law, it does not actually implement a national law and does not offer guidance on how to specialize CEs with respect to the resource in question.

Some of the most common CEs are open space easements, agricultural easements, façade easements, forest easements, wetland easements, habitat easements, grassland easements, and the list goes on. This diversity makes reform an extremely difficult topic to fully address. Consequently, this Article simply provides a conceptual framework, without fully considering every potential nuance of the federal tax incentive program. This Article is also limited to providing conceptual guidance on reforms relating to the acquisition of resource-specific CEs (“front-end” reforms), and does not make comprehensive policy recommendations or address the equally important task of implementing reforms to ensure the proper enforcement, administration, and interpretation of perpetual CEs over the long term on behalf of the public.

## **II. MAJOR FRONT-END ABUSES OF THE § 170(h) DEDUCTION**

On some level, § 170(h) is to blame for the vast majority of abuse surrounding CEs. On one hand, its generosity is almost certainly the reason for the widespread use of CEs as a voluntary conservation tool. At the same time, but for this generosity, potential CE donors would have far less incentive to abuse the tax system. As evidenced by the litigation in this context, two major forms of abuse of the § 170(h) deduction are the donation of CEs that are

either overvalued or do not satisfy the conservation purposes tests specified in § 170(h). The discussion below is only a brief overview of these issues to help understand how CE specialization could address some § 170(h) pitfalls.

Proponents of CEs often cite their voluntary, localized nature as a positive. However, these positive qualities make application of a broad federal statute like § 170(h) difficult and susceptible to abuse because local controls are not uniform or resource-specific. Additionally, there is minimal front-end control or involvement by the federal government when CEs are donated, which allows issues to rise to the surface, usually in some type of audit process, only after the easement is already in effect and the tax deduction has been claimed.

#### **A. Valuation Abuses**

To be eligible for a deduction under § 170(h) for the donation of a CE the owner of the property must obtain a qualified appraisal of the CE.<sup>21</sup> The Treasury Regulations interpreting § 170(h) provide that the amount of the deduction depends on the CE's fair market value at the time it is donated.<sup>22</sup> According to the Treasury Regulations, the ideal way to determine the fair market value of an easement would be to use sales of comparable easements.<sup>23</sup> However, comparable CE sales are generally unavailable because CEs are generally not bought and sold in open markets<sup>24</sup> and their terms and the properties they encumber are generally different (they are

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<sup>21</sup> ELIZABETH BYERS & KAREN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 23 (2d ed. 2005)

<sup>22</sup> Treas. Reg. § 1.170A-(h)(3)(i).

<sup>23</sup> Treas. Reg. § 1.170A-(h)(3)(ii).

<sup>24</sup> *Browning v. C.I.R.*, 109 T.C. 303, 1 (1997) (holding that Plaintiffs' could introduce evidence of fair market value before and after CE donation where ) ←this parenthetical is not accurate - I suggest you read the case and note in a short sentence why the court held that a CE could not be valued by looking to CEs sold as part of a county's bargain sale program

not “comparable”).<sup>25</sup> Accordingly, appraisers are generally forced to use the Treasury Regulation’s “back-up” method to determine value—the before and after method:

[T]he fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction.<sup>26</sup>

Because CEs are valued indirectly, the various valuation methods that may be employed, the fact that there generally will be a range of plausible “before” and “after” values for the subject properties, and the appraisers are employed by the taxpayers, appraisers often assert high values for CEs. As a result, the IRS often disputes these asserted values and prepares or obtains its own appraisals, and rightfully so considering the size of the deductions that are claimed. For example, in *Palmer Ranch Holdings v. Commissioner*<sup>27</sup>, the taxpayer originally claimed a \$23.9 million deduction for the donation of a CE on just over 82 acres in Sarasota County, Florida, (i.e., a deduction of \$291,000 per acre).<sup>28</sup> Large numbers like those in *Palmer Ranch* are not uncommon, equating to large losses in federal tax revenue.<sup>29</sup>

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<sup>25</sup> *Trout Ranch, LLC v. C.I.R.*, 493 F. App'x 944, 955 (10th Cir. 2012) (affirming tax court valuation where comparables were “scarce” so fair-market-value before and after method was used.). ← ditto – the taxpayer’s expert looked to sales of CEs in the same county but the court found the CEs were not comparable and the sales were bargain sales

<sup>26</sup> Treas. Reg. § 1.170A-(h)(3)(i).

<sup>27</sup> 107 T.C.M. (CCH) 1408 (T.C. 2014).

<sup>28</sup> *Id.* The court eventually allowed the taxpayer to claim a \$19.9 million dollar deduction, but the case is now on appeal.

<sup>29</sup> *See e.g.* *Kiva Dunes L.L.C. v. C.I.R.*, 97 T.C.M. (CCH) 1818 (T.C. 2009) (sustaining a \$28.6 million deduction for the donation of a CE on a 140-acre golf course); *Herman v. C.I.R.*, T.C. Memo. 2009-205 (disallowing a \$21.8 million deduction claimed with regard to a façade easement restricting use of some of the development rights above a historic building on Fifth Avenue in New York City); *Seventeen Seventy Sherman Street v. C.I.R.*, T.C. Memo. 2014-124 (disallowing a \$7.1 million claimed deduction for the donation of interior and exterior easements on a shrine in downtown Denver); *Belk v. C.I.R.*, 774 F.3d 221 (4th Cir. 2014) (affirming the Tax Court’s disallowance of a \$10.5 million deduction claimed with regard to a conservation easement encumbering a 184-acre golf course); *Mountanos v. C.I.R.*, T.C. Memo. 2014-38 (disallowing a \$4.6 million deduction claimed with regard to remote rugged undeveloped land in Lake County, California).



## B. Conservation Purpose Abuses

As noted, tax-deductible CEs can be donated for a wide variety of broadly stated conservation purposes.<sup>30</sup> Further, the regulations impose only generalized limitations on the retention of development and use rights that could have negative implications for the conservation purposes of a tax-deductible CE.<sup>31</sup> Subsequent litigation shows that this vague guidance lends itself to interpretation disputes. For example, in *Turner v. Commissioner*<sup>32</sup> and *Herman v. Commissioner*<sup>33</sup> the courts found that limitations on development in the taxpayers' CEs were not enough to support conservation purposes under §170(h). In *Turner*, the taxpayer donated a CE that purported to reduce the number of residential lots on a 29.3-acre parcel located near President Washington's Mount Vernon estate from 62 to 30 lots.<sup>34</sup> However, approximately half the property was in a 100-year floodplain, which limited development to only 30 lots under existing zoning laws.<sup>35</sup> In finding that the CE did nothing to protect open space or the historic character of the area, the Tax Court explained that the taxpayer "simply developed the ... property to its maximum yield within the property's zoning classification."<sup>36</sup>

In *Herman*, the Tax Court disallowed a \$21.8 million deduction claimed with regard to a façade easement that purported to restrict the use of a portion of the development rights above a

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<sup>30</sup> See *supra* note 2.

<sup>31</sup> See Treas. Reg. § 1.170(d)(4)(v) (prohibiting deductions for easements that would permit a degree of development that would interfere with scenic qualities or governmental purpose of the easement); *Id.* § 1.170(e)(2), (3) (prohibiting deductions for CEs that would allow for the destruction of an important resource unless destruction of one resource is necessary to protect the resource the CE is intended to protect); *Id.* § 1.170(g)(1) (requiring that development limitations for CEs be legally enforceable). ← this last parenthetical is not correct – (g)(1) mandates that a CE prevent uses of the subject land that are inconsistent with the conservation purposes of the donation

<sup>32</sup> 126 T.C. 299 (T.C. 2006).

<sup>33</sup> 98 T.C.M. (CCH) 197 (T.C. 2009).

<sup>34</sup> *Turner*, 126 T.C. at 301.

<sup>35</sup> *Id.* at 313.

<sup>36</sup> *Id.* at 317.

historic structure on Fifth Avenue in New York City.<sup>37</sup> The court found that the CE did not prevent demolition of the historic structure, and limiting the right to develop a portion of the airspace above the building did not preserve either the structure or a historically important land area.<sup>38</sup> Accordingly, the court found the façade easement did not satisfy the historic preservation conservation purpose test.<sup>39</sup> On the other hand, in *Glass v. Commissioner*,<sup>40</sup> the Sixth Circuit rejected the IRS' argument that the habitat protection conservation purposes test was not met because the grantors retained too many use rights in their easements on a small portion of a 10-acre parcel on the shore of Lake Michigan.<sup>41</sup> The Sixth Circuit rejected the IRS' argument, despite the small size of the property and the grantors' retention of rights to recreate and build accommodating facilities like a boathouse and footpath on the property; finding that potential high quality habitat for endangered eagles, would continue to exist even when landowners exercised those rights, thus the CE was sufficient to support the conservation purposes test.<sup>42</sup>

The IRS made a similar argument regarding reserved rights in *Butler*.<sup>43</sup> The taxpayers in *Butler* reserved significant development and use rights in the easements, including residential subdivision rights as well as agricultural, commercial timbering, and recreational rights, but also introduced evidence at trial, in the form of testimony from environmental consultants, that the habitat on the property would continue to be protected even at full exercise of all reserved rights, and the IRS failed to introduce any evidence to the contrary.<sup>44</sup> The Tax Court held for the

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<sup>37</sup> 98 T.C.M. (CCH) 197 (T.C. 2009).

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 11.

<sup>40</sup> 471 F.3d 698, 708 (6th Cir. 2006).

<sup>41</sup> *Id.* at 700.

<sup>42</sup> *Id.* at 709.

<sup>43</sup> *Butler* 103 T.C.M. (CCH) 1359 at 4.

<sup>44</sup> *Id.* at 9.

taxpayers, finding that, although the evidence on the issue was “sparse,” the habitat would continue to be protected even at full exercise of all the reserved rights.<sup>45</sup>

The above cases illustrate the difficulty in determining whether a CE satisfies the conservation purposes test under § 170(h). Thus, without more guidance or specificity as to what constitutes “conservation purposes,” the abuse and debate surrounding CE tax benefits will almost certainly continue.

### **III. USDA CONSERVATION PROGRAMS**

The Natural Resources and Environment “Mission Area” of the USDA is charged with ensuring the “health of the land through sustainable management.”<sup>46</sup> That Mission Area’s two agencies, the Forest Service (“USFS”) and the Natural Resources Conservation Service (“NRCS”), work to “prevent damage to natural resources and the environment, restore the resource base, and promote good management.”<sup>47</sup> NRCS acts primarily as a technical and financial facilitator of land conservation, while the USFS acts as both a direct land manager of National Forests and a technical assistant to forestland owners in a lesser capacity.<sup>48</sup> However, both agencies foster conservation of working resource systems intended to provide ecosystem services, rather than the pure preservation that other federal agencies, such as the National Park Service, strive for. Thus, the underlying philosophy of these two agencies is generally to manage resources for long-term sustainable use beyond their inherent scenic, conservation, recreational,

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<sup>45</sup> *Id.* at 35.

<sup>46</sup> *USDA Mission Areas: Natural Resources and Environment*, UNITED STATES DEPARTMENT OF AGRICULTURE (May 28, 2013) [http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea\\_NRE.xml](http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=missionarea_NRE.xml).

<sup>47</sup> *Id.*

<sup>48</sup> *See generally About: Regulations and Policies*, U.S. FOREST SERVICE, <http://www.fs.fed.us/about-agency/regulations-policies>.

or historic qualities. Because CEs can be used to manage sustainable resources as well as protect conservation values, it follows that both agencies rely on CEs as a tool for land conservation.

Every four years, Congress passes a bundle of legislation governing the activities of the USDA known as the Farm Bill. According to the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, the Farm Bill is “the single most important piece of legislation for improving the quality of life and economic vitality of our rural communities.”<sup>49</sup> The 2008 Farm Bill included eight conservation programs intended to encourage new conservation and provide more funding for technical assistance.<sup>50</sup> It also focused on cooperative conservation programs by allocating six percent of all program funds to carry out cooperative projects that bring together “producers, states, nonprofit organizations and other groups.”<sup>51</sup> The final major bullet point in the 2008 Farm Bill’s conservation initiatives was its limiting of participation in the USDA conservation programs to individuals whose gross adjusted income did not exceed \$1 million annually, unless that income was derived from farming, ranching, or forestry.<sup>52</sup>

The 2012 Farm Bill purported to implement the “most significant reforms in agricultural policy in decades” and claimed it would reduce the national deficit by \$23 billion by ending direct payments and streamlining and consolidating programs.<sup>53</sup> Taken together, the 2008 and 2012 Farm Bills drastically changed the USDA’s operations and policy and, in turn, dramatically increased their use of CEs as a conservation tool. The following parts detail the changes from the 2008 to 2012 Farm Bill with respect to CE implementation.

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<sup>49</sup> *2008 Farm Bill*, UNITED STATES COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, <http://www.ag.senate.gov/issues/2008-farm-bill>

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Agriculture Reform, Food and Jobs Act of 2012*, UNITED STATES COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, <http://www.ag.senate.gov/issues/agriculture-reform-food-and-jobs-act-of-2012>

## A. USFS & CEs

In addition to its direct management of federally held national forests, the USFS encourages healthy management of state and privately held forestlands. Because more than fifty-seven percent of all forestland in the United States is privately owned, and is being converted for development at an alarming rate – over 10.3 million acres from 1982-1997 – the federal government has a strong interest in promoting preservation on private lands.<sup>54</sup> This is an issue not only because of direct loss of forestlands, but also because isolation of forest fragments can change or lessen the ability of private, state, and national forests to provide their ecological, economic, and social benefits to the fullest extent.<sup>55</sup>

Over the years, Congress has offered fairly direct production- and finance-centric incentives for forest sustainability and management, such as reforestation tax benefits or timber production exclusions from income taxation.<sup>56</sup> Incentives to acquire CEs are a valuable addition to these tax incentives because CEs can be used for less production-centric purposes. Unlike the forest-specific tax incentives, which focus on expenditures for the implementation of timber production, CEs can be used to conserve forest ecosystem services other than timber production, such as water, wildlife, fire preparedness, or erosion control.<sup>57</sup>

The Cooperative Forestry Assistance Act<sup>58</sup> (“CFAA”), enacted in 1978, recognizes the importance of protecting privately-owned forestlands because “most” of the nation’s forestlands

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<sup>54</sup> *Forest Legacy Plan: 5 Year Strategic Direction*, U.S.D.A. FOREST SERVICE, FS-841 Appx. A. available at [http://www.fs.fed.us/spf/coop/library/flp\\_strategicdir.pdf](http://www.fs.fed.us/spf/coop/library/flp_strategicdir.pdf) [Hereinafter *FLP Strategic Direction*] (2005). Although the Strategic Direction was authored in 2005, it is the most recent update currently on the USFS website concerning the conceptual goals of the FLP.

<sup>55</sup> *Id.* at 3.

<sup>56</sup> John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm ... Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 *Fordham Env'tl. L.J.* 691 (1997).

<sup>57</sup> *Id.*

<sup>58</sup> 16 U.S.C § 2012 et seq. (2014).

are in private ownership and subject increasing development and population pressures.<sup>59</sup> The CFAA emphasizes the importance of protecting working forests to provide not only products, including timber and other forest commodities, but also ecosystem services, like fish and wildlife habitat, watershed function and water supply, aesthetic qualities, historical and cultural resources, and recreational opportunities.<sup>60</sup> The CFAA started the momentum of federal involvement, beyond reforestation credits, in state and private forestland holdings. Because this momentum was started with the idea of protecting ecosystems, rather than just timber reserves, federal protection of state and private forest resources has been a more intentional, well-planned process, as evidenced by the evolution of its Cooperative Forestry programs shown below.

Today, in the most recent offshoot of the CFAA, the USFS implements “Cooperative Forestry” programs to encourage healthy forest management on non-federal forestlands by working with states and private land owners to improve forest health.<sup>61</sup> There are four national programs within the Cooperative Forestry umbrella: Forest Stewardship, Forest Legacy, Community Forest, and Urban and Community Forestry.<sup>62</sup>

New policies in the 2008 Farm Bill prompted the USFS to “redesign” its Cooperative Forestry programs.<sup>63</sup> The stated purpose of the redesign was to focus on “the greatest threats to forest sustainability and accomplish meaningful change in high priority areas.”<sup>64</sup> The USFS states that this new approach applies “progressive competitive strategies” to a portion of the

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<sup>59</sup> *Forest Legacy Program Implementation Guidelines*, U.S.D.A. FOREST SERVICE 2 (June 30, 2003) [http://www.fs.fed.us/spf/coop/library/fpl\\_guidelines.pdf](http://www.fs.fed.us/spf/coop/library/fpl_guidelines.pdf).

<sup>60</sup> *Id.*

<sup>61</sup> *Cooperative Forestry*, U.S. FOREST SERVICE <http://www.fs.fed.us/spf/coop/> (July 15, 2014).

<sup>62</sup> *Id.*

<sup>63</sup> *State and Private Forestry Redesign*, U.S. FOREST SERVICE <http://www.fs.fed.us/spf/redesign/> (Feb. 9, 2015) (hereinafter *Redesign*).

<sup>64</sup> *Id.*

federal funds devoted to state and private forest-protection projects.<sup>65</sup> To aid in this prioritization process, the USFS required each state to complete a state-wide “Assessment and Strategy for Forest Resources,” which analyzes forest conditions and trends in the state and delineates priority rural and urban forest landscape areas. The idea behind these assessments is to provide long-term plans for the investment of federal, state, and other resources where they will be most effective.<sup>66</sup>

The USFS’s noted that the nation’s forests are experiencing new and significant health challenges, such as rising tree mortality due to disease and invasive pests, increased wildfire size and intensity, climate change disturbances, and conversion to non-forest uses.<sup>67</sup> The agency’s focus on prioritization suggests that increased budget is not following the increased threats at a comparable rate. Because CEs are a relatively cheap way to manage large tracts of land, it makes sense that the USFS is incorporating them as a major tool to help meet the redesign’s purpose: to “shape and influence forestland use on a scale, and in a way, that optimizes public health benefits from trees and forests for both current and future generations.”<sup>68</sup>

#### i. The Forest Legacy Program

The USFS Cooperative Forestry Program charged with CE implementation is the Forest Legacy Program (FLP).<sup>69</sup> The 2012 Farm Bill extended the FLP through 2017 and set a new authorized level of funding for the program at \$200 million per year.<sup>70</sup> As it does with all Cooperative Forestry programs, the USFS partners with states to implement the FLP, which

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* The USFS redesign webpage states that forests are being permanently converted to non forest uses at a rate of one million acres per year.

<sup>68</sup> *Id.*

<sup>69</sup> *Forest Legacy Program*, U.S. FOREST SERVICE, [http://www.fs.fed.us/spf/coop/programs/loa/aboutflp .shtml](http://www.fs.fed.us/spf/coop/programs/loa/aboutflp.shtml).

<sup>70</sup> AGRICULTURAL REFORM, FOOD, AND JOBS ACT OF 2012: SECTION BY SECTION SUMMARY 44 (2012).

supports state efforts to protect environmentally sensitive forestlands that are threatened by development or other non-forest uses.<sup>71</sup> The broad goals of the FLP are to promote forestland protection, conservation opportunities, and ecological values such as “important scenic, cultural, wildlife, recreational, and riparian resources.”<sup>72</sup> Land that falls within these goals is protected either with a CE or by fee-simple purchase.<sup>73</sup> However, unlike § 170(h), the FLP continues to narrow and specify as eligibility is further limited to states that prepare an “Assessment of Need” that shows, at a minimum, that there are environmentally important areas threatened by conversion to non-forest uses in the state.<sup>74</sup>

The FLP laid out the program’s priorities in 2005 in its Five-year Strategic Direction, which outlines strategies for achieving the broad goals of the FLP, namely to improve accountability and performance of the program on a uniform national level with the intention of creating a national perspective.<sup>75</sup> The Strategic Direction’s four main priorities for the FLP are to (i) promote strategic conservation of private forests, (ii) conserve private forests that provide environmental and economic benefits to people and communities, (iii) slow the conversion and parcelization of environmentally and economically important private forests, and (iv) continually improve FLP business practices.<sup>76</sup> These goals sound broad, but the Strategic Direction elaborates. For example, in promoting the strategic conservation of forests, FLP looks for projects that contribute to “regional, landscape, or watershed-based efforts to protect important

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<sup>71</sup> *Forest Legacy Program*, U.S. FOREST SERVICE, [http://www.fs.fed.us/spf/coop/programs/loa/aboutflp .shtml](http://www.fs.fed.us/spf/coop/programs/loa/aboutflp.shtml).

<sup>72</sup> *National S&PF Authorities and Guidance*, <http://www.fs.fed.us/spf/redesign /spf%20authorities.pdf> (May 11, 2011) (hereinafter *Redesign Authorities*).

<sup>73</sup> *Id.*

<sup>74</sup> FINAL AMENDED FOREST LEGACY PROGRAM IMPLEMENTATION GUIDELINES, USDA FOREST SERVICE COOPERATIVE FORESTRY 8 (June 30, 2003 amended December 21, 2011); *See also Guide to the Forest Legacy Program*, THE LAND TRUST ALLIANCE <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide>.

<sup>75</sup> *FLP Strategic Direction supra* note 60 at Appx. A.

<sup>76</sup> *Id.*



private forests, regardless of tract size.”<sup>77</sup> Strategic conservation within the FLP’s framework also means focusing on local conservation priorities, as determined by the state assessment plans, and attempting to “strategically link to other protected lands to create a cumulative conservation effect.”<sup>78</sup>

What qualifies as benefits to people and communities under goal (ii) of the Strategic Direction is narrowed down to the following three goals: protecting waters; providing economic activities; and conserving fish, wildlife, plants, and unique forest communities.<sup>79</sup> Additionally, it is a USFS priority to protect state and private lands that are adjacent to or within National Forests because they often interact as a single ecosystem. Poor forest health of private inholdings or adjacent lands has the potential to damage the health of National Forests by subjecting them to insect problems or wildfire.<sup>80</sup>

The Strategic Direction’s “guiding principles” are as follows: striving for permanent protection of important forestlands, commitment to constant improvement, use of state assessment plans as a source of local input, use of partnerships to purchase CEs or fee-simple forest properties, and encouragement of professional forest management and traditional forest uses that can coexist with the conservation purposes of a CE.<sup>81</sup> While the Strategic Direction encourages traditional forest uses provided the users create multiple use management plans and use best management practices, “priority is given to lands which can be effectively protected and

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<sup>77</sup> *Id.*

<sup>78</sup> *FLP Strategic Direction, supra* note 60 at 6.

<sup>79</sup> *Id.* at 7.

<sup>80</sup> See Robert L. Glicksman, *Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management*, 87 Neb. L. Rev. 833, 897 (2009) (noting that problems faced by ecosystems will not “respect the political boundaries separating private from state or federal land.”).

<sup>81</sup> *FLP Strategic Direction, supra* note 60 at 6.

managed and that have important scenic or recreational values; riparian areas; fish and wildlife values, including threatened and endangered species; or other ecological values.”<sup>82</sup>

Though its guiding principles are somewhat broad, the FLP’s selection and acquisition of CEs is very intentional and specifically planned. The FLP uses a competitive ranking process involving state and federal committees to select CEs that best meet the program’s goals.<sup>83</sup> In this way, rather than funding and implementing the majority of CEs offered, the FLP funds only the CEs that are best suited to meet the program’s goals in the long run. The FLP is also deliberate and specific with respect to the resources it intends to protect. It identifies resources that are of national importance like water, but also recognizes the importance of local input to identify resources of local importance, like lands connecting or expanding vital tracts or ecosystems.

Originally, the USFS negotiated the purchase of easements and fee-simple properties directly.<sup>84</sup> In 1996, Congress amended federal law to allow the USFS to make grants to states to allow the states to undertake the acquisitions themselves.<sup>85</sup> Currently, FLP funds are allocated via cost sharing with states for project or administrative grants. Under this system, grant applicants must provide at least 25% of the project cost and may not derive their portion of the cost from other federal funding.<sup>86</sup> Often the cost share is made in the form of a donation by the landowner. All projects that receive FLP funds are required to report their accomplishments in the Forest Legacy Information System to measure performance over time.<sup>87</sup> The FLP purports to

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<sup>82</sup> *Id.*

<sup>83</sup> See *Forest Legacy Program Users’ Guide*, USDA FOREST SERVICE: COOPERATIVE FORESTRY, [http://www.fs.fed.us/cooperativeforestry/library/flp\\_usersguide.pdf](http://www.fs.fed.us/cooperativeforestry/library/flp_usersguide.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> U.S. FOREST SERVICE, <http://www.fs.fed.us/cooperativeforestry/programs/loa/flp.shtml>; *Guide to the Forest Legacy Program*, THE LAND TRUST ALLIANCE <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide>.

<sup>86</sup> THE LAND TRUST ALLIANCE <http://www.landtrustalliance.org/policy/public-funding/forest-legacy-guide>.

<sup>87</sup> *FLP Strategic Direction*, *supra* note 60 at 8.

be a great success, having conserved over 2.3 million acres of private forestland, and experiencing “solid growth in terms of budget.”<sup>88</sup> According to the USFS: “The program has been successful due to the clear national need for a conservation program that focuses on forests and to the hard work of state, local, and nonprofit partners to produce effective results.”<sup>89</sup>

## **B. NRCS & CEs**

NRCS’s broad mission is to provide farmers and ranchers with financial and technical assistance to promote conservation and sustainable agricultural activities.<sup>90</sup> Like the direct production benefits used to promote forest regeneration projects by private forestland owners, farm owners can apply for direct production benefits based on the crops they produce.<sup>91</sup> However, like the § 170(h) deduction, increased use agricultural subsidies have become infamous for abuse.<sup>92</sup> Agricultural subsidies are criticized for harming the environment, disturbing the free market, and high cost to the government.<sup>93</sup> While it could be argued that CEs also disturb the free market,<sup>94</sup> NRCS’ use of CEs can be seen as a less controversial way to allocate federal resources and, if done properly, with less potential for abuse.

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<sup>88</sup> *FLP Strategic Direction*, *supra* note 60 at 4; *Forest Legacy Program*, U.S. FOREST SERVICE, <http://www.fs.fed.us/cooperativeforestry/programs/loa/flp.shtml>.

<sup>89</sup> *FLP Strategic Direction*, *supra* note 60 at 4.

<sup>90</sup> *About NCRS*, U.S.D.A. NATURAL RESOURCES CONSERVATION SERVICE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about/>.

<sup>91</sup> Marcelo Ostrea: *How U.S. Agricultural Subsidies Harm the Environment, Taxpayers, and the Poor*, NATIONAL CENTER FOR POLICY ANALYSIS available at <http://www.ncpa.org/pub/ib126> (August 7, 2013).

<sup>92</sup> Tim Worstall, *The Real Problem with Farm Subsidies: They Don’t Subsidize Farms*, FORBES MAGAZINE (2013) available at <http://www.forbes.com/sites/timworstall/2013/03/20/the-real-problem-with-farm-subsidies-they-dont-subsidise-farms/>.

<sup>93</sup> Marcelo Ostrea: *How U.S. Agricultural Subsidies Harm the Environment, Taxpayers, and the Poor*, NATIONAL CENTER FOR POLICY ANALYSIS available at <http://www.ncpa.org/pub/ib126> (August 7, 2013).

<sup>94</sup> See John M. Vandilck, *Waiting for Uncle Sam to Buy the Farm... Forest or Wetland*: 8 Fordham Envtl. L. J. 691. (2006).

i. Agricultural Conservation Easement Program

The most recent Farm Bill, the Agriculture Act of 2014 consolidated the Wetlands Reserve Program, the Farm and Ranch Lands Protection Program, and the Grassland Reserve Program into the Agricultural Conservation Easement Program (“ACEP”).<sup>95</sup> ACEP facilitates the acquisition of two types of CEs: agricultural land easements and wetland reserve easements.<sup>96</sup> Under the agricultural land easements component of ACEP, NRCS provides matching funds to state and local government, tribes, and qualified conservation organizations to help them purchase easements protecting agricultural lands in perpetuity.<sup>97</sup> In contrast, under the wetland reserve easements component, NRCS purchases easements directly from landowners to protect the wetlands and associated lands either in perpetuity or for thirty years.<sup>98</sup>

Unlike the conservation purposes tests under §170 (h), the eligibility requirements for ACEP CEs are extensive and specific. On a program-wide level, the following lands are ineligible: federal lands except those held in trust for Indian Tribes, state-owned lands, land subject to an existing easement, and lands that have onsite or offsite conditions that would undermine the purpose of the program. ACEP further limits eligibility within each of its two components. Another limiting factor is that available funding is based on the resource in question. Wetland and grassland easements, for example, are eligible for more funding from NRCS and require less from state or local organizations.<sup>99</sup> For agricultural land easements,

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<sup>95</sup> *2014 Farm Bill*, U.S.D.A. NATURAL RESOURCES CONSERVATION SERVICE, <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=stelprdb1242382>.

<sup>96</sup> AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP) RULE, <http://www.regulations.gov/#!docketDetail;D=NRCS-2014-0011> (Feb. 27, 2015) (hereinafter ACEP FINAL RULE); *Summary of the Agriculture Reform, Food, and Jobs Act of 2013*, U.S. SENATE COMM. ON AGRICULTURE NUTRITION AND FORESTRY, <http://www.ag.senate.gov/issues/farm-bill>.

<sup>97</sup> ACEP FINAL RULE *supra* note 102.

<sup>98</sup> ACEP FINAL RULE *supra* note 102.

<sup>99</sup> ACEP FINAL RULE *supra* note 102.

ACEP requires local Cooperative Agreements which lay out the procedures for purchasing the CEs, the specific requirements for every easement, and the terms that must be included in the easements (“minimum deed terms”).<sup>100</sup> The minimum deed terms help to ensure consistency in the funding, drafting, administration, enforcement, and interpretation of the CEs, including monitoring and reporting requirements, which are useful in enforcement, though not addressed in this Article.<sup>101</sup>

Moreover, after eligibility is established, ACEP prioritizes projects by creating a ranking system for funding, in which parcels compete for assistance during a given funding period.<sup>102</sup> The national ranking criteria are quantitative and include factors such as percent of prime, unique soil; grazing uses and related conservation values to be protected; percent of cropland, pastureland, grassland, or rangeland in the overall parcel; ratio of the farm’s overall size to the average size in the particular area; population growth in the area; proximity to other protected land; whether adjacent land is currently enrolled in a CE program or was previously enrolled in the past programs; and “other similar criteria.”<sup>103</sup>

On a state level, state conservation and technical committees may consider, “the location of a parcel in an area zoned for agricultural use, the eligible entity’s performance in managing and enforcing easements, multifunctional benefits of agricultural land protection, geographic regions where enrollment of particular lands may help achieve program objectives, and diversity

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<sup>100</sup> *Id.* Parties or entities under the Cooperative Agreements may be, “Indian Tribe, state government, local government, or a nongovernmental organization that has an agricultural land easement program. . .”

<sup>101</sup> See *Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. DEPART. AGRICULTURE, available at <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>

<sup>102</sup> ACEP FINAL RULE *supra* note 102.

<sup>103</sup> *Id.*

of natural resources to be protected.”<sup>104</sup> Because they will vary from locality to locality, the state criteria outlined in the national rule document are more general.<sup>105</sup> The ranking system can also assign negative points for organizations that are delinquent on annual monitoring reports for CEs.<sup>106</sup>

Thus, like the FLP, ACEP does not accept every CE that is offered and instead uses careful front-end scrutiny to determine which CEs are best suited for conservation and deserving of federal funding. This selection process, which is absent in § 170 (h), helps to ensure that ACEP CEs will provide a significant public benefit in exchange for the tax dollars spent.

#### **IV. RESOURCE-SPECIFIC LAND TRUSTS**

Land trusts with resource-specific missions more closely mirror the federal programs discussed above. Nonprofit conservation organizations, most commonly state or local land trusts, acquire and hold CEs both through and outside of the above federal programs. As of 2010, there reportedly were 1,723 active land trusts, 24 of which were categorized as national land trusts.<sup>107</sup> The vast majority of land trusts appear to be location-, rather than resource-specific, meaning their mission is conservation generally in the place where they are located.<sup>108</sup> While these “general conservation” land trusts appear to be the most common, some local and national nonprofits accept and hold CEs only in accordance with their more resource-specific missions.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *2010 National Land Trust Census*, THE LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/land-trusts/land-trust-census>.

<sup>108</sup> *Find a Land Trust*, THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/find-land-trust>; *See e.g. Mission Statement*, THE MONTANA LAND RELIANCE, <http://mtlandreliance.org/about-us/mission-statement/> (“The mission of The Montana Land Reliance is to partner with landowners to provide permanent protection for private lands that are significant for agricultural production, forest resources, fish and wildlife habitat, and open space.”).

The Nature Conservancy is likely the most well-known land trust that strictly prioritizes the CEs it accepts. It explains:

The Conservancy today only will accept donations of conservation easements or purchase an easement on lands where significant conservation benefits are obtained . . . The Conservancy has often turned down offers of donations of conservation easements on lands that do not fulfill the Conservancy's mission, even though the lands may have important ecological values.<sup>109</sup>

Some land trusts even further narrow their missions with respect to specific resources.

For example, Ducks Unlimited and its affiliate Wetlands America Trust implement and hold CEs to “ensure that large acreages of wetlands, riparian habitats and important uplands will be preserved for the benefit of waterfowl, other wildlife and the enjoyment of future generations.”<sup>110</sup> Ducks Unlimited does not accept all CEs, rather, it concentrates its conservation efforts on areas of particular importance to waterfowl.<sup>111</sup> The Humane Society’s Wildlife Land Trust limits its CEs to lands that can serve as permanent sanctuaries for wildlife.<sup>112</sup> In addition to screening potential properties for wildlife values, such as critical habitat or habitat linkages, all Wildlife Land Trust CEs prohibit recreational and commercial hunting or trapping, as well as development within protected areas.<sup>113</sup> Alabama’s Freshwater Land Trust also narrows its mission and purpose for the CEs it holds to lands that are “critical for the protection of rivers and

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<sup>109</sup> *Conservation Easements, Landowners With Whom The Conservancy Negotiates Easements*, THE NATURE CONSERVANCY <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml> (explaining that the Nature Conservancy “uses a science-based planning process for each ecoregion across the world to assemble portfolios of conservation lands that collectively represent viable examples of all native species and plant communities within that ecoregion.”).

<sup>110</sup> *Conservation Easement Program*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/land-protection/conservation-easements>.

<sup>111</sup> *Id.*

<sup>112</sup> *Qualifying Criteria*, THE HUMANE SOCIETY WILDLIFE LAND TRUST, [http://www.hswlt.org/how-you-can-help/protect-your-land/qualifying-criteria.html?credit=web\\_id330717619](http://www.hswlt.org/how-you-can-help/protect-your-land/qualifying-criteria.html?credit=web_id330717619) (hereinafter *Humane Society*).

<sup>113</sup> *Conservation Options for Landowners*, THE HUMANE SOCIETY WILDLIFE LAND TRUST, <http://www.wildlifelandtrust.org/how-you-can-help/protect-your-land/conservation-options-for.html>.

streams and that provide recreational opportunities for the community.”<sup>114</sup> Another example, Vital Ground, is a land trust whose mission is “to protect and restore North America’s grizzly bear populations by conserving wildlife habitat” Like the federal programs, Vital Ground is “both selective and strategic” in its conservation strategies to connect fragmented lands that serve as important grizzly habitat.<sup>115</sup>

These resource-specific land trusts scrutinize potential CEs by looking for specific resource values, rather than conservation value that meets § 170(h)’s broad conservation purposes tests. They also tailor the terms of their CEs to carry out their specific purposes and provide maximum protection of the targeted conservation values. Additionally, these land trusts develop a special institutional knowledge-set over time concerning areas that will both meet § 170(h)’s conservation purposes test and be in accordance with their particularized missions.

#### **V. COMMON TOOLS USED BY RESOURCE-SPECIFIC PROGRAMS**

Resource-specific CE implementation could begin to address the two common forms of abuse of the § 170(h) deduction outlined above. The resource-specific USDA and land trust CE acquisition programs analyzed above overlap in their common use of NEPA-like front-end procedural mechanisms to acquire CEs. The use of these mechanisms is important because it does two major things that can minimize or reduce valuation abuse and failure to meet the conservation purposes test of § 170(h): promote greater front-end consideration of each CE and use and build specific institutional knowledge within the CE implementation organizations. The

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<sup>114</sup> *About Us*, FRESHWATER LAND TRUST, <http://www.freshwaterlandtrust.org/about-us-2/> (hereinafter *Freshwater Land Trust*).

<sup>115</sup> *Our Vision*, VITAL GROUND, <http://www.vitalground.org/about/about-us/foundation-info/> (hereinafter *Vital Ground*).



following section discusses how the above programs promote these two values and, in turn, increase the likelihood of CEs that ensure conservation without the common abuses.

### **A. Front-end Procedural Tools**

Existing environmental laws act a model not only by incorporating resource specification, but also recognize the importance of forethought. The National Environmental Policy Act (“NEPA”), for example, intentionally imposes foresight requirements on government actions.<sup>116</sup> The Land Trust Alliance (“LTA”), the national umbrella organization for the nation’s land trusts, has also addressed forethought specifically with respect to CEs. The LTA promotes “Strategic Conservation . . . a process that produces tools to aid decision makers in identifying, prioritizing, pursuing, and protecting those specific tracts of land that will most effectively and efficiently achieve the land trust's mission.”<sup>117</sup> For example, strategic plans for organizations that focus on freshwater resources help those land trusts to focus on the protection of critical stream corridors, watersheds, and water supplies.<sup>118</sup> Strategic plans may also call for the mapping of areas to delineate places with low or high conservation values.<sup>119</sup> Front-end strategizing has also been coined as “green infrastructure,” explained by the Conservation Fund as:

solutions that government leaders, conservationists, and others need to create systemic and lasting change - in major cities, watersheds, and even multi-state regions. Strategic conservation makes economic sense – establishing an environmental legacy for future generations in the most efficient and cost effective manner.<sup>120</sup>

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<sup>116</sup> Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757 , 775 (2005).

<sup>117</sup> *Strategic Conservation*, THE LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/conservation/strategic-conservation>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Strategic Conservation Planning*, THE CONSERVATION FUND, <http://www.conservationfund.org/what-we-do/strategic-conservation-planning>

Like NEPA and the LTA's recommendations above, resource-specific CE programs promote more intensive front-end planning to strategize resource use. Under NEPA, agencies that undertake a major federal action, must take a "hard look" at the potential consequences at the earliest practicable time.<sup>121</sup> Broadly speaking, a "major federal action" includes significant allocations of federal funding or decisions made by federal agencies such as grants or denials of permits.<sup>122</sup> In contrast, under § 170(h) major amounts of federal funding are allocated to CE acquisition without sufficient front-end procedural hurdles. The success of the programs analyzed in this Article is partially due to promotion of NEPA-style front-end planning through (i) prioritization of resource distribution and (ii) stringent eligibility requirements.

#### i. Resource Type Prioritization

Rather than accepting most or all CEs offered, the resource-specific programs analyzed above prioritize the types of resources they aim to protect. For example, a major focus of the redesign of both of the federal programs was careful allocation of limited federal funding.<sup>123</sup> Both ACEP and FLP prioritize their CE funding based on a competitive ranking system.<sup>124</sup> In this way, these systems are designed to ensure that the CEs they fund are best suited to accomplish the forestland, agricultural land, and wetland protection purposes of the programs.<sup>125</sup> In both programs, the amount of federal funding allocated depends not only on the reduction in the fair-market value of the property in question, as is the case with respect to §170(h), but may also depend on the resource being protected.

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<sup>121</sup> Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757, 775

<sup>122</sup> *Id.*

<sup>123</sup> REDESIGN *supra* note 69.

<sup>124</sup> ACEP FINAL RULE *supra* note 102; REDESIGN *supra* note 69.

<sup>125</sup> ACEP FINAL RULE *supra* note 102; REDESIGN *supra* note 69.

Land Trusts with resource-specific missions discussed above also smartly prioritize their CE acquisitions to meet their resource-specific conservation goals. For example, the Alabama Freshwater Land Trust prioritizes its CE acquisitions based on freshwater resources and on location—aiming to meet its freshwater resource-specific goals in particular counties.<sup>126</sup> Vital Ground is in some ways even more specific, looking at individual bear’s habitat to select geographically appropriate CEs.<sup>127</sup> The Humane Society Wildlife Land Trust prioritizes based on specific habitat values of land, rather than tract size.<sup>128</sup>

#### ii. Hard-line Eligibility Requirements

The resource-specific programs also have firm eligibility requirements that further limit participation. Unlike § 170(h), which requires meeting only one of four broadly defined conservation purposes tests and working with an obliging conservation organization, all of the above organizations outline specific eligibility requirements beyond those set forth in § 170(h) for CE acquisitions. Eligibility requirements by resource protected automatically oblige the NEPA “hard look” conceptual process in that the organization or agency must consider certain resource values of the land in question before acquiring or funding a CE.

In addition to the Farm Bill’s general restrictions on the USDA, both the NRCS and USFS’ eligibility requirements to participate CE programs are based on resources. If states wish to participate in the FLP, they must submit an Assessment of Need showing that the resources are both important and threatened.<sup>129</sup> If an entity wishes to participate in ACEP or the FLP, it must provide a cash match to the government’s contribution.<sup>130</sup> Not only does cash matching

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<sup>126</sup> *Freshwater Land Trust*, *supra* note 123.

<sup>127</sup> *Vital Ground*, *supra* note 125.

<sup>128</sup> *Humane Society* *supra* note 121.

<sup>129</sup> REDESIGN *supra* note 69.

<sup>130</sup> FINAL RULE *supra* note 102.

restrict the sheer number of eligible entities; it shows local investment in the project. This automatically decreases the likelihood of hostility towards federal control from local parties and increases the chances of success through local help with the process. Finally, unlike ACEP and FLP, § 170(h) is not subject to cut backs in federal funding, despite that it costs federal taxpayers an estimated 1.5 billion per year.<sup>131</sup> Thus, ACEP and FLP hard line eligibility requirements weed out potential problem CEs before requiring analysis by the agencies of individual properties, and before imposing high cost on the federal government, acting act as an effective procedural hurdle without requiring much additional work on the part of the agencies.

## **B. Institutional Knowledge**

In addition to prompting front-end planning, the other important component of resource specification is that it ensures each organization acquiring CEs will have increased institutional knowledge with respect to its resource of choice. Greater institutional knowledge increases resilience, or the capacity to adapt over time, important in this case because, hopefully, CEs preserve land in perpetuity.<sup>132</sup> More resilient organizations are better suited to select and draft more resilient CEs that will better withstand litigation and are more likely to implement successful long-term conservation. For obvious reasons, the USFS and NCRS almost certainly have a greater knowledge of what constitutes successful forest or farmland conservation than a small, local land trust. However, the entire CE system does not need to be in federal hands to ensure more extensive institutional knowledge. The USDA programs and the resource-specific land trust programs discussed above have similar qualities that promote institutional knowledge.

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<sup>131</sup> Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH ENVTL. L. REV. 69 (2013).

<sup>132</sup> See generally Fitrek Burkes & Nancy Turner, KNOWLEDGE, LEARNING, AND THE EVOLUTION OF CONSERVATION PRACTICE FOR SOCIAL-ECOLOGICAL SYSTEM RESILIENCE 34 HUMAN ECOLOGY 4, 479-494 (August 2006).

In addition to specifying resources, which will increase interaction with and knowledge of the resources, the programs are intentional in their incorporation of local knowledge, which ensures not only increased success with respect to a resource generally, but increases the likelihood of success with respect to specific projects, as shown below.

i. Localized Approaches

This Article promotes some national uniformity, but recognizes that implementation of localized approaches is also important because local institutional knowledge can help to address some of the national program's issues. Local input within the resource-specific land trusts is almost second nature, but still important. Vital ground, for example, approaches CEs on a case-by-case basis to look at specific bear habitat and must inherently work with local partners to gain knowledge to properly address that habitat.<sup>133</sup> However, even within the federal programs, in addition to resource-specific CE implementation, the programs gravitate towards or incorporate local input. In the Cooperative Forestry redesign, the USFS requires[d?] states to complete and submit statewide assessment strategies of forest resources. Additionally, if states wish to participate in the FLP, they must also submit an Assessment of Need.<sup>134</sup> In ACEP, Cooperative Agreements with local agencies are required for all CEs. Both FLP and ACEP's ranking programs require that projects are ranked first at a state level, so that projects of great local importance are funded, or funded first. Thus, even the large federal programs are careful to utilize specific local knowledge. Use of state ranking systems as a foundational source of local input also provides strength to these programs by ensuring that they are developed with the best knowledge of local conditions and local conservation needs.

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<sup>133</sup> *Vital Ground supra* note 125.

<sup>134</sup> *FLP Redesign, supra* note 69.

## **VI. RECCOMENDATIONS**

Eliminating private or local programs altogether would be a major loss for conservation in general. While it would not be advantageous to limit projects to the point that valid conservation opportunities decrease, the astronomical cost of the current § 170(h) deduction and reports of abuse suggest that federal funds might be better spent implementing the ACEP and FLP programs (which are currently having their funding reduced), rather than continuing the cycle of issue-ridden tax deductions. However, as successful federal CE programs seem to indicate, the use of federal expertise when allocating federal funding may ensure more successful conservation in the long run, while programs with little or no uniform federal oversight are problematic. For this reason, in addition to promoting NEPA-style front-end planning and incorporating the above thematic similarities into private and local programs, this Article recommends resource-specific federal oversight from the relevant federal resource agencies. Although these suggestions would require more front-end planning and therefore more work, the increasing amount and frequency of litigation with respect to deductions claimed for CE donations seems to indicate that it would be worthwhile. The loss of revenue that results from the sizable deductions being claimed and granted increases this motivation further.

Thus, to be eligible for a federal deduction for the donation of a CE, both the grantor and grantee should be required to fulfill something equivalent to the NEPA “hard look” standard. This Article suggests two potential front-end resource specific mechanisms to instigate federal oversight and uniformity: (A) minimum deed terms and (B) federal resource agency approval.

### **A. Minimum Deed Terms**

As the federal purchase programs and many state CE purchase programs already do, all taxpayers should be required to use minimum deed terms in their § 170(h) deductible CEs. First,

minimum deed terms would help to create uniformity and avoid potential CE drafting problems or loopholes, which is why they are most often used. Second, minimum deed terms could force CE implementation to be resource specific. For example, the ACEP minimum deed terms impose different restrictions for agricultural viability versus grasslands or grazing uses.<sup>135</sup> The minimum deed terms require that different types of easements impose different terms for roads, permeable surfaces, and significant features, to name a few, depending on what is necessary to protect the resource in question.<sup>136</sup> In addition, the minimum deed terms ensure that terms that should not vary from easement to easement (such as the terms relating to possible extinguishment of the easement and reimbursement of the federal government for its investment in such event) are uniform across the nation.

#### **B. Federal Resource Agency Approval**

Tax reform should also require that CEs donated to non-profit land trusts or state or local government entities receive approval from the appropriate federal resource management agency to be eligible for the § 170(h) deduction. Thus, a landowner who wants to claim a deduction for the donation of a CE protecting farmland as open space would seek approval from NRCS, a CE protecting wildlife would need to be approved by the U.S. Fish and Wildlife Service (USFWS), and so on. By definition, federal resource agencies like NRCS, USFS, and USFWS employ experts concerning agricultural lands, forestlands, and wildlife, respectively. Additionally, these

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<sup>135</sup> See *Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. DEPT. AGRICULTURE, available at <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/>.

<sup>136</sup> *Id.*

agencies have personnel that are experts with respect to CEs that are used to protect these resources, by way of the ACEP and the FLP, or USFWS' existing conservation programs.<sup>137</sup>

Thus, NRCS, USFS, and USFWS are qualified to evaluate conservation purposes, and, because they typically fund easement acquisitions, they also are qualified to evaluate the economic value of new easements. While this oversight would require more agency staff time, any increased cost to the agency would likely be less than the current cost of the federal tax program. This oversight would incorporate the above similarities of successful programs by continuing to benefit from the local knowledge of the state and local land trusts and government entities, while enhancing front-end planning through use of the institutional knowledge and resource-specific expertise of the relevant federal agency.

### **CONCLUSION**

In sum, it is necessary to reconcile the scope of resources protected locally using CEs with the nationwide application of § 170(h). While CE reform must account for the fact that CEs protect a wide variety of natural and historic resources, national tax benefits are an important asset to the scale of conservation that CEs have been able to achieve. Conservation programs that are thoughtful and intentional in their resource allocation should not suffer while blanket provisions like § 170(h) are being abused to the tune of millions of dollars.

Resource specification is an important part of the path towards the resolution of these issues. It uses a framework already created though decades of building on the common law by environmental and natural resources laws, and it is already used by federal resource protection

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<sup>137</sup> USFWS implements, or partners with other agencies and organizations to implement, wildlife conservation programs based on a particular species of need, endangered species, or species that depend on particular habitats. *Partnerships in Conservation*, See U.S. FISH AND WILDLIFE SERVICE, available at <http://www.fws.gov/endangered/what-we-do/fws-programs.html>.



programs. Resource specification creates more deliberate CE use by encouraging front end planning and building institutional knowledge, which increases the likelihood that CEs will conserve more efficiently and with less potential for tax abuse.

Thus, CE reform is necessary to curb abuse of the important incentive offered by § 170(h). In considering possible reforms, it is necessary to recognize that CEs protect diverse natural resources, and reform local and national administration of CEs accordingly, rather than reform that is exclusively monetary. For the foregoing reasons, this Article recommends that reform measures focus on resource specification through uniform federal oversight, not the currently proposed restrictive tax code reforms that do not address the substance of the issue.