

## CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS

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### ABSTRACT

A tax deduction intended to encourage conservation of environmentally important land and historic buildings has become a lucrative way for real estate developers to finance development projects—cheating the government out of billions of dollars of revenue and in some cases doing little to advance environmental protection. The deduction has proved to be a popular and successful tool for encouraging conservation of environmentally important land and historic buildings, and the tax benefit to donors is often seen as a key component in making a conservation deal come together. However, some donors abuse the provision by applying grossly inflated appraisals to the value of the easement to increase their charitable deduction or by taking donations for easements that do not fulfill bona fide conservation purposes.

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A tax deduction intended to encourage conservation of environmentally important land and historic buildings has become a lucrative way for real estate developers to finance development projects—cheating the government out of billions of dollars of revenue and in some cases doing little to advance environmental protection.

Created 40 years ago, the provision allows property owners to take a charitable deduction for donating qualified conservation easements—legal agreements that permanently limit the development or use of a property—to a charitable organization. The deduction has proved to be a popular and successful tool for encouraging conservation of environmentally important land and historic buildings, and the tax benefit to donors is often seen as a key component in making a conservation deal come together. However, this obscure tax provision has proved difficult to administer and enforce, and ranks among the top ten most litigated issues between the IRS and taxpayers (National Taxpayer Advocate 2015). Some donors abuse the provision by applying grossly inflated appraisals to the value of the easement to increase their charitable deduction or by taking donations for easements that do not fulfill bona fide conservation purposes.

Indeed, some real estate developers exploit these vulnerabilities by selling the rights to claim charitable deductions to investors and using the proceeds to finance development, which costs taxpayers hundreds of millions of dollars per year and undermines the program’s conservation goals. In these transactions, developers promote arrangements structured to provide investors a “return” in the form of inflated charitable deductions, sometimes well in excess of the value of their initial investment. The developer will use the initial financing to purchase the land, make improvements or change zoning rules, and develop part of the property (like building condominiums or a club house). The improvements are then used to justify a larger appraisal on an easement on the remaining open space. Because of how some donee organizations report donations (or fail to do so) the magnitude of these abuses is hidden from public scrutiny. But at least three of the five largest donee organizations (by contribution volume) appear to actively participate in these arrangements.

The dollar amounts attributable to such abusive transactions appear to have surged in recent years. Total deductions for conservation easement contributions by taxpayers tripled in 2014—rising from \$971 million in 2012 to \$1.1 billion in 2013 to \$3.2 billion in 2014, according to preliminary IRS tabulations. Syndications—the selling off of deductions to investors—appear to be one source of this surge. Data for 2015, 2016, and 2017, years in which promoted syndications appear to have become more prevalent, are not yet available.

Concerns about abuses of conservation easements pre-date this recent surge. Among the concerns:

***Donations are concentrated in transactions that seem unrelated to conservation benefits***

The dollar value of donations of conservation easements, though not acreage donated nor the number of properties, is highly concentrated in certain types of transactions, in certain geographic areas, and in a handful of donee organizations. For instance, between 2010 and

2012, about 36 percent of all deductions nationwide for donations of conservation easements were taken by taxpayers in Georgia. According to the Land Trust Alliance, Georgia has 1.5 percent of conserved land. Connecticut, which is smaller in size than all but two states, ranked third in easement deductions. It had 7 percent of all conservation-easement deductions, but only 0.4 percent of the acres under easement because land in the wealthiest parts of that state is so valuable. (See Table 3.)

About 10 percent of the acreage under easement claims about 69 percent of all tax benefits, largely because the valuation of the easements (per transaction or on a per-acre basis) is unusually high. Similarly, the 2 percent of transactions between 2010 and 2012 valued over \$5 million each, account for 43 percent of all deductions. A relatively small number of taxpayers, transactions, and donee organizations reap a large share of the total tax benefit.

The concentration of donations is associated with two factors: (1) easements related to large real estate developments, such as tract housing, private communities, or recreational facilities, like country clubs and golf clubs; and (2) donations in high-cost areas, like expensive suburbs of major metropolitan areas (e.g. Atlanta, GA or Westchester, NY) or vacation or resort destinations (like Jackson Hole, WY or the Cape and Islands, MA). Among the roughly two dozen transactions recently examined by the IRS involving easements to conserve open space on a property that included a golf course, the average charitable deduction claimed by the owner was \$19 million. Taxpayers justify the large deduction on the basis that the improvements to the land, the proximity to high-cost residential property, and other amenities result in high land values were the land developed for another use.

When private charities and federal and state elected officials allocate spending to purchase or conserve land, they do not spend the vast majority of their resources to preserve golf courses, suburban subdivisions, real estate developments, or vacation homes. The disparity in where the money goes suggest that the tax expenditure is not flowing to preserve properties with high conservation value.

***A small handful of donee organizations are responsible for a disproportionate share of donations***

Between 2010 and 2012, 25 organizations (of about 1,700 land trusts nationwide) received about half of all donations of easements, measured in dollar value. A few of these are large, nationally-recognized organizations whose conservation efforts are transparently documented and communicated in their public filings. Many, however, are small organizations with few employees and scarce management or enforcement resources. And most do not report receiving gifts of easements or do not report the value of the easements they receive in public filings.

For instance, according to publicly-available data from the IRS, the largest recipient of donations of easements by dollar value over the period from 2011 to 2013 was the Foothills Land Conservancy of Maryville, TN. The organization reported having four employees and

spending \$19,000 to monitor the 19,600 acres of easements it maintains in five states. Foothills received 14 contributions of easements valued at \$236.7 million (about \$17 million each) in 2013. That is roughly a quarter of the total volume of deductible donations of qualified conservation easements claimed by all individual taxpayers in 2013 (\$1.1 billion). Based on the total value of deductible contributions that year, Foothills would rank alongside America's largest public charities, according to Forbes annual ranking *The Largest U.S. Charities* (Forbes 2016). (In 2015, Foothills stopped reporting the value of non-cash gifts and its reported revenues fell by 99.8 percent.) By contrast, the second largest recipient of donations of easements was the Nature Conservancy, which maintains almost 2.9 million acres, has 3,725 employees, and spends more than a million dollars each year maintaining and enforcing their easements. According to their IRS return for 2011, it received 76 easements valued at \$95 million total.

***Most organizations that receive donations of easements do not report them as gifts or revenues on their public tax returns***

The tax returns of charitable and tax exempt organizations are public to provide information about the activities of the charitable sector, to provide transparency and accountability, and to help reduce any abuse of tax-exempt status. The amount of gifts (or revenues) that an organization receives is a critical component of the return because it illustrates the scale of the organization, the size of the "tax expenditure" its deductible gifts represent, and for implementing specific rules regarding charities' public support.

Many of the organizations that manage hundreds of millions of dollars in conservation-easement donations each year cannot be identified in public records because they do not disclose the value of gifts of easements on their tax returns. Often, they report the value of easement donations at zero. Were these organizations to include these easement donations at appraised value (as they would if they received gifts of cash or marketable securities), several organizations that currently appear to be small organizations would rank among the nation's 100 largest non-hospital, non-university charitable organizations.

In addition to impeding the transparency and public accountability intended by public disclosure of charities' tax returns, this convention may also allow organizations that should be legally classified as private foundations to qualify as public charities by subverting a test related to the breadth of the organizations public support.

***Donations of 'partial interests' are difficult to administer***

The difficulty in administering this provision—and its vulnerability to abuse—arises in part because of the unusual nature of donations of conservation easements. These donations transfer only certain rights (such as the right to develop the land) to the donee organization, while the donor (landowner) retains ownership and certain other rights to continue to use the property. In most other circumstances, a donor must contribute his or her entire interest in donated property to take a deduction; donations of only some of an owner's property

rights are generally not deductible. The tax law allows a deduction for the fair market value of a qualified conservation contribution. Appraising the value of the partial interest (separately from the remaining interest), which is necessary for determining the taxpayer's deduction, has proved contentious and is the source of much of the litigation between taxpayers and the IRS. Because the donee generally cannot monetize the value of the contribution by selling the property, as it could with gifts of stock or other property, there is no guarantee that the value of the deduction claimed by the donor is commensurate with its value to the donee. High-profile examples of taxpayers taking large charitable donations for conservation easements on properties like golf courses have fueled concerns that some donations of easements have benefitted donors more than they have furthered conservation causes (see, e.g. Rubin 2016b).

## WHAT CAN BE DONE?

Abuse of the conservation easement deduction reduces tax revenue, raises the appearance of unfairness and inequity in the tax system, hinders conservation goals, and causes a disproportionate amount of IRS enforcement and taxpayer burden. Beyond the cases of abuse, a key policy question is whether this tax expenditure represents a good return on the scarce dollars the federal government uses to subsidize. It is clear that privately-funded conservation organizations do not want to prioritize or finance the preservation of golf courses or the grassy areas between tract housing when spending their own money. Instead, they buy undeveloped land with special environmental or public recreational values. This provides one indication that the current structure is inefficient—if environmental organizations could allocate how the money was spent rather than taxpayers, we would expect a very different pattern of conservation.

Policy changes could reduce the incidence of abuse, reduce (or re-direct) the tax expenditure, improve transparency and accountability, improve the conservation value achieved with the tax benefit, or some combination thereof. With policy fixes, we could get more conservation for the tax expenditure we provide, helping to achieve conservation goals while minimize the appearance of unfairness and the number of abuses.

### ***Make promoted, syndicated easement transactions a "listed transaction"***

A recent IRS notice was an important first step for promoting transparency and in identifying transactions with the largest propensity for abuse (IRS 2017). The notice requires participants in promoted, syndicated transactions that promise charitable deductions far in excess of their investments to "raise their hand" so that the IRS and policymakers can understand the scope of these transactions and to understand whether these transactions require greater scrutiny. Promoters of these investment deals have since lobbied to have the listing notice rescinded—and have won a delay of the implementation of the listing notice until later this year. But the notice does not change the law or regulations related to conservation easements, holds harmless donee organizations, and has no effect on the vast

majority of traditional easement donations. The listing notice should remain in force and IRS should implement it on schedule.

### ***Increase transparency***

Publicly available returns of donee organizations frequently exclude information on the value of donations of easements, either because the donee organizations do not report the value of the charitable contributions of easements they receive on their tax returns or value them at zero. For instance, of the 21 largest non-governmental recipients of charitable donations of conservation easements between 2010 and 2012 identified by examining donor records, 15 organizations did not disclose the value of donations received. This practice makes it impossible to know which organizations are active in using this incentive, impairing the ability of the general public, tax administrators, or associations of land trusts to monitor the activity of this sector. Moreover, it may also allow some organizations to circumvent the public charity support test, which generally requires that an organization receive at least one-third of its support from contributions from the general public, or meet a 10 percent ‘facts and circumstances’ test, or to qualify to file Form 990-EZ or Form 990-PF, which reduces the amount of information disclosed.

Several options to increase reporting by donors (on the forms they use to claim donations—the 8283) and by donee organizations (on form 990 and its supplemental schedules) would provide “sunshine” to help the public understand.

### ***Strengthen the definition of conservation purpose and standards for organizations***

While tax benefits for conservation easements were intended only to be available for certain conservation purposes, the scope of what qualifies as a valid purpose has expanded to include easements on properties that do not provide public benefits or do not further bona fide conservation policies. All donations of easements should both fulfil a clearly delineated conservation policy (or an authorized state or tribal policy) and yield a significant public benefit. In addition, both the donor and donee organization should attest to the public benefit and conservation purpose and provide a justification thereof in the course of claiming any tax benefits.

Receiving and preserving conservation easements in perpetuity (as the law requires) is a costly and burdensome responsibility. Recognizing these challenges, several states and voluntary accreditation programs have developed minimum requirements for organizations to qualify to receive donations of easements. Such qualifying minimum standards should also apply to organizations entrusted with federally-subsidized conservation easements.

Some states and federal agencies appoint boards to pre-approve easements before any benefits are provided to the landowner to ensure the easement achieves a stated conservation purpose and the appraisal is appropriate. For example, Colorado established its

Conservation Easement Oversight Commission and modified its tax credit program in the wake of similar abuses.

### *Use an allocated credit instead of a deduction*

A more fundamental reform of tax subsidies for conservation easements would take the deduction and transform it into a credit allocated to donee organizations. In this model, donee organizations would be empowered to approach landowners to “spend” the credit and to decide what kind of properties to conserve and how much to pay. Because these organizations have the right incentives to conserve properties with the greatest environmental or historic value, this approach is intended to maximize the return on the tax benefits provided without requiring adversarial IRS oversight.

## HISTORY AND BACKGROUND

Tax benefits for gifts of conservation easements were first enacted in the Tax Reform Act of 1976 and the Tax Reduction and Simplification Act of 1977, and extended permanently in 1980 with the Tax Treatment Extension Act, which created IRC section 170(h). The Taxpayer Relief Act of 1997 extended the deductibility of conservation easements against the estate tax. Rules made permanent in the Protecting Americans from Tax Hikes Act of 2015 enhanced the tax benefits available for donations of easements by allowing individuals who make donations of conservation easements to deduct up to 50 percent of their contribution base (generally, AGI) and individuals who are qualified farmers and ranchers may deduct up to 100 percent of their contribution base.

In order to be deductible, a donation of a conservation easement must be to a qualified charitable organization—generally either a public charity or a state or local government entity (but excluding, for instance, private foundations).<sup>1</sup> The contribution must be exclusively for conservation purpose, where the term “conservation purpose” means—

- the preservation of land areas for outdoor recreation by, or the education of, the general public,
- the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- the preservation of open space (including farmland and forest land) where such preservation is—
  - for the scenic enjoyment of the general public, or
  - pursuant to a clearly delineated Federal, State, or local governmental conservation policy,

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<sup>1</sup> To qualify as a public charity, an organization must have broad public support. Most charities qualify by receiving at least one-third of its support from contributions from the general public and/or from receipts from activities related to its tax-exempt purpose. Organizations that fail to meet that threshold—such as when one individual, family, or organization provides a large share of the contributions—are private foundations and governed by stricter rules intended to prevent against self-dealing.



- and will yield a significant public benefit, or
- the preservation of an historically important land area or a certified historic structure.

## EVIDENCE OF THE USE AND ABUSE OF CONSERVATION EASEMENTS IN IRS DATA

The analysis of data from a variety of IRS sources provides a picture of how conservation easements are used and sometimes abused. These data show that easements are highly concentrated in a relatively small number of large-dollar transactions, in certain geographic areas, and in a small number of organizations. This pattern of donations corroborates concerns voiced in the press and by advocates over large donations taken for properties, like golf courses, with questionable conservation values, and the red flags raised by IRS enforcement officials and the Taxpayer Advocate, focused on the high rates of litigation over easement deductions.

Data on conservation easements come from two sources: the return of charitable organizations, who are required to report donations of easements in various places on their publicly-available return (Form 990), and Form 8283 (Non-cash Contributions), which must be filed by individual taxpayers who claim itemized deductions for donations of easements.

For context, according to the latest IRS report [\*Individual Noncash Contributions, 2013\*](#), 2,025 taxpayers reported making contributions of conservation easements on their 2013 returns, some of them with more than one donation. In total, these taxpayers deducted \$1,083,785,000 of contributions, an average of about \$535,311 per taxpayer (IRS 2016). These statistics are derived from tabulations of information from Form 8283 (the form taxpayers must submit to document certain non-cash donations) from a stratified random sample of individual taxpayers.<sup>2</sup> Preliminary tabulations from 2014 show that 3,249 taxpayers claimed total contributions of easements of \$3.2 billion (about \$983,729 per return).

### *Detailed Information from Form 8283*

To provide more detailed information on donations of conservation easements, we examined information drawn from Form 8283 for a sample of taxpayers from tax years 2010, 2011, and 2012. These data are based on a stratified sample of taxpayers in which high-income taxpayers (those likeliest to contribute deductions for easements) are over-represented. The sample population generally corresponds to the samples used to inform the IRS SOI reports on non-cash contributions referenced above. However, the sample is slightly larger because we expanded the number of transactions to include any donation whose description includes the word “easement”, which results in a slightly larger sample of taxpayers, donations, and dollar amounts. These donations generally appear to have checked the box for “Land” or “Other Real Estate” instead of “Qualified Conservation Contribution” on form 8283.

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<sup>2</sup> Form 8283 “Noncash Charitable Contributions” is used to report noncash contributions and is generally required of taxpayers whose noncash contributions exceed \$500.



Table 1 provides summary information on deductions for conservation easements taken by individual taxpayers over the tax filing period from 2010 to 2012. On average over this time period, taxpayers claimed charitable deductions on approximately \$1 billion of easements each year on about 2,500 donations. The average deduction was \$429,500 and the median deduction about \$101,250. About 5 percent of transactions are in excess of \$1.34 million.

**TABLE 1**

## Annual Statistics on Easements 2010-2012



	Annual Average
Total deductions	\$1,052,103,000
Number of individual easement deductions	\$2,461
Average deduction	\$427,500
Median deduction	\$101,250
25th percentile deduction	\$43,750
75th percentile deduction	\$242,000
95th percentile deduction	\$1,340,000
Reported acreage?	34%
Average acreage reported	245
Median acreage	80
Mean deduction/acre	\$14,750
Median deduction/acre	\$1,600
Sample N (unweighted)	863

**Source:** Office of Tax Analysis

**Note:** Dollar amounts in real 2016 dollars

About 34 percent of deductions reported acreage; some deductions do not include descriptions of the property and many easements are on properties like historical buildings where acreage is not relevant. Among those reporting acreage on form 8283, the average size of the property under easement was 245 acres; half were larger than 80 acres. In the aggregate, among properties where acreage was reported, the average deduction per acre was about \$14,900. The median deduction was only about \$1,600 per acre, suggesting that while most deductions are relatively modest, the average is skewed by some transactions with large deductions per acre.

## *The Concentration of Value of Easement Deductions*

A small amount of acreage and a small number of large donations account for most of the tax expenditure. This is illustrated in Table 2, which compares the cumulative value of deductions claimed by taxpayers (columns 2 and 4) to the corresponding cumulative share of donations (column 1) and cumulative share of acreage (for donations reporting acreage; column 3).

**TABLE 2**

### The Concentration of Contributions of Conservation Easements in a Small Number of Transactions and Acreage



Cumulative Deductions by Donation		Cumulative Deductions by Acreage	
Fraction of Total Donations	Fraction of Total Deductions	Fraction of Total Acres	Fraction of Total Deductions
Top 2 percent	43%	Top 2 percent	26%
Top 5 percent	55%	Top 5 percent	56%
Top 10 percent	70%	Top 10 percent	69%
Top 25 percent	86%	Top 25 percent	89%
Top 50 percent	95%	Top 50 percent	96%
Top 75 percent	99%	Top 75 percent	99%

**Source:** Office of Tax Analysis.

The first two columns in Table 2 show that the top 2 percent of donations—roughly the largest 50 each year valued at more than \$5 million each—account for about 43 percent of the total aggregate value of donations claimed by taxpayers. The top 10 percent of donations (almost 250 donations per year valued at greater than \$900,000) account for about 70 percent. Hence, the tax expenditure for contributions of conservation easements is highly concentrated in a relatively small number of transactions with very large values.

Similarly, among properties that include the acreage involved, about 26 percent of deductions go to the highest deduction-per-acre 2 percent of the properties and 69 percent to the top 10 percent. Half of the acreage—the lowest-valued—accounts for only 4 percent of total deductions. Donations that fall within the highest value-per-acre 10 percent of properties generally are valued in excess of \$6,000 per acre and can reach into hundreds of thousands of dollars per acre.

### **Geographic Concentration**

Table 3 presents the geographic concentration of deductions for easements by taxpayers based on their state of residence aggregated over the period from 2010 to 2012.

Surprisingly, in these three years about 36 percent of all deductions for easements were claimed by taxpayers in Georgia. California and Connecticut are the second largest beneficiaries of deductions for contributions of easements, representing about 11 percent and 7 percent respectively.

In contrast, the number of land trusts, the number of acreage under easement, and total number of acres conserved by land trusts (through any means) shows a very different geographic pattern, according to the Land Trust Alliance “2010 National Land Trust Census Report” (Land Trust Alliance 2011). For instance, Georgia is home to only 1.3 percent of the nation’s land trusts, only 2.5 percent of the nation’s total acreage under easement, and only 1.5 percent of total acres conserved by land trusts. California, by comparison, has roughly ten times as many trusts and ten times as many total acres conserved, despite the fact that Georgia taxpayers account for three times the total value of tax deductions. Moreover, several states that are national leaders in the number of acres under easement or acres conserved, like Maine, Montana, New Mexico, New Hampshire, Wyoming, Arizona, or Washington, receive only a de minimis share of the tax expenditure for conservation easements. While Georgia does have state level tax credits for easements that make contributions more favorable, it is one of several states with such incentives. Several donee organizations and businesses in the southeast U.S. appear to have developed investment strategies targeted to real estate development using easements which result in very large deductions.

TABLE 3

# Geographic Concentration of Easement Deductions by Residence of Taxpayers 2010-2012



Rank	State	Easement Deductions (OTA)		Land Trust Census (LTA)	
		Percent of National Total	Share of Land Trusts	Share of Acres under Easement	Total Acres Conserved
1	GA	36%	1.3%	25.0%	1.5%
2	CA	11%	11.6%	74.0%	14.3%
3	CT	7%	8.6%	4.0%	0.6%
4	NY	6%	5.7%	3.2%	6.1%
5	PA	6%	6.1%	2.1%	3.1%
6	VA	4%	2.1%	7.3%	7.0%
7	NC	3%	2.1%	1.7%	2.1%
8	MD	3%	3.3%	1.9%	1.2%
9	TX	2%	2.1%	3.4%	2.3%
10	SC	2%	1.4%	2.4%	1.5%
11	MA	2%	9.4%	9.0%	2.1%
12	FL	2%	1.9%	0.5%	1.1%
13	WI	2%	3.4%	0.8%	0.7%
14	CO	2%	2.2%	12.9%	7.6%
15	TN	1%	1.2%	7.0%	0.9%
16	DC	1%	20.0%	0.0%	0.0%
17	RI	1%	28.0%	0.1%	0.2%
18	AL	1%	50.0%	1.1%	1.0%
19	NV	1%	30.0%	0.0%	0.3%
20	VT	1%	2.1%	5.2%	3.8%
Total (Top 20 States)		94%	67.6%	54.7%	57.5%

Source: Office of Tax Analysis, Land Trust Alliance 2010.

## DONEE ORGANIZATIONS

The IRS SOI division produces an annual [public use microdata file](#) of a sample of tax-exempt organizations drawn from the population of returns entities that file Form 990 (IRS 2011).<sup>3</sup> The most recent file available at the time of writing is for 2011. While this is a sample and does not include all charitable organizations, large organizations (defined by assets and/or income) are sampled with certainty. Hence, starting with the IRS public use microdata file and selecting organizations that report holding conservation easements on Form 990 Schedule D, it is feasible to construct a sample of charitable organizations that report receiving easements.

Governmental organizations—federal, state, or local governments—are also eligible to receive donations of easements. These organizations do not report the number, value, or

<sup>3</sup> In addition to the information in the IRS file, returns of all exempt organizations are made publically available. Individual reports are thus available online to registered users (e.g. through [www.guidestar.com](http://www.guidestar.com)).

characteristics of conservation easements they receive to the IRS (or to any other publically available repository). Hence, those entities are excluded from the IRS sample.

One important caveat when examining these data is that many conservation organizations do not report donations of conservation easements on their annual returns and, if they do, many report a nominal value such as \$1 for the value of the easement. From a sampling perspective, because the stratified sampling is based on the value of the organization's assets, organizations that assign a nominal value or zero value to their easements are less likely to be sampled, especially if they have few other assets or otherwise concentrate in preservation using easements. The organizations that are included in the stratified sample appear to provide more complete accounting for their non-cash contributions and also appear more likely to receive grants or gifts of cash. Hence, the organizations that appear in the sample may be less representative of the true population in the sense that they are likely to have greater public support in the form of cash donations and thus to have more substantial resources to devote to operations, employment, and maintenance of their easements.

This sampling convention turns out to result in a particularly severe bias against including land trusts that specialize in conservation easements, particularly easements with very large appraised values. As discussed later, a majority of the largest land trusts (measured by total deductible charitable gifts received) do not appear in the SOI public use microdata file because they have few or no other non-easement contributions and report few if any assets, and thus are not included in the sample.

Nevertheless, these data provide the best available public sample of the types of organizations that receive conservation easements, the amounts they receive, the number and acreage of the easements they hold, and the time and expense they devote to monitoring easements. However, the value of contributions of easements is not recorded in these data. To augment these data, we used the text of Form 990 available from [www.guidestar.com](http://www.guidestar.com) to gather information on whether the value of contributions of easements received was recorded and, if so, the value of easements received by the organization on each of the latest three years of forms publically available (Guidestar 2016). In particular, from the sample of organizations that report holding easements, we examined the 990s of the 50 largest organizations ranked by total gifts, the 10 organizations that report the most easements that year on Schedule M (noncash contributions), and the 10 organizations that report holding the most individual easements on schedule D. We aggregated the total dollar value of easement donations received on the last three public tax returns (form 990) filed by these organizations as of 2015.<sup>4</sup>

Table 4 presents this sample sorted first by the average annual value of deductions of easements received (column 2) and second, for organizations that do not report easements, by the total number of easements held. Columns 3 through 8 report information reported on

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<sup>4</sup> Because of the lag between when returns are filed and when they are published, and because some organizations use different fiscal years, the 990 data refer to returns filed between 2010 to 2013. In particular, returns are available from 2010, 2011, and 2012 for some organizations, but for 2011, 2012, and 2013 for others.

their returns in 2011 including total gifts reported (including cash and, when reported, the value of non-cash contributions), the number of employees, the total number of easements held, the total acreage of easements, and measures of the time and expense incurred in maintaining and enforcing the easements they manage.

The table illustrates substantial variation between the total value of easement donations received—the tax expenditure—and the size and conservation effort provided by the entity. For instance, among the organizations where the value of easements is publically available, the second largest recipient of such donations over the period from 2010-2013 was the Nature Conservancy, which maintains almost 2.9 million acres, has 3,725 employees, and spends more than a million dollars each year maintaining and enforcing their easements. In one specific year (2011), for example, according to their Form 990 Schedule M filing, they received 76 easements which were valued at \$95 million total (about \$1.25 million each).

In contrast, the recipient of the largest reported total value of donations of easements over the sample period was the Foothills Land Conservancy of Maryville, TN which reported only four employees and spent only \$19,000 to monitor the 19,600 acres of easements it maintains in 2011. Over the 3-year period from 2011 to 2013, it received an annual average of \$125 million in easements. In 2013 alone, it received 14 contributions of easements valued at \$236.7 million (about \$17 million each). (In its more recently-available 2014 return, it reported an additional \$206 million). For perspective, the \$236.7 million in gifts in 2013 is roughly a quarter of the total volume of deductible donations of qualified conservation easements claimed by individual taxpayers that year (\$1.1 billion). Indeed, its total charitable contributions places the organization alongside America's largest public charities. For instance, the \$206 million in donations it received in 2014 ranked it at the 67<sup>th</sup> largest charity according to Forbes's list of the Largest U.S. Charities for 2016, just ahead of the Smithsonian Institution, the March of Dimes Foundation, the Humane Society of The United States, and the USO (Forbes 2016).

The first 10 organizations on Table 4 report having received a total about \$346 million in donations of easements, on average, over the prior three years.<sup>5</sup> Given that the total amount of conservation easements claimed by taxpayers in 2010 was \$766 million and in 2011, \$695 million, this suggests the donations received by these organizations represent a large share of contributions of all easements in those years.<sup>6</sup>

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<sup>5</sup> The reports pertain largely to 2010, 2011, and 2012, but for several organizations the most recent filings are 2011-2013.

<sup>6</sup> The comparison is imperfect because the SOI report is based on deductions claimed by taxpayers, which may not perfectly correspond to deductions reported by organizations because of differences in the timing of when returns are filed and for which tax years, and because individuals may not claim all of the value of the deduction in the year filed and instead may carry them forward for as many as 15 tax years.

TABLE 4

## Organizations Receiving Conservation Easements in IRS Public Use Microdata Sample 2011 and Form 990



Name of Organization	Average Annual Value of Conservation Easements Received (Last 3 990s filed by 2015)	Total Gifts (2011)	# of Employees (2011)	Total Number of Easements (2011)	Total Acreage of Easements (2011)	Hours Spent on Enforcement (2011)	Expenditures on Enforcement (2011)
Foothills Land Conservancy	\$125,374,000	40,353,481	4	96	19,638	300	19,133
Nature Conservancy	\$79,353,000	530,700,000	3,725	2,367	2,888,283	22,496	1,065,954
The Trust for Public Land	\$38,117,000	66,141,921	378	13	1,448	92	5,731
The Conservation Fund: A Nonprofit	\$30,631,000	60,547,309	157	32	118,362	-	-
Rocky Mountain Elk Foundation Inc	\$18,774,000	29,548,595	151	179	24	14	107,031
Peconic Land Trust Inc	\$17,734,000	48,994,145	38	107	2,607	540	38,624
Natural Lands Trust Inc	\$13,403,000	9,455,374	82	222	18,001	1,190	51,441
Wetlands America Trust Inc	\$13,376,000	23,861,578	0	427	366,705	3,812	227,408
Triangle Land Conservancy Inc	\$4,719,000	4,130,659	15	69	5,906	281	7,625
Little Traverse Conservancy Inc	\$4,247,000	9,182,116	14	214	20,735	3,050	145,000
Puerto Rico Conservation Trust Fund	\$1,317,000	16,242,950	132	5	74	62	19,748
Save the Redwoods League	\$1,118,000	8,313,408	39	26	14,240	728	121,824
Upper Savannah Land Trust	\$866,000	2,783,500	0	53	30,571	347	-
Sheriff's Meadow Foundation	\$789,000	914,590	9	41	858	202	5,226
Iowa Natural Heritage Foundation	\$748,000	2,197,943	40	109	14,874	892	6,163
Columbia Land Trust	\$542,000	7,048,797	29	35	1,055	506	15,089
National Audubon Society Inc	\$401,000	2,588,879	1,059	27	383,516	113	6,399
Open Space Conservancy Inc	\$334,000	7,856,354	0	272	22,761	421	20,941
Mississippi Land Trust	\$283,000	58,389,766	0	94	86,156	564	30,000
Society for Protection of NH Forests	\$280,000	5,592,776	90	795	130,189	6,628	261,021
Legacy Land Conservancy	\$47,000	534,303	7	64	2,596	748	28,855
Freshwater Land Trust	\$8,000	543,646	8	12	1,862	225	20,000
Brandywine Conservancy Inc	not reported	1,569,075	156	441	34,180	6,194	145,716
The Trustees of Reservations	not reported	8,138,979	695	362	20,001	5,828	216,058
Aspen Valley Land Trust	not reported	284,551	3	231	34,379	2,500	89,700
Maine Coast Heritage Trust	not reported	16,098,023	70	204	16,725	938	128,393
Essex County Greenbelt Association	not reported	1,555,012	15	204	6,084	654	18,674
Western Pennsylvania Conservancy	not reported	6,910,782	255	163	32,507	3,247	131,368
New England Forestry Foundation Inc	not reported	1,059,480	10	145	1,144,653	1,740	81,869
The scenic Hudson Land Trust Inc	not reported	2,339,029	0	125	12,263	2,726	101,194
Napa County Land Trust	not reported	4,707,629	15	125	21	10	128,000
Historic Landmark Fnd on Indiana Inc	not reported	1,347,683	51	124	477	316	8,073
America Farmland Trust	not reported	5,011,333	75	113	44,188	1,534	103,046



While the information available on form 990 is intended to be comprehensive and to allow the general public to understand which organizations are benefiting from public subsidies for charitable donations, the reporting conventions used by some land trusts excludes the value of conservation easements from gifts they report. In addition, governmental entities are generally excluded from the IRS sample.

Data reported by individuals claiming donations of easements on Form 8283 provides a means to address these shortcomings and to provide an independent source of information on the characteristics of donee organizations. The analysis of these data suggests that many of the largest organizations that receive easements do not record the value of easements on their public filings.<sup>7</sup> Taxpayers are required to include the name of the donee on form 8283, as well as other information about the contribution, when filing their returns. Most donee organizations listed on form 8283 as recipients of a conservation easement are charitable land trust organizations, but several are governmental organizations.

Table 5 summarizes the information pertaining to the 100 largest organizations based on the average annual dollar value of contributions received over the period from 2010 to 2012. As the table shows, taxpayers claimed an average of \$61 million in charitable deductions for contributions of easements to each of the top 5 organizations (column 2). Those contributions to those five organizations are thus collectively responsible for approximately 29 percent of all easements received over that period (column 3). Column 4 provides the cumulative share of all contributions made to organizations in each group and higher; the data in this column shows, for instance, that the top 25 organizations account for about half of all deductions.

Outside of the top 50 donee organizations, the typical organization receives only a few donations a year (outside of the top 100, the average is on the order of one donation per year). Given that there are approximately 1,700 land trusts in the United States, this suggests that over the 3-year period centered around 2011, roughly half of the tax expenditure was concentrated within about 1 percent of organizations.

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<sup>7</sup> Because these data are drawn only from individual returns (and thus exclude corporate donations) and because some taxpayers either do not report the donee or the donee name could not be accurately transcribed, the table likely understates the concentration of donations in these organizations.

TABLE 5

## Characteristics of Donee Organizations 2010-2012



Rank (by Donations Received)	Average Annual Gifts Received per Donee	Fraction of Aggregate Deductions	Cumulative Aggregate Deductions	Number Reporting Gifts on 990	Average per Donation	Donations per Year
1-5	\$61,462	29%	29%	2	\$1,770	35
6-10	\$20,799	39%	39%	1	\$639	33
11-15	\$10,115	44%	44%	1	\$1,445	7
16-25	\$4,434	48%	48%	2	\$174	26
26-50	\$1,156	51%	51%	N/A	\$118	10
51-100	\$974	55%	55%	N/A	\$228	4

**Source:** Office of Tax Analysis

**Note:** Dollar amounts in \$1,000 of 2016 dollars. Estimates from individual samples 2010-2012.

A surprising finding in this analysis is that only 6 of the top 25 organizations report a (non-zero) value for gifts of conservation easements on either form 990 or on Schedule M (non-cash contributions). (Four of the top 25 recipients are government agencies that do not file 990.) Hence, of the 21 public charities that receive the most gifts of donations of easements, 15 do not report those gifts as receipts, assets, or otherwise report them on their public disclosures. The Form 990 instructions require only that donee organizations report the value of gifts for tax purposes using the same methods as they use for their books. Many organizations take the view that, for financial purposes, easements have no value because they cannot be sold or otherwise monetized.<sup>8</sup>

A consequence of this accounting approach is that organizations that receive non-cash contributions, even those that receive hundreds of millions of dollars of public support in the form of deductible contributions, avoid public oversight that the disclosure of Form 990 is intended to provide. While many still file Form 990, Schedule D (indicating that they received qualified conservation easements), and Schedule M (non-cash contributions), some land trusts that receive conservation easements avoid filing either supplementary schedules because they qualify (based on gross receipts and assets) to file either the 990N or 990EZ. Several of these organizations would otherwise rank among the top 100 or even top 50 largest charitable organizations if they reported gifts of easements at their appraised value rather than at zero.

This practice may also allow donee organizations to sidestep an important legal test required to qualify as a public charity. In particular, their non-cash contributions are excluded from gifts reported on Schedule A, which is used to determine whether the organization meets the public support requirements necessary to be a public charity. Given the size and concentration of certain non-cash contributions, this could affect whether certain organizations qualified to be public charities or were instead private foundations. This distinction is particularly

<sup>8</sup> It appears that other non-cash contributions, such as for art or collectibles, are sometimes treated similarly.

important for these entities and for their contributors, because donations of conservation easements to private foundations do not qualify for a tax deduction for the donor.

## WHAT IS CAUSING THE CONCENTRATION OF ACTIVITY?

Qualitatively, the descriptions of the donations included on 8283, the characteristics of donee organizations, and other public information provide some insight into why donations are so concentrated.<sup>9</sup> First, many large donations appear to be associated with large real estate developments, such as a recreational community surrounding a golf course or tennis club, or a suburban residential development in which multiple homes are built on a large parcel. Because the value of the donation of the easement is generally based on its “highest and best” private use, the development of recreational amenities or high-value residences increases the value of any adjacent or undeveloped parcels of the land. For instance, building roads, installing infrastructure, and landscaping an undeveloped property increases its value in the private market, which also increases the value of the charitable contribution.

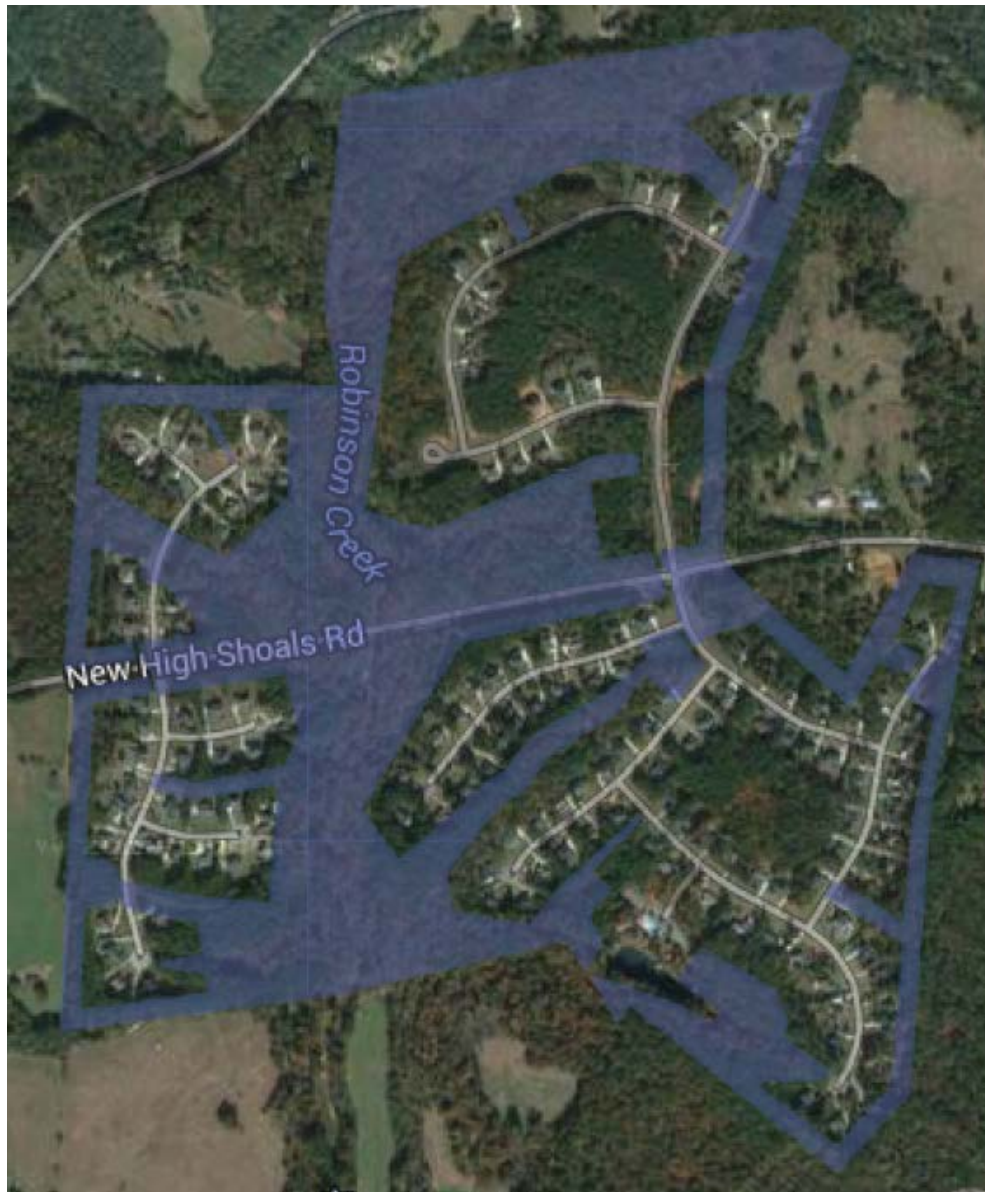
The publically available maps from the website [www.conservationeasement.us](http://www.conservationeasement.us) provide a selection of easements that illustrate development-related easements that could potentially result in large charitable deductions (National Conservation Easement Database 2016). Figure 1 presents one example of an easement that is integrated with a housing development. The areas in blue were the subject of a conservation easement. Because the property is in a suburban area and because the homes are likely to be valuable, the valuation of the development rights could be high.

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<sup>9</sup> For instance, [www.conservationeasement.us](http://www.conservationeasement.us) provides GIS-coded maps of easements superimposed over Google Maps. Within these maps, it is possible to identify easements that are closely integrated with owner-occupied housing developments or recreational facilities, where the borders of the area under easement were drawn up to the edges of the roads and residences in the developments or superimposed over recreational facilities. Because the included land is adjacent to high-value developments and located in relatively high-cost suburbs, the private value of the land is likely to be high.

**Figure 1**

Example of a Conservation Easement within a Housing Development



Tabulations from information regarding golf course-related easements currently under audit by the IRS suggest that such developments are heavily represented among large donations. In these transactions, the owner of a golf club pledges not to build houses or otherwise develop their golf course, and to keep it in its current use (i.e. as a privately owned and operated course) for purposes of environmental conservation. The owner then takes a charitable deduction for the diminution of value of the property. The average deduction claimed for the roughly two dozen golf course easements currently under audit is about \$19 million and individual transactions can exceed \$50 million. A single such transaction can therefore be 5 to 7 percent of all donations in a year. Indeed, the Obama Administration's Fiscal Year 2017 Budget included proposals to eliminate easements associated with golf courses and 'air rights.' The revenue estimates

associated with those proposals suggest that roughly 10 percent of all easements are associated with golf courses and 5 percent with ‘air rights’.

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### *Donations of golf courses?*

Golf courses, with manicured greens, crisscrossed by paths, maintained with fertilizers and pesticides, and surrounded by condominiums and club houses might not seem like the idyllic environmental ecosystems envisioned by the conservation-minded legislators who first introduced tax benefits for conservation easements—but these properties claim a disproportionate amount of the benefits. How so?

In one of the first major cases, the elite golf course at Kiva Dunes claimed a \$30 million deduction for preserving the golf course as open space—and had its claim upheld in tax court, when challenged by the IRS (Kiva Dunes Conservation, LLC v. Commissioner 2009). The developers of Kiva Dunes had purchased the undeveloped land on a barrier island off Alabama for \$1.05m in 1992 and transformed it into a gated, residential subdivision, a 141-acre golf course, and a resource community with swimming pools, tennis courts, and beach access. Subsequently, the property owner placed an easement on the golf course and donated it to the North Atlantic Land Trust, and claimed a deduction of \$30,588,235.

How could a property purchased for \$1m result in a \$31m deduction for contributing only partial development rights? The developer argued that he could have developed an additional 370 residential lots on the property with about \$170,000 each. One reason for the high value—the “access to the amenities of the adjacent Kiva Dunes subdivision, including the use of tennis courts, swimming pools, and beach walkovers...” Perversely, the reason for the increased value was the development of the land itself. This decision is credited for broadening the types of properties that satisfy a conservation purpose and supporting these valuation methods (Ruchelman and Hicks 2009).

Kiva Dunes is certainly not the only nor the largest such donation. In 2005, Donald Trump received a \$39 million deduction for contributing an easement on one of his New Jersey golf courses (Rubin 2016a). (He also took a deduction for an easement on his Westchester home’s backyard (Rubin 2016b).) And many more golf course owners have clearly taken deductions for donations of easements on their courses—even if the dollar amounts are not public—based on land records and maps.

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### *The Rise of Development Use and Syndications*

More recently, developers and other promoters have begun using syndicated transactions to expand the tax breaks they receive from easement deductions. Figures 2 and 3 provide examples of promotional materials offered to would-be investors in real estate deals that involve taking advantage of charitable deductions for conservation easement. The first document is advertised to “landowners, developers, accountants, attorneys, appraisers, land-use consultants, financial

planners, and [last but not least, hopefully] wildlife resource managers” and offers seminars on topics that include “turning an easement into a source of liquidity.”

The second document provides a more direct example of the promoted scheme itself in which investors are offered a substantial return in the form of a charitable deduction for investments into a real estate deal. Investors in the deal are offered the opportunity to buy one of 99 lots (just under the limit for SEC registration of an investment fund) for \$36,000 and promised a return of charitable deductions of \$158,000 from donation of the easement. In other words, the investor is offered a deal in which they buy the land for \$36,000 but get a charitable deduction which may save them on the order of \$60,000 in federal taxes alone. In total, the 99 lots would result in \$15.6 million in deductions for property apparently sold to investors for \$3.6m and presumably acquired by the current land owner for much less.




Figure 2

## Promoted uses of conservation easements in real estate development

Join industry leaders to learn more about how conservation easements can be effective vehicles for land-use control and sources of liquidity. This one day seminar will offer a comprehensive overview of the due diligence associated with modern day conservation easements: tax considerations, team members and other business dealings, documentation of conservation values, current appraisal techniques, transaction structuring pitfalls and legal defense. Space is limited. [Register today](#) to reserve your place at this event.

**Who Will Benefit?** Landowners, developers, accountants, attorneys, appraisers, land use consultants, financial planners and wildlife resource managers will benefit from this informative seminar.



### The Business of Conservation: Partnering to Promote Conservation and Create Liquidity

**May 7th, 2015 7:30 AM**  
Atlanta Financial Center | East Wing | 11th Floor | Agora Room

## 2015 Seminar Agenda

**Breakfast 7:30am-8:30am** | Sponsored by Atlantic Coast Capital

- I. **Welcome & Introduction** | 8:30am-8:45am | Walter Ernest, Pelican Coast Conservancy
- II. **Promoting Land Conservation - *Partnerships and Available Resources*** | 8:45am-9:15am | Chuck Roe, Southern Conservation Partners
- III. **Meet the Tax Adviser - *Taking Advantage of Congressionally Mandated Conservation Incentives*** | 9:15am-10:05am | Joe Skalski, Asset Strategists
- IV. **Meet the Quarterback - *Exploring the Feasibility of an Easement and Coordinating the Team*** | 10:05am-10:40am | Bryan Kelley, Webb Creek Management Group

**Break 10:40am-10:55am** | Sponsored by Asset Strategists, LLC

- V. **Meet the Land Trust - *Establishing Conservation Values, Baseline Study and Easement Issues*** | 10:55am-11:45am | Robert Keller, Ph.D, Atlantic Coast Conservancy
- VI. **Meet the Appraiser - *Addressing Appraisal Issues*** | 11:45am-12:30pm | Clay Weibel, MAI, Weibel & Associates

**Lunch Speaker - A Story of Success 12:30pm-1:30pm** | Charlie Curry & Ronnie Wallace

- VII. **Meet the Structuring Attorney - *Turning an Easement into a Source of Liquidity*** | 1:30pm-2:15pm | Tim Pollock, Morris, Manning & Martin
- VIII. **Meet the Broker - *Finding the Liquidity*** | 2:15pm-2:50pm | Trevor Gordon, Sandlapper Securities, LLC | Don Deans, Capital Investment Companies

**Break 2:50pm-3:05pm** | Sponsored by Southern Conservation Partners & The Pelican Coast Conservancy



### Figure 3

#### Promoted easements offering substantial returns to investors

Subject: Conservation Easement- Possible Large Charitable Tax Deduction

Dear all, I have become aware of an opportunity to invest in a unique offering. In summary Stuckey Timberland Inc. is selling about 2,300 acres of unimproved property in Dodge County Georgia to the Parkerson Church Reserve Investments LLC (PCRI). PCRI is selling 99 units of this property at the price of \$36,000/unit. Stuckey Timberland is retaining 1 unit.

If a simple majority of the PCRI unit holders vote to pursue a conservation easement then it is expected each unit holder would benefit by receiving a charitable deduction of about \$158,000. In other words an outlay of \$36,000 should provide a charitable deduction of \$158,000. How much each investor may save on taxes from this deduction will vary. However, roughly speaking an investor with about \$500,000 of income might expect a reduction of federal taxes of around \$60,000. It must be noted that there is no way to generalize the value of the charitable deduction nor make any guarantees. Each investor must work with their individual CPA to estimate how much would be saved in taxes from a \$158,000 charitable deduction.

Unfortunately, both time and investment units are limited. The sponsor expects this offer to be fully subscribed before 12/10/16, there are only 99 units. In order to realize the tax deduction the conservation easement must be approved and implemented before year end. This means time is short to make a decision. Please let me know by Monday 11/28 if you have an interest in this investment. I am not looking for commitment. Just interest. If there is interest we should work as a team to determine if this investment should be pursued.

That said there are risks to investing in this opportunity. There is a long list of risks delineated in the Private Placement Memorandum attached. However, some of them are:

1. The unit holders may not approve pursuing a conservation easement.
2. The company has no operating history that would permit projecting earnings. In fact there should be no net earnings if PCRI pursues a conservation easement.
3. The IRS may challenge the appraised Fair Market Value of the property and/or the intention of the RE Holding Co. to be treated as a partnership.
4. Set asides and income to pay future expenses of the property may not be enough to sustain the property.
5. There is no public market for the units and the units are subject to transfer restrictions.
6. This investment should be considered illiquid.
7. There are unlikely to be any cash distributions from the manager. All the benefits from this opportunity are likely to be derived from the charitable contribution created by the conservation easement.

Significantly, I have never been involved in a conservation easement investment opportunity, and I have no connection or history with any of the people who have created this investment. That said my preliminary due diligence suggests that the offer does seem to meet IRS guidelines, the CPA for the seller appears to have significant experience in offers like these and the same family closed a similar offer in 2015. This is the second in what is planned to be a multi-year offer.

Assuming the investment performs as expected an investor should be able to reduce their actual federal tax liability by an amount that substantially exceeds the investment cost of \$36K. It appears that actual tax liability could be reduced by \$50K - \$70K based on the specific tax profile of each investor. However, there are risks. The investment is completely illiquid and it is possible that an investor could lose their entire investment.

Please look over the attached PPM and let me know if an investment in what is likely to be a conservation easement is of interest. If it works as expected about 2,300 acres of land will be preserved and investors should make a profit by saving taxes in excess of the amount invested.

## CONCLUSION: WHAT CAN BE DONE?

The susceptibility of the deduction for conservation easements to abuse and the acrimonious disputes arising between taxpayers and the IRS over its enforcement make the deduction ripe for reform. When used in the spirit it was intended, the deduction benefits the environment and the taxpayer by encouraging preservation of land with substantial conservation benefits. The following recommendations are intended to preserve the deduction for those purposes, while reducing the instances of abuse. The approaches outlined below try to reduce instances of abuse of the deduction by clarifying and narrowing the purposes for which a deduction can be taken; requiring organizations to meet minimum qualification standards, increasing their reporting and disclosure, and imposing minimal accountability for the transactions they facilitate; and to bring some sunshine into the area with increased public disclosure and reporting to the IRS.

### *I. Make Abusive Easement Transactions “Listed Transactions”*

In January of 2017, The Treasury and the IRS identified certain easement transactions as “listed transactions” (IRS 2017). The notice, whose purpose is to provide additional reporting of certain transactions, is important to sustain.

The notice requires participants in promoted, syndicated transactions to “raise their hand” so that the IRS and policymakers can understand the scope of these transactions and to understand whether these transactions require greater scrutiny. The notice does not change the law or regulations related to conservation easements, and has no effect on the vast majority of traditional easement donations.

The IRS listing notice requires individual taxpayers who engaged in a specific type of transaction to provide additional information regarding their charitable contribution. There is a standard filing for taxpayers to submit this information for recent transactions and, in future years, for taxpayers to submit in future years with their returns.

Importantly, the notice does not change the law regarding conservation easements or narrow the scope of transactions that were legally available to taxpayers before the listing notice. It is simply a tool to provide the IRS with more information on the frequency, size, and potential for abuse.

Moreover, the charitable organizations themselves are specifically held harmless in the notice and so cannot face penalty simply for being party to these transactions. And the notice does not affect the traditional donations of conservation easements.

Finally, the listing notice is extremely conservative and focuses exclusively on an extreme syndication transaction. The listing notice requires reporting only transactions with the following three characteristics: 1) the transaction was promoted 2) involved investments through partnership structures and 3) the promotion offered the possibility of a charitable donation of 2.5 times or more the investor’s initial investment (i.e. “if you invest \$1m you will get a charitable deduction of \$2,5 million or more.”)

Since the listing notice, promoters of these abusive transactions have reacted vigorously to have the notice overturned. This is no surprise, as they are marketing and profiting from the sales of potentially billions of dollars of charitable contributions. But most charitable organizations and most conservationists find such profiteering under the veneer of environmentalism repugnant. That's why their advocates, including the Land Trust Alliance, publically support the notice.

## ***II. Improve Reporting and Transparency***

### *Form 990 – Organization reporting*

Most charitable organizations must file annual information returns or notices with the IRS. Organizations that normally have \$200,000 or more in gross receipts or assets greater than or equal to \$500,000 at year-end must file Form 990. Organizations not meeting these thresholds, but normally having more than \$50,000 in gross receipts, may file Form 990EZ instead. Organizations that normally have \$50,000 or less in gross receipts may opt to file a Form 990N ("e-postcard"), which is an electronic notice to the IRS confirming that the organization exists, providing minimal information (such as the organization's name and address). Forms 990 and 990EZ have different "core" forms – with the Form 990EZ being shorter and easier to complete – but a variety of schedules are required to be attached to the core form if the organization is involved in specific activities or otherwise triggers filing requirements for particular schedules. For example, Schedule A, *Public Charity Status and Public Support*, and Schedule B, *Schedule of Contributors*, must be filed by Form 990EZ filers, as well as Form 990 filers, when certain threshold requirements are met.

Information regarding conservation easement contributions and holdings is required in several places on Form 990, Form 990EZ and various schedules. Both core forms require balance sheet information, which typically does not include any value for the conservation easements held because the easements cannot typically be sold and, for financial statement purposes, are commonly not viewed by the organization as an asset, but, if anything, as a liability. Both core forms also require income statement information, which may or may not include the value of contributed easements as part of gross receipts. This is because the instructions to the core forms instruct an organization to report financial information in accordance with the way it reports information for financial accounting purposes. Some organizations report contributions of conservation easements as part of gross receipts at FMV (using an appraised or estimated value). These organizations generally also record an expense of an equal or nearly equal amount, recognizing that after receipt of the easement, the asset will not be readily marketable and will have little, if any, value to be carried on their balance sheet. Other organizations, however, treat contributed easements as having no value for all reporting purposes, including both income and balance sheet reporting on the core forms, and for the calculation of public support on Schedule A.<sup>10</sup> (Note that this method of accounting is not necessarily specific to donations of easements,

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<sup>10</sup> Since the Schedule B is not publicly available, it is not clear whether or how organizations are reporting contributions of conservation easements on Schedule B. However, it is likely that organizations reporting conservation easements as having no value on the core form are also not reporting those contributions on Schedule B. This is because the instructions to Schedule B specifically indicate that the organization should "report the value of any qualified conservation contributions and contributions of conservation easements listed in Part II consistently with how it reports revenue from such contributions in its books, records, and financial statements and in Form 990, Part VIII, Statement of Revenue." Thus, because the organization values conservation easements at

but may also occur with non-cash gifts that effectively have no value or represent a liability to the donee, like certain restricted gifts of art or property.)

Organizations that receive or hold conservation easements that are Form 990 filers must also report information about the easements on Schedule D, *Supplemental Financial Statements*, and on Schedule M, *Noncash Contributions*. Schedule D, Part II (Conservation Easements) asks for information about conservation easements held by the organization, including the total number of easements held; the total acreage held under easement; the number of easements modified, transferred, released, extinguished, or terminated during the tax year; and the staff hours and expenditures during the tax year related to monitoring and enforcing easements. Schedule M requires reporting, by type of contributed property, of the number of contributions, the total value of the contributions and the method of valuation used and asks additional questions regarding the restrictions on contributed property and the acceptance/sale of contributed property. Form 990EZ filers are not required to file Schedules D or M.

In most places, the instructions for the Form 990 and related schedules indicate that the organization should report information, including contributions of conservation easements, consistently with how it reports information for its books, records, and financial statements. Thus, organizations reporting contributions of conservation easements as having no value on the core form, will also report no value for these contributions on Schedule M.<sup>11</sup> Note, however, that if an organization reports its conservation easement contributions as having no value, it is likely that it will also use the zero value for purposes of determining whether it meets the gross receipts and asset thresholds for filing Form 990. Thus, it is possible that an organization could have significant contributions of conservation easements, but normally less than \$200,000 in other contributions, and under \$500,000 in assets, qualifying it to file Form 990EZ. It is even possible that an organization with significant conservation easement contributions could have less than \$50,000 in gross receipts annually and qualify to file the Form 990N.

The current reporting regarding conservation easement contributions and holdings on the Forms 990 and 990EZ results in several shortcomings.

1. *Inconsistent reporting.* Different organizations report information about conservation easements in very different ways, making it impossible to compare organizations on the basis of their filings or to identify comparable organizations and/or outliers.
2. *Hides large donee organizations.* Because organizations may report the value of the contributions of easements as zero, it is difficult to identify which donee organizations are receiving donations of easements for which large charitable contributions have been taken.
3. *Understates conservation activity.* The Forms 990 and 990EZ are used to communicate to the public – including state and federal policy makers, donors, academics and the media – about

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zero for financial statement purposes, and the Schedule B only requires reporting of contributors giving cash or property valued at more than \$5000, these contributions would not be reported on a Schedule B.

<sup>11</sup> Schedule M instructions indicate that “[a]n organization that received qualified conservation contributions or conservation easements must report column (c) revenue consistent with how it reports revenue from such contributions in its books, records, and financial statements. The organization must also report revenue from such qualified conservation contributions and conservation easements consistently with how it reports such revenue in Form 990, Part VIII.”

the levels of conservation activity undertaken by the reporting organizations. When organizations report their conservation activities using a zero value, the level of activity is understated and it may be difficult to draw any meaningful conclusions from the reported information.

4. *Skews the calculation of public support, potentially allowing more deductible contributions.* Because donations of easements may be excluded from the calculation of public support, it is possible that public support calculations include only a small portion of the deductible contributions received by the organization. Thus, an organization receiving valuable easement contributions from a single donor or family, which otherwise would be a private foundation – and thus unable to receive deductible contributions of conservation easements – if easement contributions were included at FMV, may be a “qualified organization” if the easement contributions are valued at zero. This might be an appropriate outcome in some cases, but it may not be desirable in others. Moreover, the code includes a process for excluding extraordinary gifts from the public support test, which many donee organizations use when they receive a large gift (e.g. of an easement), but which is more transparent and follows a prescribed process.

#### *Options for Reporting Revisions on Form 990*

To address issues involving lack of transparency, Form 990/990EZ and/or the associated Schedules should be revised to require additional reporting of the FMV of contributed easements by the organizations receiving the conservation easements. In all options below, FMV would be defined as the value of the easement at the time of the contribution (in the hands of the donor). In addition, instructions would provide that organizations may use a reasonable good faith estimate of the FMV and do not necessarily need to obtain an appraisal. Further, instructions could provide that the FMV of the contributed conservation easement determined by the qualified appraiser that signs the donor’s Form 8283 will be considered a reasonable estimate of the FMV of the easement unless the donee organization knows or has reason to know that the value is not correct.

Although a donor is not required to provide the donee organization with a copy of the appraisal for the contributed easement, a donee organization may request a copy of the completed appraisal from the donor (as is recommended as part of the Land Trust Alliance best practices and is required by many governmental entities that receive easements). The fact that the organization would have its own Form 990 tax reporting requirement would provide an additional basis for that request. If a donor refuses to provide a copy of the appraisal to the organization, the organization could make a good faith estimate of the value. The organization could also refuse to sign the donor’s Form 8283. Although a donor may take a deduction for a contribution if the Form 8283 has not been signed by the donee organization, the donor would need to attach a detailed explanation of the reason it was impossible to obtain the donee’s signature to the form.

The following options for revising the reporting of conservation easements may be implemented alone or in combination, and may address some or all of the issues noted above.

In general, these options would require additional reporting of information about contributed conservation easements and their fair market values. In most cases, these options could be implemented by regulation or by modifying IRS guidance or instructions. In other cases, Section 6033 would be amended to require electronic reporting and public disclosure by donee organizations. These options focus on increasing disclosure regarding deductible contributions of easements that is sufficient for transparency and accountability including: detailed descriptions of the subject property and the restrictions imposed on the property, the conservation purposes served by the easement, and any rights retained by the donor or related persons; the fair market value of both the easement and the full fee interest in the property at the time of the contribution; and a description of any easement modifications or actions taken to enforce the easement that were taken during the taxable year. As is the case under current law, personally identifying information regarding the donor would not be subject to public disclosure.

#### *Option 1 – Revise Schedule D reporting/Require Form 990 filing*

- Revise the Schedule D to require reporting of the number and total value of conservation easement contributions during the tax year. Optionally, acreage covered by the contributed easements could also be reported. Revise the Schedule D instructions to require that the value be reported at the FMV of the contributed easements.
  - Specifically, Schedule D, Part II would be revised to add a new multi-part question requiring reporting for the tax year of (a) “Number of conservation easements received”; (b) “Total acreage covered by the conservation easements received”; and (c) “Fair market value of the conservation easements received.”
  - Optionally, the cumulative total value of contributed easements could also be required by revising Schedule D, Part II, Line 2 to add another subline as line 2c for the “Total value of contributed conservation easements.”
- Revisions would also be needed to ensure consistent reporting by all organizations receiving significant conservation easement contributions. Options include:
  - Require that all organizations that receive contributions of conservation easements file Form 990 (and, thus, Schedule D). This would require a change to the Form 990, Form 990EZ and Form 990N instructions.
  - Require organizations to use a reasonable estimate of the FMV of contributed easements when determining whether they meet the thresholds for filing a Form 990EZ or Form 990N. (See Option 5 below.) Because contributions of conservation easements are often valued at more than \$50,000 (at FMV), most organizations receiving contributions would file at least the Form 990EZ, and only those contributions of conservation easements were valued in excess of



\$200,000 annually would be required to file the Form 990/Schedule D. This would require a change to the Form 990, Form 990EZ and Form 990N instructions.

- Require that Form 990EZ filers also attach Schedule D if they receive contributions of conservation easements. Other parts of Schedule D could also be required of Form 990EZ filers, if desired. This would require a change to the Form 990EZ instructions.
- Although a donor is not required to provide the donee organization with a copy of the appraisal of the contributed easement,<sup>12</sup> a donee organization may request a copy of the appraisal from the donor, with the tax reporting requirement providing a basis for that request. If a donor refuses to provide a copy of the appraisal to the organization, the organization would be able to make a good faith estimate of the value – or it may refuse to sign the Form 8283. Although a donor may take a deduction for a contribution if the Form 8283 has not been signed by the donee organization, a detailed explanation of the reason it was impossible to obtain the donee signature must be attached to the form.

Alone, this option would provide a minimum level of consistent reporting across organizations, allowing transparency as to which organizations are currently receiving tax-deductible contributions of conservation easements from all types of taxpayers. It would also provide an additional measure of the relative size of organizations' conservation programs. This information would be helpful in creating and evaluating policy alternatives, and could be useful for State and IRS enforcement efforts.

#### *Option 2 – Revise Schedule B reporting*

- Revise the Schedule B instructions to require any reporting of conservation easement contributions to be at FMV.
- It appears from the review of the IRS forms that other property contributions, such as art and historical treasures, may also be given a zero value for financial statement purposes.<sup>13</sup> It would seem that the FMV of these contributed items should also be disclosed – particularly given concerns regarding inappropriate deductions for contributions of art works in media reports in recent years. However, this revision could also be limited to just conservation easements.

This option might be useful for IRS enforcement efforts, particularly if combined with Option 1. However, because the Schedule B is not publicly disclosed, this option alone would not provide

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<sup>12</sup> Currently, a donor is required to provide the donee organization with a copy of Section B of the Form 8283 that includes only the name and SSN of the donor and a description of the property contributed. The donor is not required to provide a copy of the appraisal to the donee organization. This position is reflected in final regulations that are currently in clearance. We could consider, if desired, later amending the regulations and instructions to Form 8283 to require the donor to provide more information, including the appraised fair market value and a copy of the appraisal, to the donor.

<sup>13</sup> See Instructions to Schedule M, page 3, column 2 below Example 2.



much transparency into the contribution and holding of easements. Moreover, legislation has proposed eliminating Schedule B.

#### *Option 3 – Revise Schedule M reporting*

- Revise the Schedule M instructions to require reporting of conservation easement contributions at the FMV of the contributed property. Also provide that if the organization reported no value for the contribution in the Statement of Revenue in the core form (Form 990, Part VIII), an explanation of why no value was reported should be included in Schedule M, Part II.
  - Specifically, the Schedule M instructions for Column (c)-(d), on page 3, column 2 would need to be revised and the paragraph in column 3 specifically indicating that qualified conservation contributions should be reported consistent with the organizations bookkeeping method would need to be eliminated.
  - Additionally, an Example could be added to the instructions to illustrate how an organization would report the FMV of a conservation easement in Column (c) (and, if desired, illustrate reporting in Part II of an explanation of valuation at zero on Form 990, Part VIII (Statement of Revenue)).
  - Instructions for Lines 13-14, on page 2, would also be revised to include specific instructions for reporting the easement at FMV, including use of the appraised FMV reported on Form 8283 or in the appraisal of the property done by the appraiser who signed the Form 8283.
  - A conforming revision of the Schedule M, Part I, Column (c) title would also be needed
- As with Option 2 (Schedule B reporting), this revision arguably should be made for all noncash contributions reported on Schedule D (including artwork).
- Like Option 1 (Schedule D reporting), revisions would also be needed to ensure consistent reporting by all organizations receiving significant conservation easement contributions.
- Like Option 1 (Schedule D reporting), this option alone would provide a minimum level of consistent reporting across organizations, allowing transparency regarding which organizations are currently receiving tax-deductible contributions of conservation easements and permitting easier aggregation of information on contributions by all types of donors (individual, corporate, etc.). However, these would be easier to make because changes are primarily to the instructions, and do not require structural changes in the form. This information would be helpful in creating and evaluating policy alternatives and also could be useful for State and IRS enforcement efforts.
- If this revision were implemented alone, it could result in a potential differential between the total amount of revenue reported in Form 990, Part VIII (which may include easement contributions

reported at a zero value) and the total of the contributed property reported in Schedule M, Part I, Column (c). However, the organization would be required to identify and explain where this was the case in Part II.

- If implemented in combination with Option 5 (Core Form reporting), then amounts reported on Schedule M would be consistent with amounts reported in the core form

#### *Option 4 – Require reporting of contributions of conservation easements at FMV in Form 990 and Form 990EZ core forms*

- Revise the instructions for the Form 990 to require contributions of conservation easements to be reported at FMV as receipts, and also to record an equal amount recorded as an expense, reflecting a write-down of the value of the assets for balance sheet purposes.
  - Specifically, that would require changing the instructions in Part VIII (where it says “The organization must report any contributions of conservation easements and other qualified conservation contributions consistently with how it reports revenue from such contributions in its books, records, and financial statements.”). In addition, the language pertaining to Line 1g should specifically call out donations of easements. One option is to add a sentence to say something like “if you acknowledged receiving non-cash contributions on form 8283, refer to the instructions for schedule M for how to include their value on line 1g.” Or something more specific, like “...non-cash contributions of real property, art, qualified conservation contributions or other property...then fill out schedule M.” “If the value of these contributions, as determined according to the instructions on Schedule M exceed \$25,000, then include that in 1g.”

#### *Option 5 – Revise Schedule A reporting and calculation of public support*

- Revise the Schedule A instructions to require calculation of public support, for purposes of determining whether an organization is publicly supported and qualified to receive deductible contributions of conservation easements, using the FMV of contributed easements.

Arguably, the FMV of all contributions should be used in calculating public support, but if organizations have been calculating public support using a zero value for contributed easements, there could be some organizations, particularly smaller organizations with few easements contributed, that might be negatively impacted by such a change. Because of that, this type of a change would ordinarily require a change in regulation, with notice and comment, rather than just by changes in instructions.

#### *Form 8283 – Donor reporting*

Generally, donors may take a tax deduction for gifts of cash and property to governmental entities and “charitable organizations” qualifying for tax-exemption under Section 501(c)(3), provided the requirements of Section 170 are met. Generally, there is no charitable deduction

allowed for contributions of partial interests in property, but an exception to this rule is provided in the case of a “qualified conservation contributions,” including a contribution of a conservation easement to a “qualified organization.” A qualified organization, which may receive deductible qualified conservation contributions, generally must be either a governmental entity or a 501(c)(3) organization that also qualifies as a “public charity” because it meets one of three public support tests.<sup>14</sup>

A donor’s deduction for contributed property is generally the fair market value (FMV) of property contributed, less any gain which would not be long-term capital gain if the property had been sold instead of donated. In addition, in some cases the deduction amount is also reduced by the amount of gain that would be long-term capital gain, including if the contribution is made to a private foundation that does not qualify as a private non-operating foundation. Finally, the contribution amount must also be reduced by the value of any return benefit received by the donor (or related parties). For donations of property valued over certain dollar thresholds, the donor must meet certain substantiation and recordkeeping requirements.

Generally, no deduction is allowed for a contribution valued at \$250 or more unless the donor obtains a contemporaneous written acknowledgement (CWA) containing specified information from the donee organization.<sup>15</sup> In addition, donors of property valued over \$500, donors must disclose certain information regarding the donated property on Form 8283, which is attached to the donor’s tax return for the year of the contribution. For contributions valued under \$5,000, only Section A of Form 8283 is required. For contributions valued over \$5,000, the donor must obtain an appraisal of the contributed property and fill out Section B, as well, which requires both an acknowledgement of the contribution by the donee organization and a declaration by the appraiser. The donee acknowledgement must be signed by an authorized official, and must include the organization’s name, address and EIN, and an acknowledgment both that the organization is an organization qualified to receive charitable contributions (i.e., described in Section 170(c)) and that the organization received the described property on the given date. (The organization must also specify if it intends to use the property for a use unrelated to its exempt purposes.) Donors must file separate forms for each piece of property (or group of like items) contributed.

Although there is currently some information gathered regarding contributions of partial interests (including conservation easements) valued at \$5,000 or less in Section A of Form 8283, the same information is not currently requested for contributions of property valued in excess of \$5,000.

#### *Option: Improve Donor Reporting*

- In order to take a deduction, a donor must provide a detailed description of the conservation purpose or purposes furthered by the contribution, including a description of the significant public benefits it will

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<sup>14</sup> See Section 170(h)(3), defining a qualified organization as one which is described in Section 170(b)(1)(A)(v) (certain governmental entities eligible to receive deductible contributions), Section 170(b)(1)(A)(vi) (generally charitable organizations that meet one of two regulatory tests for receiving a “substantial part” of their support from the government or the general public), or Sections 501(c)(3) and 509(a)(2) (charitable organizations meeting a statutory public support test). Certain supporting organizations controlled by the foregoing may also be “qualified organizations.”

<sup>15</sup> See Section 170(f)(8).

yield, and the donee organization must attest that the conservation purpose, public benefits, and fair market value of the easement reported to the IRS are accurate. Penalties would apply on organizations and organization managers that attest to values that they know (or should know) are substantially overstated or that receive contributions that do not serve an eligible conservation purpose.

### ***III. Strengthen Standards for Donee Organizations and the Definition of “Conservation Purpose”***

Donors have considerable latitude to determine whether an easement on their property furthers conservation purposes and over the appraised value of the easement, because the donor chooses both the organization holding the easement and the appraiser. While the majority of donors and easement holders act in good faith, there are no repercussions on those organizations that knowingly accept contributions of easements that are overvalued or do not further conservation purposes. Court cases over the last decade have highlighted donors who have taken large deductions for overvalued easements and for easements that allow donors to retain significant rights or that do not further important conservation purposes. For example, large deductions taken for contributions of easements preserving recreational amenities, including golf courses, surrounded by upscale, private home sites have raised concerns both that the deduction amounts claimed for such easements are excessive, and also that the conservation easement deduction is not promoting only bona fide conservation activities, as opposed to the private interests of donors. In addition, easement valuations often do not appropriately take into account existing limitations on the property or rights retained by donors. Reforms are needed to ensure that conservation tax benefits encourage important conservation activities and do not provide opportunities for abuse. The proposal would make changes to the deduction provision to reduce the likelihood that contributed easements are overvalued, to better ensure that contributed easements further bona fide conservation purposes, and to improve the administration and transparency of the deduction.

#### *Option 1: Require minimum standards*

- One proposal would strengthen standards for organizations to qualify to receive deductible contributions of conservation easements by requiring such organizations to meet minimum requirements, specified in regulations, which would be based on the experiences and best practices developed in several States and by voluntary accreditation programs. For example, the regulations could, among other things, specify that a “qualified organization” must not be related to the donor or to any person that is or has been related to the donor for at least ten years; must have sufficient assets and expertise to be reasonably able to enforce the terms of all easements it holds; and must have an approved policy for selecting, reviewing, and approving conservation easements that fulfill a conservation purpose. An organization that accepts contributions that it knows (or should know) are substantially overvalued or do not further an appropriate conservation purpose would jeopardize their status as a “qualified organization.”

#### *Option 2: Clarify definition of “conservation purpose”*

- A second option would modify the definition of eligible “conservation purposes” for which deductible contributions may be made, requiring that all contributed easements further a clearly delineated Federal conservation policy (or an authorized State or tribal government policy) and yield significant public benefit. Rather than just strictly prohibiting the use of easements for golf courses or air rights, the intent of the clarifications regarding conservation purposes is to make sure a clearly delineated public purpose is served and to allow the public to monitor public charities.

#### *Option 3: Require pre-approval or review of easements in order to qualify for the deduction*

In the wake of similar abuses of state programs, some states appoint boards to pre-approve easements before any benefits are provided to the landowner. These boards assess the conservation purpose and environmental benefits associated with the land and the easement, and ensure that the appraisal and valuation is appropriate. For example, Colorado established its Conservation Easement Oversight Commission to pre-screen easement donations prior to issuing tax credits and Virginia requires verification of the conservation value using criteria adopted by the Virginia Land Conservation Foundation for large easement donations. New Mexico requires that taxpayers apply for a certificate of eligibility from the Energy, Minerals and Natural Resources Department that affirms the conservation purpose and that the resources or areas contained in the donation are significant or important. This affirmative approval process is credited with reducing abuses and raising the environmental benefits of the state programs. A federal authority or delegated authorities to such state boards could similarly reduce abuses, prevent disputes between taxpayers and the IRS, and increase the environmental and preservation returns on federal tax expenditures.

#### ***IV. Change the deduction to an allocable credit for conservation contributions***

A disadvantage of the options above is that they do not address the intrinsic incentives for individual donors to inflate their deductions or to take deductions for high-cost, low-conservation-value properties. Rather, those options simply provide more rules and oversight to limit such practices. In that regard, it involves more compliance and more burden on donors, conservation organizations, and the IRS.

An alternative approach is to replace the deduction with an allocated tax credit and effectively turn over to qualified conservation organizations the responsibility to “spend” those credits to secure easements. These organizations would have the appropriate incentives to husband the credits and to spend them to secure easements on high-value conservation purposes. By getting the incentives right, the need for strict rules and additional oversight is reduced, reducing the burden on donors, organizations and the IRS.

The [Obama Administration’s 2017 budget](#) proposed to pilot a non-refundable credit for conservation easement contributions as an alternative to the conservation contribution deduction (i.e., donors taking the deduction would not be eligible for this credit) (Treasury 2016).

The credits of \$100 million per year would be allocated by a Federal interagency board to qualified charitable organizations and governmental entities that hold and enforce conservation easements. These conservation organizations would in turn allocate the credits to donors of conservation easements. Donors would receive up to a maximum of 50 percent of the fair market value of the contributed easement in credits and could use the credits to offset up to 100 percent of their income tax liability. Any unused credit amounts could be carried forward for up to 15 years. The proposal also calls for a report to Congress from the Secretary of the Treasury in collaboration with the Secretaries of Agriculture and the Interior on the relative merits of the conservation credit and the deduction for conservation contributions, including an assessment of the conservation benefits and costs of both tax benefits.

#### *Summary of the Credit Approach*

The proposal would provide for a credit to be taken in lieu of the current deduction for contributions of conservation easements, incorporating and making permanent the enhanced incentives for contributions of easements. The credits would be allocated to certain qualified charitable organizations and governmental entities who hold and enforce conservation easements. These organizations and entities would in turn allocate the credits to donors who contribute to them conservation easements that the organizations and entities have determined to have conservation benefit. Donors could receive credits of up to a maximum of 50 percent of the fair market value of the contributed easement and could use the credits to offset up to 100% of their income tax liability. Any unused credit amounts could be carried forward for up to 15 years. A revenue-neutral replacement of the deduction with credits would provide for roughly \$600 million in credits per year.

This approach entrusts qualified conservation organizations with the decision-making and monitoring authority to select easements with greatest conservation value, and provides the incentives to pay an appropriate price. Donors would have enhanced incentives to contribute because of the enhanced incentives and because the credit amount would not be limited to the donor's marginal tax rate. Finally, this approach improves administration by giving the primary responsibility for selecting and prioritizing conservation projects to the private non-profit organizations, giving it in the first instance to the interagency group that allocates the credits to qualified easement holders and, indirectly, to the qualified easement holders, who have deep knowledge of the conservation priorities and values in the communities in which they operate. The IRS would retain the ability to monitor the process through possible reporting requirements or, in extreme cases, audits of the allocating organizations.

#### *Proposal Mechanics*

##### *(1) What organizations would be eligible to receive a conservation credit allocation?*

The baseline proposal would retain the current-law definition of “qualified organizations” described in section 170(h)(3) currently eligible for the charitable contribution deduction. These organizations include governmental units and certain domestic charitable organizations.

Additional minimum standards for qualification could also be required, following the examples of states like Colorado, Delaware, Maryland and Pennsylvania or the accreditation program requirements developed by the Land Trust Alliance.<sup>16</sup> Qualification could require minimum standards regarding conservation organizations; the processes by which organizations select, review, and approve conservation easements; the management of organizations' conservation easements; and organizations' finances and governance. Additionally, in recent years there has been a move toward self-regulation by the land trust community which could also form the basis for additional qualifications for qualified easement holders.<sup>17</sup>

*(2) How would a donor of a conservation easement receive the benefit of the tax credit?*

In order to claim the credit, a taxpayer would contribute a conservation easement to a qualified easement organization that has received a conservation credit allocation. If the qualified easement holder is willing to assign a portion of its credit allocation to the taxpayer/donor, it would report to both the taxpayer and the IRS the allocation of the conservation credit to the taxpayer, including information on the donor, the property, the value of the easement, and the amount of the qualified easement holder's conservation credit allocation being assigned to the donor. The donor would be required to attach a copy of the certificate to his tax return.

*(3) What Federal agency or agencies would have oversight responsibilities, including determining which organizations receive an allocation?*

Oversight for qualifying organizations and for allocating credits would be a joint responsibility of the relevant federal land management agencies, such as Department of Interior (DOI) and U.S. Department of Agriculture (USDA). In recent years, the nine bureaus and agencies that are involved in conservation efforts—particularly the lead agencies, DOI and USDA—have begun to work together to coordinate their conservation activities to increase the impact of their work. These organizations could be jointly responsible for reviewing applications of qualified easement holders and allocating the credits to the organizations based on more informed and conservation-oriented criteria, such as the capacity of the organization to hold and administer a conservation easement program and the strength and experience of their conservation strategy. These organizations would not review the easements themselves but only monitor and allocate credits among qualified organizations. The IRS would administer the conservation credit only at the donor level and only to verify credits were claimed legitimately.

*(4) How would qualified easement holders apply for a credit allocation?*

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<sup>16</sup> According to the Delaware Ag Conservation director, most states with farmland conservation programs are in the mid-Atlantic and include CT, DE, MD, NJ, PA and VT. In DE, the state appraises the easement value of 100-125 farms per year. The farmer has the option of signing a contract for at least 10-year deferral of development to become eligible (Phase 1). Starting the next year, the farmer can apply for the program for the foundation (mostly state and USDA money) to buy the development easement rights. In a Dutch auction, the farmers bid an acceptable discount from FMV. The foundation buys the rights of the farms with the biggest % discounts up to the annual budgeted amount (typically winners bid a 60-65% discount). Not sure how the other states work. He said some counties have programs: Lancaster Co PA and Montgomery and Baltimore Counties in MD. If farmers sell at a discount, they could claim a charitable deduction for the discounted amount, but need a new appraisal due to IRS rules about appraisals within 60-90 days of settlement as this program takes a year to complete.

<sup>17</sup> For example, the Land Trust Alliance has created and administers an accreditation program for land trust organizations. See <http://www.landtrustaccreditation.org/>.



Qualified easement holders would apply annually for a conservation credit allocation amount, much in the same way that qualified “Community Development Entities” apply for an allocation of the New Markets Tax Credit. In their applications, the qualified easement organizations would provide information regarding their conservation easement programs and their ability to monitor and enforce conservation easements. Credits would be allocated on the strength of their conservation strategies, demonstrated records of success, and their capacity to receive and monitor easements. A qualified easement holder that receives an allocation would need to assign its allocation to taxpayers within a specified time period (e.g. 3 years) or return the unassigned amounts to be reallocated.

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