

CONSERVING THE FUTURE: POLICING SYNDICATED  
CONSERVATION EASEMENTS

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INTRODUCTION

“What . . . a sale of dead souls?”

“Oh no,” said Tchitchikov, “we shall write them as living, just as it actually stands in the census list. It is my habit never to depart one jot from the law . . . .”

“. . . will not this negotiation be inconsistent with civic code and the ultimate welfare of Russia?”<sup>1</sup>

Discussions of abusive tax scams conjure visions of offshore bank accounts, fake charities, and phishing schemes.<sup>2</sup> Yet, it may be surprising to learn that the noble goals of charitable conservation have been subverted to cost the U.S. Government an estimated \$3.2 billion dollars in tax revenue yearly.<sup>3</sup> Conservation easements are statutory creations which construct an enforceable, assignable negative easement in gross to be donated to a charitable organization or government entity in perpetuity.<sup>4</sup> Historically, conservation easements have been important

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1. NIKOLAI GOGOL, *DEAD SOULS* 35 (Constance Garnett trans., Barnes & Noble Classics ed., 2005). Like selling dead serfs for the tax benefits, syndicated conservation easements present a murky area of law that, despite its potentially abusive purpose of tax theft, may still produce a net benefit for the conservation.

2. I.R.S. News Release IR-2018-66 (Mar. 21, 2018).

3. *Senate Inquiry into Syndicated Conservation Easements*, 30 *TAX’N EXEMPTS*, May-June 2019, at 41.

4. Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 *NEB. L. REV.* 1043, 1085–88 (2005).

tools to protect natural, historic, or scenic areas while giving owners a generous tax deduction.<sup>5</sup> In recent years, nonprofits and governments have used easements for land conservation purposes, with the National Conservation Easement Database estimating that 191,476 conservation easements encumber 32,701,848 acres of land.<sup>6</sup>

However, conservation partnership, or “syndicated conservation easements,” subvert the goals of conservation by “rely[ing] on a network of complicit appraisers and even charitable organizations,” to overvalue easements and distribute inflated tax deductions to members of the partnership, LLC, or S-Corporation.<sup>7</sup> Proponents of syndicated conservation easements argue that they still support the ideology of land conservation, and should not be subject to additional scrutiny merely because they purchase via a partnership.<sup>8</sup> Yet such a scheme “inspires contempt for the system of honest, voluntary income tax reporting and undermines the *public’s confidence in a deduction designed to encourage preservation and conservation efforts* that is instead being abused” for financial benefit.<sup>9</sup> Internal Revenue Service (IRS) enforcement and recent litigation by the Department of Justice (DOJ) have targeted these partnerships to curb tax theft.<sup>10</sup> Yet, even proponents of syndicated conservation easements argue that the underlying issue is overvaluation of easements, not who purchases them.<sup>11</sup> The income tax benefits that abusive partnerships provide would not exist but for the conduct of complicit property appraisers.<sup>12</sup>

This Note addresses the novel legal concept of syndicated conservation easements, their harm to the goal of conservation, and both current and novel ways to prosecute syndicated conservation easements without completely removing the mechanism from the environmentalist’s

5. See 26 U.S.C. §§ 170(b)(1)(E)(i)–(ii), (h)(4) (2019).

6. NATIONAL CONSERVATION EASEMENT DATABASE, <http://conservationeasement.us> [<https://perma.cc/7ZWU-QGB2>] (last visited Mar. 7, 2021); Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC’Y 107, 109 (2015); see also Mary Jane Angelo, *Integrating Water Management and Land Use Planning: Uncovering the Missing Link in the Protection of Florida’s Water Resources*, 12 U. FLA. J.L. & PUB. POL’Y 223, 231 (2001) (discussing how conservation easements significantly contribute to water resource stewardship by Water Management Districts).

7. *Senate Inquiry into Syndicated Conservation Easements*, *supra* note 3; Bryan Hickman, *Environmental Tax Deduction at Risk Due to Overzealous IRS*, NAT’L TAXPAYERS UNION, July 29, 2019, at 1, 2.

8. See *generally* Hickman, *supra* note 7.

9. See Complaint at ¶ 169, *United States v. EcoVest Capital Inc.*, No. 1:18-cv-05774-AT (N.D. Ga. Dec. 18, 2018) (emphasis added).

10. I.R.S. Notice 2017-10, 2017-4 I.R.B. 544; Charitable Conservation Easement Program Integrity Act of 2019, S. 170, 116th Cong. (2019) [hereinafter CCEPI Act].

11. Hickman, *supra* note 7, at 2–3.

12. See Complaint, *supra* note 9, at ¶¶ 19, 90–94.

toolkit. Instead of scrutinizing conservation efforts, regulation and litigation should focus on the underlying issue of valuation. While pending legislation will attempt to impose caps on returns for partnerships,<sup>13</sup> the conduct of appraisers is still left unchecked. Ultimately, revising the current method of regulating appraisers to mirror a model of cooperative federalism and refocusing litigation to focus exclusively on the issue of valuation would curb the abuse of conservation easements.

Part I will consist of a historical and legal review of conservation easements, their income tax benefits, and the rise of syndicated conservation easements.<sup>14</sup> Part II will examine the current regulation and enforcement of syndicated conservation easements by analyzing IRS regulation, Tax Court decisions, and pending litigation.<sup>15</sup> Finally, Part III will argue that instead of looking directly at the partnerships, the IRS and state licensing boards should focus on the conduct of appraisers to curb the abuse of the noble goals of conservation.<sup>16</sup> In doing so, this Note will argue that addressing the issue of valuation will curb tax theft while still allowing for individuals and partnerships alike to invest in conservation.

## I. THE RISE OF SYNDICATED CONSERVATION EASEMENTS

A conservation easement is a partial interest in land that is either voluntarily donated or sold by a landowner to an IRS-recognized nonprofit or government agency for the purpose of protecting natural habitat; open space; or recreational, agricultural, or historic resources.<sup>17</sup> The term conservation easement, as used to describe private restrictions, was first coined in 1959 by land-use planner William Whyte to explain the preservation of open space and environmentally valuable land.<sup>18</sup> Yet, widespread easement purchases had already begun in the 1930s with the purchase of open-space easements along the Blue Ridge Parkway by the National Parks Service.<sup>19</sup>

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13. CCEPI Act, *supra* note 10.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. John B. Wright, *Conservation Easements: An Analysis of Donated Development Rights*, 59 J. AM. PLAN. ASS'N 487, 487 (1993).

18. William H. Whyte, Jr., *Securing Open Space for Urban America: Conservation Easements*, 36 URB. LAND. INST. 1, 8 (1959).

19. *See* John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV'T LAW. 319, 333 (1997) ("The primary impetus for the widespread use of modern conservation easements, however, was the protection of scenic views along highways. During the 1930s and 1940s, the National Park Service (NPS) purchased conservation easements . . . to protect scenic views along the Blue Ridge Parkway."); *see also* Wright, *supra* note 17, at 488.

However, the modern conservation easement is a product of legislation designed to remedy the ineffective use of the common law devices of easements, real covenants, and equitable servitudes.<sup>20</sup> While real covenants presented a solution for land conservation in contract law, problems existed as to the enforceability and the burden running with the land when the burdened party is off site.<sup>21</sup> Moreover, easements in gross were unassignable, meaning they extinguished upon the death of the owner and presented problems for perpetual conservation.<sup>22</sup> On the other hand, equitable servitudes did not require privity of estate and seemed like a likely mechanism to enforce conservation, but authorities differed whether they could run with the land.<sup>23</sup> In fact, it was this uncertainty in common law solutions for conservation that led to the widespread adoption of the Uniform Conservation Easement Act (UCEA) in 1981.<sup>24</sup>

The UCEA made land conservation more accessible by eliminating these common law impediments and creating a broad and flexible framework for land conservation.<sup>25</sup> Twenty-two states and the District of Columbia have adopted the UCEA.<sup>26</sup> Additionally, every state except North Dakota<sup>27</sup> has enacted conservation easement enabling statutes that are similar the UCEA's provisions.<sup>28</sup> These statutes promote long-term conservation by removing common-law barriers, mandating the easement's conservation purpose, and requiring that easements be held by governmental entities or charitable organizations in perpetuity.<sup>29</sup>

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20. Hollingshead, *supra* note 19, at 325–26, 332–33.

21. *Id.* at 330–31.

22. *Id.* at 327–28.

23. *Id.* at 332.

24. *Id.* at 332–33.

25. The UCEA defines “conservation easement” in broad terms as:

a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996).

26. *Uniform Conservation Easement Act*, USLEGAL, <https://environmentallaw.uslegal.com/uniform-laws/uniform-conservation-easement-act/> [<https://perma.cc/NH5U-R3GR>] (last visited Oct. 16, 2019).

27. *See* *Wachter v. Comm’r.*, 142 T.C. 140 (2014) (holding North Dakota statute banned the holding of conservation easements in perpetuity, thus failing to meet the requirements of a qualified conservation contribution); *but see* N.D. CENT. CODE § 47-05-02.1(2) (North Dakota law allowing for waterfowl production easements to exist in perpetuity at the negotiation of the dominant and servient tenement).

28. Nancy A. McLaughlin & Robert W. Swenson, *Uniform Conservation Easement Act Study Committee Background Report*, in UTAH L. FAC. SCHOLARSHIP 6 (2018).

29. *Id.* at 6–7; *see, e.g.*, Fla. Stat. § 704.06 (2020).

Today, conservation easements have emerged as a viable and favored tool of conservationists.<sup>30</sup>

Additionally, conservation easements have developed into a source of lucrative tax deductions for landowners.<sup>31</sup> Typically, a donor cannot receive any tax deduction for donating a mere partial interest in land, such as an easement.<sup>32</sup> In response, Congress passed the Tax Reform Act of 1976, which provided a statutory allowance for the deductibility of charitable conservation easements.<sup>33</sup> The act amended 26 U.S.C. § 170(f)(3) to include “a qualified conservation contribution” as an exception to the partial interest rule, thus providing a generous tax benefit for the donation of conservation easements without a donor losing the entire interest in the land.<sup>34</sup> Under section 170, an individual may deduct up to 50% of the individual’s contribution base for the value of the easement on the land, with 100% annual deduction for farmers and ranchers.<sup>35</sup> If the value exceeds the individual’s contribution base, they can carry over the deduction for more than fifteen years.<sup>36</sup> After uncertainty about the future of this benefit, the conservation easement tax incentive was made permanent as part of the Congressional budget deal on December 18, 2015.<sup>37</sup> For many, this tax benefit is what inspires their donation, with the conservation of the land as an ancillary concern.<sup>38</sup>

Unexpectedly, this generous tax benefit has attracted more than just conservation—it has attracted the ire of the IRS.<sup>39</sup> Although conservation easements have always been abused for their tax benefits to some extent, such abuses were limited to worthless façade easements on historical property and fanciful preservation of golf courses with no conservation

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30. Owley, *supra* note 4, at 1044.

31. David J. Dietrich, *Conservation Easements*, 12 PROB. & PROP. 43, 43 (1998) (“Clients usually grant conservation easements for two reasons: genuine charitable motive to protect environmentally unique land and desire to obtain a charitable income tax deduction.”).

32. *Id.*; see 26 U.S.C. § 170(f)(3) (“Denial of deduction in case of certain contributions of partial interests in property.”).

33. See generally Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976).

34. 26 U.S.C. § 170(f)(3)(B)(iii) (2019); see also *id.* at § 170(h)(1) (defining a qualified conservation contribution as a contribution of a qualified real property interest to a qualified organization to be used exclusively for conservation purposes).

35. *Id.* at § 170(b)(1)(E); I.R.S. Conservation Easement Audit Techniques Guide 35–36 (revised Jan. 24, 2018) [hereinafter Audit Techniques Guide].

36. Audit Techniques Guide, *supra* note 35, at 36–37.

37. Derrick P. Fellows, *Enhanced Conservation Easement Tax Incentive Reinstated, Made Permanent*, PRESERVING FOR TOMORROW (Dec. 24, 2015), <https://www.preservingfortomorrow.com/2015/12/enhanced-conservation-easement-tax-incentive-reinstated-made-permanent/#.Xat2TuhKg2x> [https://perma.cc/6NPA-3GK5].

38. See Dietrich, *supra* note 31, at 48.

39. I.R.S. Notice 2017-10, *supra* note 10, at 544–45.

value.<sup>40</sup> However, the common thread is that it was individual entities committing the abuse, not, as in current cases, partnerships that advertise to investors the ability to receive eight times the investment in tax breaks and defend their theft with conservation purposes.<sup>41</sup> The current scheme is as follows:

[T]en investors kick in \$100,000 each for an LLC to purchase for \$1 million an entire square mile of cattle grazing land . . . . The Promoter then waives his magic wand, creates a 50-page business plan for the land to become a fly-in golf club, and the property magically becomes worth \$20 million -- this is determined by a friendly property appraiser . . . . An easement to maintain the land as grazing land is then donated to a charity at the \$20 million price, giving each of the ten investors a \$2 million deduction for a \$100,000 investment.<sup>42</sup>

In this example, the actual characteristics of the land did not change, nor will it change in the future. Yet, somewhere along the way, it became an abusive tax shelter with the potential to deduct \$2 million deductions to each investor. Such syndicated conservation easements may seem beneficial on paper, but there is no real substance or motivation to their preservation purpose.<sup>43</sup>

In fact, syndicated conservation easements have contributed to the tax theft of a total of \$20 billion.<sup>44</sup> Additionally, the top 248 entities claiming these deductions have absconded with \$6 billion in the year 2016 alone.<sup>45</sup>

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40. See e.g., *Champions Retreat Golf Founders, LLC v. Comm’r*, 116 T.C.M. (CCH) 262 (T.C. 2018) (holding that a golf course had no conservation value for habitat of wildlife, protection of the nearby national forest, or protection of open space and therefore could not be deducted); see also *Whitehouse Hotel Ltd. P’ship v. Comm’r*, 755 F.3d 236 (5th Cir. 2014) (rejecting a deduction based on a historic façade easement when the best use of the property was grossly overvalued).

41. *S. 170 / H.R. 1992*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/s-170-hr-1992> [<https://perma.cc/R298-4HXP>] (“[T]he top 10 percent of these transactions enabled investors to claim, on average, deductions valued at more than eight times the amount of their original investment.”).

42. Jay Adkinsson, *The IRS Leaves a Lump of Coal for Syndicated Conservation Easements in Notice 2017-10*, FORBES (Dec. 27, 2016, 10:56 PM), <https://www.forbes.com/sites/jayadkinsson/2016/12/27/the-irs-leaves-a-lump-of-coal-for-syndicated-conservation-easements-in-notice-2017-10/#53b23e96eb35> [<https://perma.cc/ZL8Z-N98M>].

43. *Id.*

44. Letter from David J. Kautter, Acting Comm’r, I.R.S., to Sen. Ron Wyden (Mar. 20, 2018), <http://s3.amazonaws.com/landtrustalliance.org/IRS-Wyden-letter-3-20-18.pdf> [<https://perma.cc/NZG5-9XXN>].

45. Letter from David J. Kautter, Acting Comm’r, I.R.S., to Sen. Orrin Hatch 1 (July 12, 2018), <http://s3.amazonaws.com/landtrustalliance.org/IRS-Hatch-letter-7-13-18.pdf> [<https://perma.cc/5TW2-NMSQ>].

The use of these partnerships have exploded in recent years, causing outcries for regulation of this abusive tax scheme.<sup>46</sup>

Thus, the IRS issued Notice 2017-10 (Notice) to define and officially recognize abusive syndicated conservation easements as “tax avoidance” and therefore subject to required disclosure and maintenance obligations as a presumed tax shelter, lest they face reporting- and accuracy-related penalties.<sup>47</sup> With the issuance of the Notice, the IRS intended to challenge the purported tax benefits from syndicated conservation easements based on overvaluation of the easement.<sup>48</sup> Further, the Notice identified eight elements triggering disclosure: (i) promotional information is provided to potential investors; (ii) the investment promoted is membership in a pass-through entity; (iii) the pass-through entity owns real property; (iv) the investors are informed they will receive at least 2.5 times the value of their initial investment; (v) this representation causes the investment in the entity; (vi) the pass-through entity contributes a conservation easement on the land it owns; (vii) the easement generates a charitable deduction allocated among members in the partnership; and (viii) these deductions are claimed against the investors taxable income.<sup>49</sup> Identified pass-through entities are made to fill out Form 8918 (Material Advisor Disclosure Statements) to disclose any easement transaction purporting 2.5 times the amount invested.<sup>50</sup> With the issuance of the Notice, the IRS recognized that syndicated conservation easements are suspect enough to require disclosure and accordingly enforcement.<sup>51</sup>

Opponents of the Notice argued that it was overly broad and burdensome, it applied retroactively to 2010, and it did not address the problem of overvaluation.<sup>52</sup> Additionally, pro-syndication group The Partnership for Conservation argued that the requirements imposed by Form 8886 did not provide the IRS with any additional substantive information that was not already disclosed in the already required Form 8283 (Appraisal Summary).<sup>53</sup> Moreover, they argued that targeting conservation easements contravened congressional intent in offering the

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46. See Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2016, 6:30 AM), <https://www.propublica.org/article/conservation-easements-the-billion-dollar-loophole> [https://perma.cc/LN2Q-RVD2].

47. I.R.S. Notice 2017-10, *supra* note 10, at 544–45.

48. *Id.*

49. Timothy Lindstrom, *A Tax Guide to Conservation Easement Syndication*, 47 REAL EST. REV. 2, 6–7 (2018).

50. *Id.* at 8–13.

51. Lindstrom, *supra* note 49, at 11.

52. *Our Position on IRS Notice 2017-10*, P'SHIP FOR CONSERVATION (last visited Oct. 19, 2019), <https://partnershipforconservation.org/position-irs-notice-2017-10/> [https://perma.cc/5NHY-G32W].

53. *Id.*

tax breaks to foster land preservation.<sup>54</sup> In essence, proponents of syndication objected that adding further scrutiny on a legitimate form of land conservation effectively closed the door to participation in protecting unique lands.<sup>55</sup> Syndicated conservation easements may even generate meaningful land conservation that would not have otherwise occurred, regardless of the intent of the investors to receive the inflated benefit.<sup>56</sup>

However, the main opposition argument was that syndicated conservation easements were essentially tax scams that undermined confidence in the entire charitable structure of voluntary land conservation.<sup>57</sup> Further, conservation easement syndication subverted the public trust in the goals of conservation by financially benefitting individuals at the expense of the U.S. Treasury.<sup>58</sup> Organizations supported the Notice as a way to prevent abusive charitable incentive for profit while still allowing for honest philanthropy and land conservation.<sup>59</sup> Traditional proponents of conservation, led by the national conservation organization Land Trust Alliance, argued that public outrage over bad actors may jeopardize the tax deduction altogether and give conservationists a bad name.<sup>60</sup>

Yet, at the heart of the controversy lies the issue of valuation.<sup>61</sup> Partnerships are already required to file an annual return, Form 1065 (U.S. Return of Partnership Income), to report the partnership's income, deductions, gain, losses, and to report each member's distributive share to the IRS.<sup>62</sup> As part of the Form 1065, partnerships are required to file a Form 8283 (Appraisal Summary), which additionally must be signed by the appraiser and the charitable or government organization to which the

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54. *Id.*

55. *We Must Encourage Conservation Efforts, Not Close Doors to Participation*, P'SHIP FOR CONSERVATION, <https://partnershipforconservation.org/must-encourage-conservation-efforts-not-close-doors-participation/> [<https://perma.cc/TZC7-Q5R7>] (last visited Oct. 19, 2019).

56. See Lindstrom, *supra* note 49, at 5–6 (examining two hypothetical examples of syndicated conservation—one of them evidently done for conservation, with another that is clearly abusive).

57. *Id.* at 3.

58. Complaint, *supra* note 9 (“Defendants’ abusive conservation easement syndication scheme inspires contempt for the system of honest, voluntary income tax reporting and undermines the public’s confidence in a deduction designed to encourage preservation and conservation efforts that is instead being abused to financially benefit [individuals] at the expense of the U.S. Treasury.”).

59. Letter from Land Tr. All. et al., to Sens. Steve Daines & Debbie Stabenow (January 18, 2019), <http://s3.amazonaws.com/landtrustalliance.org/LetterSupport-S170.pdf> [<https://perma.cc/6Y5K-XKZM>].

60. Elkind, *supra* note 46.

61. Lindstrom, *supra* note 49, at 3.

62. Complaint, *supra* note 9, at ¶ 60.

conservation easement was donated.<sup>63</sup> However, the appraiser is also required to prepare a supplemental statement to accompany the Form 8283 including calculations of the cost of the easement.<sup>64</sup> Since syndicated conservation easements cannot function without high-value easement donations, the function of the appraiser is critical to the continuance of this tax appraisal scheme.<sup>65</sup> Even some conservation groups have sided with syndicated conservation easement holders in lobbying for policing the appraisal process rather than the partnerships on their own.<sup>66</sup>

Typically, a donor will receive the fair market value (FMV) for their contribution determined by a qualified appraiser as defined by statute.<sup>67</sup> However, calculating the FMV presents a difficulty because the value the donor is entitled to is not the value of the land itself, but the value of the easement on the land. Therefore, the FMV of a conservation easement depends on the particular facts and circumstances of the property.<sup>68</sup> The best evidence for determining the value of a conservation easement is the difference in value of the property before and after it is encumbered by the conservation easement. This difference can be calculated by determining the values of the uses of the property, the zoning of the property, and other restrictions, which existed before the easement, and which may exist after the easement.<sup>69</sup> A qualified appraiser determines the FMV of the easement by subtracting the before and after value.<sup>70</sup>

Yet, while the valuation of the easement is determined by a before and after method, the appraisal is based on the valuation philosophy of highest and best use (HBU).<sup>71</sup> The HBU is the reasonable and probable use that will support the highest value for the property at the time of the appraisal.<sup>72</sup> Generally, this includes the most profitable, likely, and legal use for a property.<sup>73</sup> The HBU must further satisfy four valuation criteria:

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63. *Id.* at ¶ 61(k); Treas. Reg. § 1.170A-13I(4)(iv)(G) (2020).

64. Complaint, *supra* note 9, at ¶ 61(k).

65. See I.R.S. News Release IR-2019-47 (Mar. 19, 2019).

66. Elkind, *supra* note 46.

67. *Audit Techniques Guide*, *supra* note 35, at 42; see Treas. Reg. § 1.170A-11(2) (2020) (“The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.”); see IRC § 170(f)(11)(E)(ii) (defining a qualified appraiser as one who has earned appraisal designation, regularly performs appraisals, and meets any other requirements as specified by the Secretary).

68. *Audit Techniques Guide*, *supra* note 35, at 42–43; Treas. Reg. § 1.170A-14(h)(3)(i).

69. *Audit Techniques Guide*, *supra* note 35, at 43–44; Treas. Reg. § 1.170A-14(h)(3)(ii).

70. *Audit Techniques Guide*, *supra* note 35, at 43.

71. *Id.* at 46.

72. LAND TR. ALL. & NAT’L TR. FOR HIST. PRES., APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 16 (1999) [hereinafter APPRAISING EASEMENTS].

73. *Id.*

physical possibility, legal permissibility, financial feasibility, and maximum productivity.<sup>74</sup> To determine the HBU value, three professionally accepted methods of valuation are employed by appraisers—the comparable sales approach, the cost approach,<sup>75</sup> and the income approach.<sup>76</sup> All three should be employed to determine the FMV of the easement.<sup>77</sup> The comparable sales approach involves the direct comparison with recently sold properties in the general area to determine a market value.<sup>78</sup> While this approach is generally considered the most reliable, syndicated conservation easement partnerships sometimes ignore the data for comparable sales.<sup>79</sup> Instead, appraisers favor the income approach, which provides an indication of value by focusing on the income that the property could generate had it not been encumbered by the easement.<sup>80</sup> However, appraisers tend to misapply the viability of this approach, ignore relevant recent sales, and typically use false assumptions about the actual use of the property.<sup>81</sup> Ultimately, appraisers hold the power to generate tax deductions, and thus are the driving force behind the entire scheme of syndicated conservation easements.

## II. THE CURRENT STATE OF SYNDICATED CONSERVATION EASEMENTS

Although the purpose of the Notice was to create a mechanism to completely halt and prosecute abusive tax schemes, the effect of the Notice has been delayed and widely criticized as ineffective.<sup>82</sup> Originally, persons engaged in syndicated conservation were required to submit documents disclosing their participation to the IRS Office of Tax Shelter Analysis by May 1, 2017.<sup>83</sup> Material advisors, like appraisers, were required to file mandatory disclosures of documents on or before May 1, 2017.<sup>84</sup> However, in response to “requests for additional time,” the IRS extended the due date under Notice 2017-23 for participants to October 2, 2017, but neglected to include appraisers.<sup>85</sup> In response to the effects of hurricane damage, the IRS extended the due date yet again with Notice

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74. *Audit Techniques Guide*, *supra* note 35, at 46.

75. Cost approach is typically used for property with new buildings or important historic conservation easements on them and is generally inappropriate for vacant land like that to be protected via a conservation easement. APPRAISING EASEMENTS, *supra* note 72, at 26.

76. *Id.* at 24.

77. *Id.*

78. *Id.*

79. *Id.*; e.g., Complaint, *supra* note 9, at ¶ 76.

80. APPRAISING EASEMENTS, *supra* note 72, at 28; *see, e.g.*, Complaint, *supra* note 9, at ¶ 150.

81. *See, e.g.*, Complaint, *supra* note 9, at ¶¶ 76, 150.

82. Adkisson, *supra* note 42.

83. I.R.S. Notice 2017-10, *supra* note 10, at 4–5.

84. *Id.*

85. I.R.S. Notice 2017-29, 2017-20 I.R.B. 1243.

2017-58 to October 31, 2017, for any person “whose principal residence or principal place of business was located in a Hurricane Harvey, Hurricane Irma, or Hurricane Maria covered disaster area . . . or whose records necessary to meet the disclosure obligation were maintained in such a covered disaster area.”<sup>86</sup> The IRS routinely allows for extensions by request, and grants additional limited extensions to taxpayers in federally declared disaster areas.<sup>87</sup> However, when looking at the purpose of the Notice as a way to concretely prevent tax avoidance, delays and uncertainty seemed to undermine a supposed simple way to save the reputation of conservation easements.<sup>88</sup> Additionally, the Notice was met with intense resistance from promoters and syndicators which delayed any actual prosecution.<sup>89</sup>

For all its promise, the Notice has been widely cited as a failure by environmentalists for its inadequacy.<sup>90</sup> Even though their official position is that the Notice has prevented the promotion and marketing of syndicated conservation easements, the IRS has only processed 552 Forms 8886 for syndicated conservation easements identified as listed transactions as of May 21, 2018.<sup>91</sup> Additionally, the volume of improper deductions reported by the IRS after the issuance of the Notice shows the need for a more varied approach to the issue.<sup>92</sup> For one, the IRS usually only publishes notices listing transactions after receiving input from both the Senate Finance Committee and the Joint Committee on Taxation.<sup>93</sup> This consultation with financial agents is reflected in the language of the Notice, which states that the main purpose is to prevent tax avoidance, not to preserve a conservation mechanism.<sup>94</sup> Thus, despite the Notice’s good intentions, this form of relief tries to remedy an abuse of environmental issues in the same way an abuse of a tax shelter is handled, attacking the promoters and participants rather than the mechanism which let the scheme continue.

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86. I.R.S. Notice 2017-58, 2017-42 I.R.B. 326 (“Taxpayers who believe they are entitled [to an extension] should mark ‘Hurricane Harvey’, ‘Hurricane Irma’, or ‘Hurricane Maria’ on the top of their Form 8886 . . .”).

87. See Anne Carrns, *It’s Tax Time Again for the Millions Who Got an Extension*, N.Y. TIMES (Oct. 11, 2019, updated July 10, 2020), <https://www.nytimes.com/2019/10/11/your-money/tax-filing-extension.html> [<https://perma.cc/7EL2-A649>].

88. I.R.S. Notice 2017-10, *supra* note 10, at 544–45.

89. See *Greenberger v. Internal Revenue Serv.*, 283 F. Supp. 3d 1354 (N.D. Ga. 2017) (Freedom of Information Act litigation involving an ongoing investigation of syndicated conservation easements).

90. See Land Tr. All. et al., *supra* note 59.

91. *The 2018 Tax Filing Season and Future IRS Challenges: Hearing Before the S. Comm. on Fin.*, 115th Cong. 30 (2018) (statement of David J. Kautter, Acting Comm’r, Internal Revenue Serv.).

92. Land Tr. All. et al., *supra* note 59.

93. Adkinsson, *supra* note 42.

94. I.R.S. Notice 2017-10, *supra* note 10.

Recently, there has been a renewed threat of litigation against promoters and syndicators from the DOJ.<sup>95</sup> At the moment, the IRS and DOJ have begun renewed prosecution of syndicated conservation easement in the State of Georgia. While Georgia has only 2.5% of the nation's total land under easement and 1.3% of the nation's land trusts, about 36% of all federal tax deductions from charitable conversation easements were from Georgia.<sup>96</sup> With eight of the ten biggest syndicators located in Georgia, syndication has become an industry with earth-friendly sounding partnerships like EcoVest touting the get-rich-quick appeal of an infomercial.<sup>97</sup> Thus, it comes as no surprise that two important cases on syndicated conservation easements are currently working their way through the court system.<sup>98</sup>

#### A. *Belair Woods, LLC v. Comm'r of Internal Revenue*<sup>99</sup>

While *Belair Woods* does not function as a crack-down on syndicated conservation easements per se, it does represent the renewed scrutiny the IRS is placing on charitable deductions claimed by partnerships.<sup>100</sup> In fact, in an amicus brief, the Land Trust Alliance applauded “the Commissioner’s attempt to end abusive tax shelters that use inflated conservation easement appraisals to claim excessive charitable deductions” while approving of the continued policy initiated with original listing Notice.<sup>101</sup>

*Belair Woods, LLC* (Belair), is a Georgia based corporation formed in late 2008.<sup>102</sup> *Belair Woods*’s tax matter partner, Effingham Managers, LLC, was affiliated with HRH Investments, LLC.<sup>103</sup> HRH owned a 1,490-acre tract of woodland abutting several properties they had previously developed.<sup>104</sup> HRH meant to develop this land, too, but instead abandoned it during the Great Recession.<sup>105</sup> Through two individual transfers, Belair became the owner of 145.15 acres on this tract of land

95. See generally *Belair Woods, LLC v. Comm'r*, 116 T.C.M. (CCH) 325 (2018); see also Complaint, *supra* note 9; *Greenberger v. Internal Revenue Serv.*, 283 F. Supp. 3d 1354 (N.D. Ga. 2017).

96. ADAM LOONEY, TAX POL’Y CTR., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 11 (2017), [https://www.brookings.edu/wp-content/uploads/2017/05/looney\\_conservationeasements.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf) [<https://perma.cc/KXG9-3DZJ>].

97. Elkind, *supra* note 46.

98. See generally *Belair Woods*, 116 T.C.M. (CCH) 325; Complaint, *supra* note 9.

99. 116 T.C.M. (CCH) 325 (2018).

100. See generally *id.*

101. Brief for Land Trust Alliance, Inc. et al. as Amici Curiae Supporting Respondents, *Belair Woods*, 116 T.C.M. (CCH) 325 (2018) (No. 19493-17), 2018 WL 6990894, at \*3.

102. *Belair Woods*, 116 T.C.M. (CCH) 325, at 3.

103. *Id.*

104. *Id.*

105. *Id.* at 3–4.

shortly after Belair's founding.<sup>106</sup> A year later, Belair deeded the land as a conservation easement to Georgia Land Trust, hiring a consulting firm by the name of Forever Forests, LLC (Forever Forests) that specialized in maximizing the tax benefits, and thus land appraisals, to owners.<sup>107</sup>

The easement conveyed was for the preservation of significant natural, scenic, and aesthetic values, covering 141.15 acres of the tract.<sup>108</sup> However, Belair reserved certain rights in the easement, including forest management, agricultural activities, recreational activities, and constructing driveways to connect two designated homesites they had reserved.<sup>109</sup> In contracting with Forever Forests, Belair claimed that the HBU of the site was a "high-density residential development."<sup>110</sup> Thus, the easement reduced the land from a supposed \$5.08 million to \$302,000.<sup>111</sup> Belair was then advised to omit a portion of Form 8283 relating to the "cost or adjusted basis."<sup>112</sup> Even while Belair circumvented the appraisal summary, the IRS determined a 40% gross valuation misstatement, meaning that Belair was liable for 20% valuation penalties under 26 U.S.C. § 6662.<sup>113</sup>

In this case, Belair had raised the price of land from \$2,605 per acre to \$35,990 per acre for a total valuation of \$5,080,000.<sup>114</sup> Such a gross misstatement of value assumes that the land had increased in value by 1,380% during the worst real estate crisis and economic instability since the Great Depression.<sup>115</sup> The memorandum stated that Belair's refusal to comply with Form 8283 circumvents the IRS's efficiency in identifying overvalued property.<sup>116</sup> Further, the Tax Court recognized that the subjective nature of valuation causes syndications to "play the audit lottery," hoping that their appraisals will fall through the cracks as tax agents attempt to interpret "hundreds" of pages of documents to determine valuation method.<sup>117</sup> The Tax Court found that requiring appraisal summaries will prevent abusive schemes and that valuation is an "essential tool" used by the IRS to identify these schemes.<sup>118</sup>

When a taxpayer claims a charitable contribution deduction for recently purchased property, a wide gap between cost basis and claimed

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106. *Id.* at 4.

107. *Id.*

108. *Belair Woods*, 116 T.C.M. (CCH) 325, at 4–5.

109. *Id.* at 5.

110. *Id.* at 6.

111. *Id.*

112. *Id.* at 7.

113. 26 U.S.C. § 6662 (a), (h).

114. *Belair Woods*, 116 T.C.M. (CCH) 325, at 18.

115. *Id.*

116. *Id.* at 19–20.

117. *Id.* at 16–17, 20.

118. *Id.* at 17–19.

value raises a red flag, suggesting that the return merits examination.<sup>119</sup> Unless the taxpayer discloses their cost basis and the date and manner of acquiring the property, thereby complying with the regulatory requirements, the IRS will be deprived of an essential tool that Congress intended it to have.<sup>120</sup>

While the findings in *Belair Woods* may seem a promising tool for attacking syndicated conservation easements, the holding is substantially limited by its procedural posture. As a Tax Court Memorandum, the holding is persuasive, but not necessarily binding on the Tax Court.<sup>121</sup> Additionally, there was doubt as to whether *Belair Woods* relied on the opinions of Forever Forest as a competent and independent tax advisor, so no actual penalty was levied or evaluated against them as a means of deterrence.<sup>122</sup> Yet, the persuasive holding of *Belair Woods* cannot be understated, as it emphasizes just how important valuation is, and therefore how much power appraisers have, in the continuance of abusive syndicated conservation easements. In recognizing Belair's omitted appraisal summary, the Tax Court recognized that inflated valuations of donated property have been increasingly exploited by tax shelter promoters.<sup>123</sup> Thus, the discussion of policy opines for strict reporting requirements as a method to curb overvaluations.

#### B. United States v. EcoVest Capital Inc.<sup>124</sup>

Two months after the Tax Court announced its ruling in *Belair Woods*, the DOJ filed an official complaint against Nancy Zak (the organizer of the syndication), Claud Clark III (a runaway appraiser), and other promoters, partners, and syndicators for EcoVest Capital Inc. (the partnership at issue) for organizing, promoting, or selling an allegedly abusive conservation easement syndication tax scheme.<sup>125</sup> Unlike *Belair Woods*, *United States v. EcoVest Capital Inc.* represents an attempt by the DOJ to effectively shut down a syndicated conservation easement and its complicit appraisers.

The initial complaint alleged that the defendants led a syndicated easement scheme that amounted to the sale of grossly overvalued federal tax deductions under the guise of an investing partnership.<sup>126</sup> While much

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119. *Id.* at 17; see generally Kaufman v. C.I.R., 784 F.3d 56, 66 (1st Cir. 2015).

120. *Belair Woods*, 116 T.C.M. (CCH) 325, at 17.

121. *Blau v. Comm'r*, 924 F.3d 1261, 1270 (D.C. Cir. 2019).

122. See *Belair Woods*, 2018 WL 4523228, at 24.

123. *Id.* at 16–17.

124. No. 1:18-cv-05774-AT (N.D. Ga. Dec. 18, 2018).

125. *Justice Department Sues to Shut Down Promoters of Conservation Easement Tax Scheme Operating Out of Georgia*, U.S. DEP'T OF JUST. (Dec. 19, 2018), <https://www.justice.gov/opa/pr/justice-department-sues-shut-down-promoters-conservation-easement-tax-scheme-operating-out> [<https://perma.cc/G24N-84TX>].

126. Complaint, *supra* note 9, at ¶ 2.

of the complaint relates to the tax theft of syndication, the DOJ does mention that part of the harm is that syndication “undermines the public's confidence in a deduction designed to encourage preservation and conservation efforts that is instead being abused to financially benefit Defendants.”<sup>127</sup>

Yet, unlike *Belair Woods*, the DOJ takes special notice of the runaway appraiser's conduct, citing that Clark had reaped financial gain for the participation in at least fifty-eight conservation easements syndicates.<sup>128</sup> While Clark routinely ignored comparable sales and relied on inappropriate methodologies, he also reached the unreasonable determination that the HBU of a property was a multi-family resort-like development.<sup>129</sup> In this case, Clark specifically omitted a previous purchase agreement that valued the property at \$1,092,000 and subsequently overvalued the HBU at \$39,697,000.<sup>130</sup> While defendants admit Clark provided appraisals, they repeatedly stated that his methods comply with statutory appraisal standards.<sup>131</sup> In fact, the defendants submitted a 130-page response and counterclaim denying the inflated appraisals and accusing the IRS of making “unlawful disclosures” of appraisal information.<sup>132</sup> Yet, the DOJ alleges that Clark's appraisal standard falls far below appraisal standards and, in light of his experience, violates the professional obligations of real estate appraisal.<sup>133</sup>

Since there is no direct statutory mechanism to prosecute a syndicated conservation easement, the DOJ has employed a variety of existing tax statutes related to abusive tax shelters.<sup>134</sup> First, the DOJ is seeking injunctive relief against the syndication for conduct promoting an abusive tax shelter within the meaning of 26 U.S.C. § 6700.<sup>135</sup> Additionally, the syndication is alleged to have interfered substantially with the administration and enforcement of the internal revenue laws causing over 1.8 billion dollars of overvalued and improper charitable contribution deductions, and thus liable under 26 U.S.C. § 7402.<sup>136</sup> It seems the DOJ took the stance that a combination of penalties and injunctive relief is the

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127. *Id.* at ¶ 169.

128. *Id.* at ¶ 23.

129. *Id.* at ¶¶ 91, 108.

130. *Id.* at ¶¶ 107, 108(b).

131. Answer at ¶¶ 101, 102, *United States v. EcoVest Capital Inc.*, No. 1:18-cv-05774-AT (N.D. Ga. Dec. 18, 2018).

132. See Peter Elkind, *The IRS Tried to Crack Down on Rich People Using an “Abusive” Tax Deduction. It Hasn’t Gone So Well.*, PROPUBLICA (Jan. 3, 2020, 5 AM), <https://www.propublica.org/article/the-irs-tried-to-crack-down-on-rich-people-using-an-abusive-tax-deduction-it-hasnt-gone-so-well> [<https://perma.cc/VE82-PNWF>].

133. Complaint, *supra* note 9, at ¶¶ 153, 154.

134. *Id.* at ¶¶ 175–227.

135. *Id.* at ¶ 175; 26 U.S.C. § 6700; 26 U.S.C. § 7408.

136. Complaint, *supra* note 9, at ¶ 214; 26 U.S.C. § 7402.

most appropriate way to curb and deter such schemes, otherwise the defendants would be “likely to continue to promote this conservation easement syndication scheme.”<sup>137</sup>

Thus, it is not surprising that the DOJ also asked for additional injunctions and penalties against the organizer and appraiser in their individual capacities.<sup>138</sup> For instance, 26 U.S.C. § 6695A(a) imposes a civil penalty on any appraiser, like Clark, who reasonably knows that the claimed value of an appraisal would be used in connection with a deduction and results in a substantial or gross valuation misstatement.<sup>139</sup> An injunction against Clark under 26 U.S.C. § 7402 is appropriate to prevent recurrence of such conduct.<sup>140</sup> In addition, Clark may be liable as a “tax return preparer” for his role in furnishing the Form 8283.<sup>141</sup> Specifically, he would be liable because he has vocally and consistently engaged in overvaluation causing irrevocable harm to the United States.<sup>142</sup> This is a marked difference from the IRS past treatment of Clark as a tax professional.<sup>143</sup>

While the DOJ has requested injunctive relief and penalties, it has also requested the repayment of ill-gotten gains that investors would not have received but for the overvalued easements and corresponding improper tax benefits.<sup>144</sup> Under 26 U.S.C. § 7402(a), the gross receipts that the defendants received for their participation in the conservation easement syndication scheme should be repaid to the United States.<sup>145</sup> Thus, by requesting the equitable and punitive remedy of disgorgement, the DOJ recognizes that an injunction alone may not completely remedy the conduct of syndicators.<sup>146</sup> However, the defendants allege that such a remedy would violate the Excessive Fines Clause of the Eighth Amendment.<sup>147</sup> Clark specifically alleges that disgorgement in this case is not deterrent, but compensatory towards the Treasury.<sup>148</sup> Regardless, such a severe penalty may be necessary to act as a message to other syndicators.

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137. Complaint, *supra* note 9, at ¶ 185.

138. *Id.* at ¶ 191.

139. *Id.*; 26 U.S.C. § 6695A(a).

140. Complaint, *supra* note 9, at ¶ 197; 26 U.S.C. § 7402.

141. *Id.* at ¶ 207.

142. *Id.* at ¶¶ 201, 208.

143. *Kiva Dunes Conservation, LLC v. C.I.R.*, 97 T.C.M. (CCH) 1818 (T.C. 2009), 2009 WL 1748862, at \*6 (“We conclude that Mr. Clark’s testimony is credible and his assumptions are reasonable and amply supported by the evidence presented at trial and in his report.”).

144. Complaint, *supra* note 9, at ¶ 226.

145. *Id.* at ¶ 227.

146. *See S.E.C. v. World-Wide Coin Investments, Ltd.*, 567 F. Supp. 724, 760 (N.D. Ga. 1983).

147. *Claud Clark’s Reply to Plaintiff’s Opposition to His Motion to Dismiss* at 55, *United States v. EcoVest Capital, Inc.*, No. 1:18-CV-05774-AT (N.D. Ga. Dec. 18, 2018).

148. *Id.* at 12.

Yet, despite its aspirational goal in prosecuting syndicated conservation easements with tools more apt to address tax fraud rather than environmental concerns, the case has continued to proceed at a snail's pace through federal court.<sup>149</sup> In fact, the case has proceeded for almost a year without any resolution as to the efficacy of this scheme of enforcement.<sup>150</sup> While the individual prosecution of appraisers and organizers seems promising, it still seems like an expensive method to curb the spread of syndication overall. In the context of this litigation, hopefully the threat of disgorgement will be a deterrent, injunctions will prove effective, and penalties will serve as punishment.

### III. THE (POSSIBLE) FALL OF SYNDICATED CONSERVATION EASEMENTS

The IRS has committed to increasing enforcement of syndicated conservation easements.<sup>151</sup> For example, in its first decision on a syndicated conservation easement, the U.S. Tax Court fully denied all tax benefits from a syndicated conservation easement and applied forty percent gross valuation misstatement and negligence penalties.<sup>152</sup> Since most syndicated conservation easements fail to meet the basic perpetuity requirement for a charitable deduction, the ruling in *TOT Property Holdings, LLC v. Commissioner*<sup>153</sup> stopped a syndicated conservation easement while not directly remedying the problem of syndication.<sup>154</sup> However, this decision represents the first time the Tax Court has commented officially on syndicated conservation easements.<sup>155</sup> The Court devoted considerable discussion to the issue of appraisals in continuing these schemes.<sup>156</sup> The taxpayer's appraiser claimed a 1.2 million dollar easement valuation, citing the HBU as a "low density, destination mountain resort residential development."<sup>157</sup> Yet, IRS

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149. See Docket, *EcoVest*, No. 1:18-CV-05774-AT.

150. *Id.*

151. See I.R.S. News Release IR-2019-182 (Nov. 12, 2019) ("Every available enforcement option will be considered, including civil penalties and, where appropriate, criminal investigations that could lead to a criminal prosecution.").

152. See Order of Service of Transcript (Bench Opinion), *TOT Property Holdings, LLC v. Comm'r*, No. 005600-17, 2019 WL 11880554, at 34 (T.C. Nov. 22, 2019).

153. No. 005600-17, 2019 WL 11880554 (T.C. Nov. 22, 2019).

154. See I.R.S. News Release IR-2019-213 (Dec. 20, 2019) ("We are prepared to take each of these and all other cases being developed by the IRS to trial, although the substance of most cases can be resolved without trial because the transactions do not meet the basic requirements to claim the charitable contribution deduction.").

155. *No Deduction for Conservation Easement not Protected in Perpetuity*, RSCH. INST. AM., FED. TAX UPDATE, 2019 WL 7284153 (Dec. 30, 2019).

156. See Peter J. Reilly, *IRS Grinch Ruining Christmas for Syndicated Conservation Easements*, FORBES (Dec. 24, 2019, 3:43 PM), <https://www.forbes.com/sites/peterjreilly/2019/12/24/irs-grinch-ruining-christmas-for-syndicated-conservation-easements/> [<https://perma.cc/68K2-V5J6>].

157. Order of Service of Transcript (Bench Opinion), *supra* note 152, at 24.

appraisers valued the easement at \$632,000, citing an HBU of “recreation and timber revenue.”<sup>158</sup> In dismissing the taxpayer’s comparable sales valuation, the Court stated that “all of the supposedly comparable sales . . . put forward were of intended residential developments in mountainous terrain, or with views of large bodies of water, such as a lake. The subject property lacks either feature, and we think it is not conducive to the same use.”<sup>159</sup> While the Tax Court denied the deduction for not fulfilling the perpetuity requirement, the holding signified the first successful penalty levied against syndicated conservation easements.<sup>160</sup>

The ruling in *TOT Property Holdings* was hailed as a success by the IRS, with Commissioner Chuck Rettig announcing the ruling as evidence of the IRS’s commitment to halting abusive conservation easements.<sup>161</sup> Commenting directly on the inability of syndicated conservation easements to survive scrutiny, Commissioner Rettig stated that the IRS “will not stop in [their] coordinated pursuit of these abusive transactions while seeking the imposition of all available civil penalties and, when appropriate, various criminal options for those involved.”<sup>162</sup> Moreover, Commissioner Rettig announced that IRS “innovation labs” are currently developing more extensive enforcement tools that employ advanced techniques.<sup>163</sup> With around fifty cases pending regarding syndicated conservation easements, the IRS is taking enforcement entirely into its own hands.<sup>164</sup>

Unfortunately, the IRS has been subject to deep budget cuts, leaving it with limited resources for the expensive task of disputing appraisals and prosecuting syndicated conservation easements, which may require costly expert witnesses.<sup>165</sup> A mere five Tax Court trials that focused on syndicated conservation easements were concluded in 2019.<sup>166</sup> Moreover, efforts by the DOJ to prosecute syndicated conservation easements have been subject to significant delay and cumbersome filings that impede efficiency and expediency in bringing about definitive resolutions.<sup>167</sup> Although the current rhetoric is that the dismantling of these abusive tax schemes are under control, the delayed litigation and slow moving wheels of the federal government have drastically impeded the actual dissolution of syndicated conservation easements.

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158. *Id.*

159. *Id.* at 25.

160. *Id.* at 37.

161. See I.R.S. News Release IR-2019-213, *supra* note 154.

162. *Id.*

163. See I.R.S. News Release IR-2019-182, *supra* note 151.

164. See I.R.S. News Release IR-2019-213, *supra* note 154.

165. See Elkind, *supra* note 46 (“The IRS is outgunned,” says Steve Small, the former IRS attorney. “They don’t have the budget or personnel to audit a fraction of these transactions.”).

166. See I.R.S. News Release IR-2019-213, *supra* note 154.

167. See Complaint, *supra* note 9.

However, pending legislation in the U.S. Senate and House of Representatives aims to eliminate the ability of syndicators to profit from the donation of a conservation easement on land held for a short period of time.<sup>168</sup> In its current iteration, the Charitable Conservation Easement Program Integrity Act, as it is titled in both the Senate and House, states:

No amount of such contributions may be taken into account under this section by any partner of such partnership as a distributive share of such contributions if the aggregate amount so taken into account by such partner for the taxable year would . . . exceed 2.5 times such partner's adjusted basis in such partnership.<sup>169</sup>

Both bills, which are identical, remove the ability to profit from charitable donations by adding a total limit on tax deductions from syndicated conservation easements regardless of the total value of the easement.<sup>170</sup> In practice, the bipartisan bill would preserve conservation by legitimate syndication while placing a cap on bad actors who abuse the system for inflated deductions. Additionally, the Joint Committee on Tax has estimated that the legislation would end abusive tax shelters and generate 6.6 billion dollars in federal revenue.<sup>171</sup> Accordingly, multiple land conservation organizations and appraisal organizations have supported the Charitable Conservation Easement Program Integrity Act as a solution to end the subversion of conservation while still preserving the valuable incentive that conservation easements represent for legitimate preservation.<sup>172</sup>

Expectedly, supporters of syndicated conservation easements have sharply criticized both the Charitable Conservation Easement Program Integrity Act and the findings of the Joint Committee on Taxation regarding possible revenue saved by its implementation.<sup>173</sup> Critics characterize the bill as “anti-easement,” stating that it would only be a temporary solution because the “disallowance rule” would only apply to the first three years, ending after the date the investor joins the

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168. See Press Release, Land Tr. All., Land Trust Alliance Applauds Introduction of the Charitable Conservation Easement Program Integrity Act (Mar. 28, 2019) (on file with author).

169. S. 170, 116th Cong. (2019); H.R. 1992, 116th Cong. (2019).

170. See Press Release, Land Tr. All., Charitable Conservation Easement Program Integrity Act Expected to Generate \$6.6 Billion in Federal Revenue (July 11, 2019) (on file with author).

171. *Id.*

172. See Land Tr. All., *supra* note 170 (“Multiple land conservation organizations . . . have endorsed the [Act], including Ducks Unlimited, The Trust for Public Land, The Nature Conservancy, The Conservation Fund and Pheasants Forever, among others. Additionally, the Appraisal Institute, . . . and the American Society of Farm Managers and Rural Appraisers support the bill.”).

173. Kristen Parillo & Fred Stokeld, *Anti-Easement Bill Would Produce Temporary Results, JCT Says*, P'SHIP FOR CONSERVATION (July 16, 2019), <https://partnershipforconservation.org/anti-easement-bill-would-produce-temporary-results-jct-says/> [<https://perma.cc/RLU9-SLVX>].

partnership.<sup>174</sup> Thus, syndicated conservation easements would still be an attractive tax avoidance mechanism for those who can simply wait out the holding period.<sup>175</sup> Critics claim that promoters may even be able to create “tiered-entity structures to allow future investors to avoid the disallowance rule.”<sup>176</sup> Moreover, they point out the uncertainty and variability in the Joint Committee on Taxation’s 6.6 billion dollar revenue generation.<sup>177</sup> In fact, opponents of the bill express fear that it would retroactively punish taxpayers who engaged in a syndicated transaction when they were still legal.<sup>178</sup> In response, supporters have argued that the Notice effectively warned violators that the IRS was looking into syndication and was likely to pursue enforcement in the near future.<sup>179</sup> Yet, critics of the bill argue that instead of targeting one class of land ownership, legislation should focus on “common-sense valuation solutions.”<sup>180</sup>

In fact, valuation and appraisals lie at the heart of the entire issue of syndicated conservation easements. Without overvalued appraisal of the easement, the scheme cannot continue. All that is needed to be an appraiser is an appraisal designation from a recognized professional organization or the minimum education and experience requirements.<sup>181</sup> Traditionally, regulation of real estate appraisers was handled at the state level through licensing boards, usually through the highest court in the state, with very little federal oversight.<sup>182</sup> Yet, in recent years, these licensing boards have been targeted with additional *federal* oversight by the Appraisal Subcommittee (ASC).<sup>183</sup> The ASC funds the Appraisal Foundation in their creation of the Uniform Standards of Professional Appraisal Practice (USPAP), which acts as the definitive set of guidelines, best practices, and professional standards for the appraisal practice.<sup>184</sup> USPAP’s authority to define appraisal standards is unquestionable, as it became the official appraisal standard mandated under the Financial Institutions Reform, Recovery and Enforcement Act

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Parillo & Stokeld, *supra* note 173.

179. *Id.*; see I.R.S. Notice 2017-10, *supra* note 10.

180. Parillo & Stokeld, *supra* note 173.

181. I.R.C. § 170(f)(11)(E)(ii) (2020).

182. EDWARD V. MURPHY, CONG. RSCH. SERV., RS22953, REGULATION OF REAL ESTATE APPRAISERS 1 (2012); John M. Burman, *Non-SEC Whistle-Blowing Obligations of Lawyers Who Represent Organizations*, 46 WASHBURN L.J. 127, 152 (2006) (“Historically, lawyers have been licensed by and subject to the disciplinary authority of state licensing boards (usually the highest court of the jurisdiction).”).

183. MURPHY, *supra* note 182.

184. *Id.* at 4.

of 1989, which required every state to adopt licensing and certification standards for real estate appraisers.<sup>185</sup> Ultimately, the USPAP acts as the polestar for how states discipline and regulate appraisers.

The guiding philosophy of the USPAP is for appraisers to “develop and communicate their analyses, opinions, and conclusions to intended users of their services in a manner that is meaningful and not misleading.”<sup>186</sup> Accordingly, the USPAP requires that appraisers do everything to ensure that their valuations do not mislead, which is crucial to curbing the abuse of overvalued conservation easements.<sup>187</sup> In fact, appraisers “must not communicate assignment results with the intent to mislead or to defraud.”<sup>188</sup> Yet, even questionable appraisers claim that their overvaluations are in compliance with USPAP.<sup>189</sup> Thus, the onus should fall on the state licensing boards to be more vigilant in disciplining and removing hired gun appraisers by following the USPAP, thereby nipping overvaluation in the bud.<sup>190</sup>

Although the IRS may sanction any “appraiser who falsely or fraudulently overstates the value of the contributed property referred to in a qualified appraisal or appraisal summary . . . that the appraiser has signed,” federal regulation has shown to be cumbersome in prosecuting syndicated conservation easements, especially in the context of individual appraisers.<sup>191</sup> The scale of this problem may be more easily remedied through the laboratory of the states. For example, state licensing boards already have the necessary authority and ability to punish violators without federal assistance.<sup>192</sup> By revising the USPAP, state licensing boards would receive guidance, direction, and enforcement tools to punish runaway appraisers in their jurisdiction, instead of leaving the entire enterprise to the federal government. One possible revision is for the USPAP to place additional obligations on any appraiser that works for a partnership or in the context of conservation easements. Additionally, the USPAP could devise more specific guidelines for appraisers who market their services to maximize tax benefits. Additional

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185. 12 U.S.C. § 3336; 7 C.F.R. §761.7 (2020).

186. THE APPRAISAL FOUND., UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 1 (2018).

187. *Id.* at 7, 20, 28, 30, 40, 49.

188. *Id.* at 7.

189. *See* Answer, *supra* note 131, at ¶ 171, 174.

190. *See generally* Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 742 (2012) (discussing in the antitrust context how legislatures delegating flexible authority to state licensing boards allow the enlisting of the expertise and experience of practicing professionals in formulating regulation).

191. 26 C.F.R. § 1.170A-13(c)(3)(iii) (2020).

192. *See* Diaz v. Fla. Dep’t of Bus. & Pro. Regul., 21 So. 3d 919, 920 (Fla. 3d DCA 2009) (affirming a state licensing board’s suspension of an appraiser’s license for manipulation of data to create an inflated appraisal).

guidelines have already been mandated for other professionals in the wake of massive fraud.<sup>193</sup> In the wake of Enron, the passage of section 307 of the Sarbanes-Oxley Act allowed the SEC to mandate strict disclosure rules for professionals and lawyers who become aware of fraud.<sup>194</sup> Thus, revising the USPAP in this manner is not an unprecedented solution to syndicated conservation easements and tax fraud.

Theoretically, working on a state scale with federal oversight, minimums, or standards by the USPAP would more thoroughly address the problem, while still allowing the federal government to prosecute larger scale syndicated conservation easements. Already in the context of environmental law, the concept of cooperative federalism has been an important consideration in applying consistent standards while allowing states to provide additional enforcement.<sup>195</sup> Cooperative federalism has been used since the 1930s to define and recognize areas where the federal and state power overlap.<sup>196</sup> Instead of stripping power away from states, responsibility for enforcement is allocated between the state and federal government.<sup>197</sup> Although the definition varies, most cooperative federalist schemes follow a similar formula.<sup>198</sup> An agency, in this case the IRS or Appraisal Institution, would publish minimum standards of enforcement of appraisers that preempt state licensing boards.<sup>199</sup> Next, states that wish to pursue their own enforcement, or provide more stringent localized enforcement in the case of state licensing boards, would have to be approved by the IRS or alternative government agency.<sup>200</sup> In the end, the IRS could provide additional oversight authority and possibly even funding to implement the approved programs.<sup>201</sup> Ultimately, the model of cooperative federalism allows for the states to experiment with enforcement while receiving guidance from the IRS or from USPAP, thereby curbing conservation easement exploitation based on the state's unique circumstances.<sup>202</sup>

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193. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 138 (4th ed. 2016).

194. *Id.*

195. ENV'T L. INST., *LAW OF ENVIRONMENTAL PROTECTION* § 9:21 (2021).

196. Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 ADMIN. L. REV. 1, 22–23 (2012).

197. *Id.* at 23–24.

198. *Id.* at 26.

199. *Id.*

200. *Id.*

201. *Id.* at 27.

202. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”) (Brandeis, J., dissenting).

While detractors argue that federal oversight of state enforcement erodes the concept of self-government, the problem of syndicated conservation easements cannot be appropriately enforced nationwide without cooperation from the state level.<sup>203</sup> In addition, legislative reform and revisions to the appraisal standards of conduct could provide better tools for the enforcement of the syndicated conservation easement scheme.<sup>204</sup> By pairing specific revised guidance from USPAP for the state licensing boards with a stronger federal check on syndicated conservation easements, it is feasible to preserve the lucrative tax benefit of conservation easements that is relied upon by environmentalists while curbing the abusive use of syndication that continues to subvert the noble goals of conservation.

### CONCLUSION

IRS Commissioner Rettig recently captured the essential spirit of the controversy stating “[a]busive syndicated conservation easement transactions undermine the public’s trust in private land conservation and defraud the government of revenue . . . [p]utting an end to these abusive schemes is a high priority for the IRS.”<sup>205</sup> The IRS has shown a commitment to halting these abusive transactions by prosecuting fraud and levying heavy penalties on possible violators.

Yet in the words of famed conservationist Aldo Leopold, “conservation will ultimately boil down to rewarding the private landowner who conserves the public interest.”<sup>206</sup> Essentially, the tax benefit provided from conservation easements is essential in securing valuable and unique land to be protected in entirety for generations. Not all conservation easement holders are bad actors. In fact, they come from all walks of life and all income levels bound together by their desire for a guarantee that their land will be protected.<sup>207</sup>

However, honest land conservation may be hindered when donors incentivized by the tax benefit fear IRS action. While the IRS’s efforts have been slow and largely ineffective, they generally focus on the conduct of the partnerships rather than the appraisals. In truth, the scheme of syndicated conservation does not exist without appraisers willing to commit misleading or fraudulent appraisals. While legislation provides a popular option for targeting the partnerships, critics have revealed workarounds.<sup>208</sup> Ultimately, it should be the responsibility of the state

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203. Michael S. Greve, *Against Cooperative Federalism*, 70 *MISS. L.J.* 557, 559 (2000).

204. S. 170, 116th Cong. (2019); H.R. 1992, 116th Cong. (2019).

205. See IR-2019-182, *supra* note 151.

206. Aldo Leopold, *Conservation Economics*, 32 *J. FORESTRY* 537, 544 (1934).

207. Carissa W. Brown, *Conservation Easements Attractive Opportunity or Risky Endeavor?*, *BENCH & BAR MINN.*, Nov. 2014, at 19, 19.

208. Parillo & Stokeld, *supra* note 173.

licensing boards to correct overvaluation before it reaches the easement. In the end, the laboratory of the state paired with a revised USPAP may have the ability to preserve the value of conservation for donors and conservationist alike. By creating a model of cooperative federalism that sets minimum standards, guidance, and oversight of appraisers while pressing for additional enforcement by the state licensing boards, the benefit to both income and conservation may be conserved for the future.

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