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A NEW GENERATION FOR FEDERAL ROYALTY VALUATION

Peter J. Schaumberg and
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The Department of the Interior's Office of Natural Resources Revenue (ONRR) is the second largest revenue collector for the federal government after the U.S. Treasury. ONRR collects billions of dollars annually in royalties on production of oil, gas, and coal from thousands of federally managed leases onshore (primarily in the Western states) and on the Outer Continental Shelf (OCS). On July 1, 2016, ONRR issued regulations at 30 C.F.R. part 1206 significantly amending procedures in place since the late 1980s for the valuation of oil and gas produced from federal leases and coal produced from federal and Indian leases. 81 Fed. Reg. 43,338. The ONRR final rule presents a number of challenges for lessees. While ONRR stresses "certainty," the final rule effectively leaves lessees guessing as to what ONRR may view the "correct" valuation to be, even years after royalties are reported and paid.

I. Principal Issues with the New ONRR Rules

Several of the changes in the new rule apply uniformly to ONRR's federal oil, gas, and coal valuation regulations. The most dramatic change is ONRR's adoption of a new "default" valuation process that allows ONRR, in almost any circumstance, to substitute a value derived through its preferred valuation method for the value the lessee initially reported. 30 C.F.R. §§ 1206.104(c)(oil), 1206.143(c)(gas), 1206.253(c) (coal). ONRR claims that it will use the default provision "only in rare situations," but the rules create over a dozen unique triggers. One example is "misconduct," broadly defined in 30 C.F.R. § 1206.20 to encompass nearly any reporting error, even if unintentional. Another default trigger occurs when ONRR finds that the lessee has marketed production at a price 10 percent below the "lowest reasonable price"—a circular standard because ONRR retains total discretion without any guidelines to establish the "lowest reasonable price." ONRR also adopted a similar default provision for determining transportation, gas processing, and coal washing allowances in circumstances where ONRR finds that the claimed allowance is 10 percent higher than the highest reasonable transportation or washing allowance, a process that is subject to the same circular problems as for sales prices. 30 C.F.R. §§ 1206.110(f) (oil transportation), 1206.152(g) (gas transportation), 1206.159(e) (gas processing), 1206.260(g) (coal transportation), 1206.267(d) (coal washing). Application of the default methodology could occur on any lease as late as seven years after the production month, potentially requiring substantial payments for underpaid royalty and interest.

ONRR also is now requiring that all contracts, or contract revisions, for the sale of oil, gas, or coal

Continued on page 3.

Public Land and Resources Committee Newsletter
Vol. 14, No. 1, February 2017
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In this issue:

A New Generation for Federal Royalty Valuation
Peter J. Schaumberg and James M. Auslander 1

Application of the Bankruptcy Automatic Stay to NEPA Challenges
Benjamin Machlis and Matt Ochs........5

NEPA: Studies in Effectiveness
John Ruple and Mark Capone 7

***Encino Motorcars, LLC v. Navarro*: A Tool for Public Lands Advocates and a Possible Reason for More Paperwork**
Tim Canon...10

Custom-made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuse
Meg Osswald..13

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Continued from page 1.

are written and signed by all parties to the contract. 30 C.F.R. §§ 1206.103(g) (oil), 1206.143(g) (gas), 1206.253(g) (coal). This requirement is inconsistent with 30 C.F.R. § 1206.20, which defines the term "contract" as "any oral or written agreement . . . that is enforceable by law. . . ." Despite this apparent contradiction, if the lessee's sales contract is not written, it provides ONRR the option to trigger the "default" provision and determine the value. This change is an important issue for lessees currently conducting transactions based on oral or e-mail exchanges, particularly in repeat business situations.

II. Oil and Gas Valuation Changes

The most significant rule change affecting federal oil and gas lessees is ONRR's alteration to the definition of "gathering" in 30 C.F.R. § 1206.20 to include "any movement of bulk production from the wellhead to a platform offshore." As a result, OCS lessees no longer can take millions of dollars of transportation allowances for the movement of oil and gas (that reduce the royalties owed on the transported production) from subsea completions to the first platform where production surfaces, often a distance of many miles. ONRR had expressly authorized a transportation allowance for these costs since 1999 in order to incentivize development in deep water. Now the agency claims that those incentives are unnecessary (even for ongoing development that was undertaken in reliance on the prior allowance), and that the change provides a "more consistent and reliable application of the regulations" without explaining how that will happen. 81 Fed. Reg. at 43,340.

The new rules also generally conform the basic gas valuation procedures to the same process adopted for oil valuation in 2000. ONRR will now require a lessee that transfers gas to its marketing affiliate to base royalty value on the affiliate's arm's-length resale price (with a transportation allowance, as applicable). Previously, the transfer to the marketing affiliate was treated as a non-arm's-length disposition requiring valuation based upon a hierarchical set of "benchmarks" (largely founded on comparable sales in the field or area). Like for oil, a gas lessee engaging in an initial non-arm's-length transaction with its marketing affiliate may choose to base its royalty value on applicable index prices rather than chase the gross proceeds to the affiliate's first arm's-length sales point with applicable allowances. Unlike for oil, however, a gas lessee that does not market through an affiliate does not have this index option. 30 C.F.R. §§ 1206.141(c), 1206.142(d).

Though index valuation is simpler, ONRR has imposed a premium. ONRR is requiring the lessee to use the "highest" reported monthly bidweek price for the index pricing point. Moreover, if the lessee theoretically could transport its gas through multiple index points, it must use the highest published index price for all those index points even if the lessee physically could not move any gas to that index point, e.g., if the pipeline to that index point were already fully subscribed. *Id.* Further, ONRR is limiting any allowance for transportation deductions to 50 percent of the value of the oil, gas, or gas plant product that is transported. 30 C.F.R. §§ 1206.110(d)(1) (oil), 1206.152(e)(1) (gas). This alteration contradicts ONRR's assertion that it is adhering to the principle of valuation "at the lease" whereby lessees may deduct their actual transportation costs when sales occur downstream of the lease. This artificial limitation on actual costs could have particular consequence for lessees that convert gas to liquefied natural gas (LNG) and sell that LNG in distant foreign markets.

III. Coal Valuation Changes

The final rule adopts identical changes for both federal and Indian (30 C.F.R. §§ 1206.450–1206.473) coal valuation. Like for oil and gas, ONRR amended the valuation rules to require that coal lessees value production based on the lessee's, or its affiliate's, first arm's-length sales price for the coal. 30 C.F.R. § 1206.252(a). Yet ONRR has denied coal lessees the option to ever use an index-based or other alternative value in lieu of “chasing” gross proceeds to the rst arm’s-length sales point, despite that ONRR itself has repeatedly acknowledged that a net-back method yields the greatest burdens and least accuracy. The well-established problems with the net-back methodology are exacerbated by ONRR’s failure to correspondingly change its coal transportation allowance regulations to expressly address terminalling and ocean transportation costs to distant foreign sales points.

The most signi cant coal valuation change applies in the case where the lessee has no contract for the sale of coal because the lessee or its af liate uses the coal in a power plant. The new valuation rules require the lessee to base the royalty value on the sales price of the electricity derived from the coal. 30 C.F.R. § 1206.252(b). However, ONRR nowhere explains how it can simply apply the same royalty rate established in the lease contract for coal to the value of an entirely distinct energy commodity that is priced differently in a separate and regulated market. Other issues potentially undermining the accuracy of substituting electricity for coal include variability of power plant feedstocks, inability to access utilities’ and electricity customers’ information, stockpiling, accounting limitations, and multiple methods for selling electricity. Likewise, the nal rule adopts by reference the generation and transportation allowance regulations applicable to valuing geothermal resources (30 C.F.R. pt. 1206, subpt. H) with no analysis or explanation as to the comparability to coal- red generation plants. And if ONRR decides it dislikes a lessee’s electricity-based valuation it may invoke the “default” provision to substitute a different value.

Implementation of this new generation of ONRR valuation rules is set to begin January 1, 2017. At the same time, ONRR and its sister agencies have recently adopted or proposed other major regulatory changes onshore and offshore, including but not limited to the measurement of oil and gas production, civil penalties, fracking operations, and venting and aring limitations on Bureau of Land Management-managed lands, OCS air quality regulation, and OCS well control.

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APPLICATION OF THE BANKRUPTCY AUTOMATIC STAY TO NEPA CHALLENGES

Benjamin Machlis and Matt Ochs

Recent years have seen a precipitous rise in the number of legal challenges to federal agency approval of natural resource company projects on federal lands and a parallel drop in commodity prices, leading a number of those companies to seek bankruptcy protection. This gives rise to an interesting question: do the protections enjoyed by debtors in bankruptcy, such as the automatic stay, apply to litigation challenging a federal agency's approval of a company's project on federal lands?

This scenario can arise in a variety of circumstances. For example, a mining company operating on unpatented mining claims obtains approval of its plan of operation, but that approval is challenged by an environmental organization under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq., for alleged failure to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and the Federal Land Policy Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq. During the pendency of litigation challenging the federal agency's approval, the mining company les a bankruptcy petition (and becomes a "debtor"), triggering the automatic stay. But does, or should, the automatic stay apply to halt the environmental group's challenge to the federal agency's approval of the mining company's project?

Over the years, much has been written regarding the applicability of bankruptcy provisions to proceedings under various environmental laws. *See, e.g.*, Laura M. Dalton & Dennis F. Kerringan, *Analysis of the Con icts Between Environmental Law and Bankruptcy Law*, 15 Wm. & Mary Envtl. L. & Pol'y Rev. 1 (1990). A fairly consistent body of case law has developed, under which governmental enforcement actions, compliance orders, or corrective action orders are not subject to the automatic stay. *See, e.g.*, *City of New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Fed. Res. Corp.*, 525 B.R. 759 (Bankr. D. Idaho 2015). But, little has been written about, and the courts do not appear to have adjudicated in reported decisions, whether the automatic stay should apply to challenges of federal project approvals.

Speci cally, section 362 of the Bankruptcy Code provides that ling a bankruptcy petition "operates as a stay, applicable to all entities" of eight types of proceedings, including "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case]" or "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(1), (3). The Bankruptcy Code then provides a laundry list of proceedings that are exempt from the application of the automatic stay, including "action[s] or proceeding[s] by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit." 11 U.S.C. § 362(b)(4).

At rst glance, the applicability of the automatic stay to the scenario presented here may seem tenuous—the plaintiff/environmental group is challenging the federal agency's approval of the project, not attempting to obtain possession of or control over the debtor's property, and the federal agency, not the debtor, is the defendant. Indeed, these are the likely arguments that parties opposing application of the automatic stay to federal permitting lawsuits would make. However, the question is actually much closer than this plain language analysis suggests.

First, although section 362(a)(1) stays proceedings "against the debtor," courts do not rigidly interpret this provision to mean that every action involving a debtor implicates the automatic stay or that a debtor must be a defendant. Instead, courts consider whether the debtor is a "real party in interest" or the proceeding "would have an adverse impact on the property of the estate." *In re Klarcheck*, 508 B.R. 386, 394 (Bankr. N.D. Ill. 2014); *In re St. Vincents Catholic Med. Ctrs. of N.Y.*, 449 B.R. 209, 217 (S.D.N.Y. 2011). In the scenario presented here, the debtor's project is at the heart of the challenge, and a successful challenge would strip the debtor of the necessary federal agency approvals to proceed with its project—diminishing the value of the debtor's property interest. Thus, the debtor could be considered a real party in interest. This argument is bolstered by the fact that a company whose project approvals are being challenged generally meet the test for intervention as of right, if requested, because it has "an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede [its] ability to protect its interest." Fed. R. Civ. P. 24(a)(2).

Second, the proceeding challenging a federal agency's approval of the project might also be considered an attempt "to exercise control over property of the estate" because the action seeks to set aside the federal agency's approval of the debtor's project, which is necessary for the debtor to proceed with its project. 11 U.S.C. § 362(a)(3). Courts acknowledge that a proceeding attempting to alter or revoke governmental approvals for a debtor's business or project fall within section 362(a)(3) as acts "to exercise control over property of the state." *See In re Yellow Cab Co-op Ass'n*, 132 F.3d 591, 598 (10th Cir. 1997); *In re Go West Entm't, Inc.*, 387 B.R. 435, 439 (Bankr. S.D.N.Y. 2008). In those cases, where a governmental entity sought to alter or revoke the debtor's governmental authorization to conduct its business, the police or regulatory power exemption to the automatic stay has been applied to allow the action to proceed. *Id*. But in the scenario presented here, the challenge is brought by an environmental group, not a governmental entity, so the section 362(b)(4) exemption would not apply. *See In re Edison Mission Energy*, 502 B.R. 830 (Bankr. N.D. Ill. 2013) (holding that a citizen suit brought by the Sierra Club under the Illinois Environmental Protection Act was subject to the automatic stay because the Sierra Club was not a "governmental entity").

While the superficial treatment afforded here introduces the question and identifies arguments that can be made both for and against applying the automatic stay to cases challenging federal agency approval of a debtor's project on federal lands, a more detailed inquiry into the policy questions raised and competing merits of the arguments may be warranted. Regardless, it is clear that whether a court applies the stay to federal permit challenges will likely depend on the specific circumstances of the cases. Factors to consider will almost certainly include (1) whether the challenge is specifically directed at a federal agency decision that only concerns the debtor's project or if it is directed at a broader decision implicating multiple projects and project proponents; (2) the nature of the debtor's interest in the project; and (3) the impact that a successful challenge would have on the debtor's existing operations. As a practical matter, a court may be far less likely to apply the automatic stay to a challenge that would not substantially alter a debtor's ability to pursue or continue the project than to a situation where the debtor would have to cease ongoing operations if the plaintiff prevails on its claims. In short, compelling arguments can be made both for and against applying the stay to actions challenging federal agency approvals of a debtor's project on federal lands and courts may likely reach different conclusions based on the specific facts of the cases.

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NEPA: STUDIES IN EFFECTIVENESS

John Ruple and Mark Capone

The National Environmental Policy Act (NEPA) requires that prior to making, authorizing, or funding any "major Federal action significantly affecting the quality of the human environment," the lead federal agency prepare a detailed statement discussing the environmental impacts resulting from the proposed action and alternative means of satisfying the purpose and need for the proposed action. 42 U.S.C. § 4332(2)(C). The scope and intensity of impacts associated with the proposed action determine the level of analysis required, with the most significant projects necessitating completion of an environmental impact statement (EIS). 40 C.F.R. § 1501.4.

NEPA has proven to be a controversial statute, with supporters claiming that it enhances public involvement and leads to environmentally aware decision making. Detractors contend that NEPA is unduly burdensome, unnecessarily expensive, that it results in unnecessary and unreasonable project delays, and that the burden of compliance outweighs speculative environmental benefits. These competing claims are difficult to evaluate because NEPA is a purely procedural statute, and statutory compliance is measured with regard to the adequacy of the investigation rather than the environmental impacts resulting from the final decision. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). Furthermore, as the Government Accountability Office explained recently: "agency activities under NEPA are hard to separate from other environmental review tasks under federal laws, such as the Clean Water Act and the Endangered Species Act; executive orders; agency guidance; and state and local laws." U.S. Government Accountability Office, Report to Congressional Requesters, National Environmental Policy Act, Little Information Exists on NEPA Analyses, GAO-14-370 at 11 (2014).

Difficulties in evaluating NEPA efficacy aside, we hypothesize that NEPA compliance is likely to result in final agency decisions that are less damaging to the environment. We believe that impact reduction is a by-product of careful consideration of environmental consequences through an open and public process. If our hypothesis holds true, that finding would weigh against efforts that would either exempt certain projects from NEPA analysis or severely limit the scope of the analysis required. If our hypothesis is proven false, that finding would highlight a need for NEPA reform.

To test this hypothesis, we first evaluated all EISs completed by the Bureau of Land Management (BLM) for large oil and gas (O&G) development projects in Colorado, Montana, Utah, and Wyoming between January 2004 and October 2014. We then evaluated EISs for BLM Resource Management Plans (RMPs) completed over the same time period and within the same region. EIS preparation involves publication of a draft EIS, a final EIS, and a record of decision (ROD). Because EISs normally quantify environmental impacts at each phase of the NEPA process, evaluation of iterative changes between each phase may provide an indicator of the benefits obtained during NEPA review. For all projects we sought to determine whether a statistically significant reduction in environmental impacts occurred between the draft EIS and the ROD. We also evaluated whether impact reductions were associated with a commensurate economic cost, as measured in terms of job and tax revenue creation.

When summarizing our results, we highlight whether changes were statistically significant ($p < .05$ one-tailed) or trending toward statistical significance ($p < .10$ one-tailed) and describe the percent reduction or increase for each impact metric. It should be noted at the outset that large percentage reductions or increases for a particular impact metric may not always result in statistical significance. We attribute this to two factors: (1) low sample sizes (the sample size is the number of EISs reporting on a specific impact metric, which differed across impact metrics in our study); and (2) high variability (when data for individual impact metrics across different EISs differ to a large degree).

For O&G projects, we found that impacts to all measured indicators were reduced between the draft EIS and the ROD. Statistically significant reductions ($p < .05$ one-tailed) occurred for permanent (-13%) and temporary (-10%) surface disturbance, number of well pads (-8%), miles of road (-4%) constructed, and NO_X emissions (-24%). Reductions in the number of wells drilled (<1%), miles of pipeline built (-2%), and emission of PM_{10} (-23%), and $PM_{2.5}$ (-24%) were all trending toward significance ($p < .10$ one-tailed). Impacts to wetlands were also reduced by more than 30 percent between the draft EIS and the ROD, though these reductions were not statistically significant.

NO_X, PM_{10}, $PM_{2.5}$, and wetland impacts are all subject to independent action-forcing regulations, perhaps indicating that impact reductions are attributable to compliance with environmental laws other than NEPA. However, SO_2 and CO are also subject to independent action-forcing regulation, but both experienced statistically insignificant and comparatively minor impact reductions (-5%). Lower rates of emission reduction may indicate that regulators and land managers focus their efforts on pollutants of local concern (the project areas analyzed in these EISs appear to have ambient SO_2 and CO levels that are well below National Ambient Air Quality Standards), which would be consistent with NEPA's mandate to focus on significant impacts. 40 C.F.R. § 1500.4(c).

A reduction of less than 1 percent in the number of wells drilled resulted in 13 percent reductions in permanent surface disturbance and 10 percent reductions in temporary surface disturbance. Both disturbance reductions were statistically significant, indicating that meaningful reductions can occur without a hard regulatory mandate such as that contained in the Clean Air Act or Clean Water Act.

We suspect that the concurrent maturation of directional drilling and hydraulic fracturing techniques was partially responsible for the reduction in surface disturbance, as co-utilization of these technologies allows developers to locate multiple wells from a single well pad, and in so doing reduce the total number of well pads developed. The reduction in well pads would equate to a reduction in surface disturbance. The number of well pads did decrease by 8 percent between the draft EIS and the ROD, compared to a less than 1 percent reduction in the number of wells over that same period, which is consistent with a shift toward development of multiple wells from a single pad. The reduction in the number of well pads also contributed to the reduction in road and pipeline construction and associated disturbance, because fewer pads necessitate a less extensive inter-pad road and utility network.

For O&G development, the reduction of environmental impacts does appear to involve a substantial economic cost. Both job creation and state and local tax revenue declined between the draft EIS and the ROD. However, reductions in impacts to key environmental indicators occurred at higher rates than declines in economic indicators. Projected job growth remained positive but fell by 3 percent between the draft EIS and the ROD. Declines in job growth, however, occurred at a lower rate than reductions in eleven of thirteen environmental impact indicators, nine of which experienced statistically significant reductions. Similarly, state and local tax revenue generation also remained positive but fell by 6 percent between the draft EIS and the ROD, a lower rate than seven of thirteen environmental indicators. With four environmental indicators experiencing more than 20 percent reductions in impacts and nine environmental indicators experiencing statistically significant reductions, it appears that environmental impacts can be reduced through the NEPA process without driving a commensurate reduction in economic benefits.

With respect to EISs for RMP revisions we found statistically significant reductions in the amount of terrain open to unrestricted cross-country off-road vehicles travel (-67%) and reductions trending toward statistical significance in the miles of road open to motorized travel (-9%) and number of livestock grazing on public lands (-4%). RMP revisions also increased application of more protective surface use stipulations by statistically significant amounts without causing a statistically significant change in either the number of jobs created or the number of O&G wells drilled. In fact, both the number of jobs created (+8%) and wells drilled (+2%) increased slightly despite strengthened environmental protections.

Additionally, we found that the number of alternatives considered in an EIS affects impact reduction. EISs that consider a broader range of alternatives are more effective at reducing environmental impacts. We therefore urge caution when considering proposals to streamline the EIS process, because streamlining efforts may reduce NEPA's tangible benefits. We also note that our preliminary results indicate that aggressive EIS timelines may hinder the impact analysis, and in so doing, make EISs more vulnerable to legal challenge. Court-ordered EIS supplementation would almost certainly negate any benefits of expediting proposals.

We recognize that our conclusions are constrained by a small sample size. We also recognize that causal factors can be hard to isolate. While our results are but a first step in empirically evaluating NEPA efficacy, they do appear to indicate that NEPA can produce significant reductions in environmental impacts without incurring a commensurate economic cost. We hope that our research will provide a helpful first step in assessing whether NEPA lives up to its promise and how to focus efforts to make NEPA even more effective.

For more information, *see* John Ruple & Mark Capone, *NEPA—Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 Geo. Wash. J. Energy & Envtl. L. 39 (2016); and John Ruple & Mark Capone, *NEPA, FLPMA, and Impact Reduction: An Empirical Assessment of BLM Resource Management Planning and NEPA in the Mountain West*, 46 Envtl. L. ___ (2016). Also look for our forthcoming work in the *Vermont Journal of Environmental Law*, *NEPA and the Energy Policy Act of 2005 Statutory Categorical Exclusions: What Are the Environmental Costs of Expedited Oil and Gas Development?*, comparing impact reduction across 186 environmental impact statements, environmental assessments, and categorical exclusions.

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ENCINO MOTORCARS, LLC V. NAVARRO: A TOOL FOR PUBLIC LANDS ADVOCATES AND A POSSIBLE REASON FOR MORE PAPERWORK

Tim Canon

In June 2016 the U.S. Supreme Court held that an agency's issuance of a regulation that changes decades of policy and practice without adequate explanation does not receive the high level of deference courts typically afford to final agency actions under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Encino Motorcars, LLC v. Navarro*, No. 15-415, 136 S. Ct. 2117, 195 L. Ed. 382 (2016). The *Encino* decision's immediate impact is to provide a potential avenue for challenging regulations and other final agency actions. Over time, the decision could result in longer agency decision-making processes as agencies attempt to bolster their rationales when they change long-standing policies.

The agency regulation at issue in *Encino* was the Department of Labor's (DOL) final rule on overtime pay, which provided that an exemption from the Fair Labor Standards Act's (FLSA) overtime pay requirement did not apply to service advisors (dealership employees who sell maintenance and other services for vehicles). DOL originally issued overtime pay regulations in 1970, under which service advisors were eligible for overtime pay, but multiple court rulings found that provision invalid. As a result, DOL issued an opinion letter in 1978 that changed course and found service advisors were not eligible for overtime pay. In 2011, DOL again reversed course in a final rule that determined service advisors were not exempt and were entitled to overtime pay. DOL's final rule devoted just a page to the change in policy, most of which discussed the policy's history and comments received on the issue. The actual justification for the change appeared in a single paragraph of mostly conclusory statements.

Encino's service advisors claimed overtime pay under the 2011 regulation, and the appellate court, affording *Chevron* deference to the 2011 regulation, agreed. The Supreme Court reversed. Following the test originally announced in *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the *Encino* Court acknowledged that a change in policy itself is not arbitrary and capricious so long as the agency (1) acknowledges the change in position, and (2) provides good reasons for the new policy. *Encino*, 136 S. Ct. at 2125–26. The Court held that "good reasons" need not necessarily be more than a summary explanation, but if the new policy "disregard[s] facts and circumstances that underlay or were engendered by the prior policy," a more detailed justification is required. *Id.* at 2126.

In *Encino*, the Court found that DOL's prior policy resulted in decades of industry reliance and DOL was required to provide more than a single paragraph of conclusory statements justifying its change in course. Its failure to do so resulted in "a rule that cannot carry the force of law." *Id.* at 2127. Accordingly, the Court denied *Chevron* deference but remanded the case to the Ninth Circuit to interpret the statutory language.

The *Encino* decision's most interesting implication for public lands is its finding that the agency's change in policy was arbitrary and capricious because it failed to consider industry reliance on the prior policy. Public land management agencies such as the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) often adjust priorities and change their policies to meet new and evolving demands. And while regulatory revisions will typically be subject to arbitrary and capricious review and thus susceptible to *Encino* challenges, public lands policy changes do not always come from regulatory revisions. As public lands practitioners are aware, the BLM, USFS, and other public land management agencies often act pursuant to land use plans, manuals, handbooks, and general guidance documents. Some of these documents themselves may not be subject to judicial review, but site-specific decisions issued in reliance on these documents are often subject to legal challenges under the National Environmental Policy Act, the Administrative Procedure Act (APA), and other statutes.

Notwithstanding Encino's factual context, there is, in principle, no reason its discussion on the arbitrary and capricious standard will not apply to any agency action subject to APA arbitrary and capricious review, including land use plans, permits, and other decisions. Indeed, the Supreme Court previously indicated in at least one other decision (albeit in dicta) that it would consider applying the Fox Television Stations rule followed in Encino to interpretive regulations as well. Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1209 (2015). Presumably, then, the Encino/Fox Television Stations rule could apply to any action subject to challenge under section 706(2)(A) of APA.

Encino's impact on public lands could manifest itself relatively quickly. *Encino* has already provided fodder for current litigants challenging a variety of agency actions, some of which are tangentially related to public lands. Days after the decision was announced, industry and environmental groups argued that *Encino* supported their position in cases involving Clean Water Act permits as well as more traditional *Chevron*-type rulemaking. *See* Robin Bravender, "*Chevron* Language Trickles Down to Enviro Cases," Greenwire (June 24, 2016). Similar challenges may be brought to recent revisions in policies with arguably signi cant impacts on public land use, such as the Obama administration's broad revisions to compensatory mitigation policies across multiple departments and agencies. *Compare* BLM Instruction Memorandum No. 2005-069 (Feb. 1, 2005) (stating off-site compensatory mitigation will take place on a voluntary basis only), *with* BLM Draft Manual MS-1794—Regional Mitigation Manual Section, § 1.6(D)(17)(c)(iii) (stating BLM may deny applications if applicant will not agree to off-site mitigation). Given the pending change in presidential administrations, these types of challenges may intensify as the next administration makes its mark on public lands policies.

A word of caution is in order for advocates considering bringing *Encino* challenges to agency decisions that are inconsistent with or reverse prior policies. The D.C. Circuit has already rejected an *Encino* challenge to revocation of a coal-mine operator's Clean Water Act permit because the coal company did not suf ciently bring its reliance interests to the agency's attention. *See Mingo Logan Coal Co. v. Envt'l Protection Agency*, _ F.3d _, 2016 WL 3902663, at *8 (D.C. Cir. July 19, 2016) (rejecting a challenge by coal-mine operator to revocation of previously issued permit where operator made conclusory allegations that revocation would cost millions of dollars). In doing so, the court cited to a footnote from Justice Ginsburg's concurring opinion in *Encino* that stated "[t]he extent to which [an agency] is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. . . . An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it." *Id.* (citing *Encino*, 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring)). Potential litigants should be prepared to offer detailed comments explaining their reliance interests or other changes in facts and circumstances before considering an *Encino* challenge.

Encino may have an additional side effect. Heeding Ginsburg's words, advocates who seek to use *Encino* to their advantage likely will provide lengthier and more detailed public comments on agency rulemaking, management plan updates, and other policy changes. For example, those advocates with the resources to do so will likely provide agencies with full economic analyses (many already do) showing the costs of policy changes in terms of lost investments, etc. Agencies, of course, will have to address these comments prior to nalizing the policy revision, resulting in ever more detailed administrative records. While more detailed consideration of these issues may result in better decision making, the desirability of bulkier administrative records is certainly a matter for debate.

On the other hand, the scope and detail of public comments on public lands decisions have already been increasing for the last few decades and whether *Encino* results in a meaningful change in public participation and the administrative record remains to be seen. In addition, the BLM, USFS, and other agencies should not nd it dif cult to draft better justi cations for policy changes than DOL's single paragraph of conclusory statements in *Encino*. In light of these trends, *Encino*'s impact may be modest. Either way, public lands practitioners will likely watch with anticipation as more courts hear *Encino* challenges and esh out its application to public lands decisions.

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

Meg Osswald

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

I. Introduction

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

Tax-deductible CEs are used to protect a wide variety of resources: farms, golf courses, historical building facades, forests, ranches, and recreational properties, just to name a few. Unlike many other federal resource protection tools, which are written with a specific resource in mind, the only directly applicable federal law governing tax-deductible CEs is Internal Revenue Code section 170(h), which authorizes deductions for the donation of CEs.[1] In contrast, resource-specific management statutes dominate progressive federal environmental and natural resource law. For example, the National Forest Management Act governs the sustainable management of federally held forest resources, the Clean Water Act controls abuse of water resources, the Clean Air Act does the same for air, and so on. This specialization in environmental regulation suggests that different resources are most effectively controlled, regulated, or protected in different ways. The Clean Air Act's rules about hazardous air pollutants differ from its rules concerning more common air pollutants, and from the Clean Water Act's rules about water pollution. It is unrealistic to expect successful management of both air and water resources under a single set of rules. It, likewise, is unrealistic to expect successful governance of historical building facades using the same set of rules that govern forests. Still, on a national level, the federal tax incentive program for CE donations relies on a tax code section that applies the same rules to CEs protecting a broad array of resources.

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

II. Relevant Background

Put simply, a CE is an agreement between a landowner and a qualified conservation organization or government body that restricts future activities on the subject land to protect the land's conservation values.[2] In practice, this agreement functions more or less like a contract with the deed acting to bind the parties.[3] The landowner retains ownership of the land, but gives certain rights to restrict the use of the property, generally those that might impede conservation, to the easement holder.[4] However, unlike a typical contract, the public is the beneficiary of a CE and subsidizes the acquisition of CEs through tax incentive and easement purchase programs. Accordingly, a variety of other federal and state laws that protect the public interest also apply to CEs.[5] In addition, what CEs protect, how they protect it, and the sheer number of CEs are quickly increasing and adding to the complexity of this seemingly straightforward arrangement.
The primary federal tax incentive offered to landowners who donate CEs is the charitable income tax deduction under section 170(h), which authorizes a deduction for the donation of a broad array of CEs.[6] Typically, taxpayers are not eligible for tax benefits for donating only partial property interests, but the Internal Revenue Code makes an exception for "qualified conservation contributions."[7] Under section 170(h), a landowner who donates a CE can claim a charitable income tax deduction provided the CE is "granted in perpetuity,"[8] to a "qualified organization,"[9] exclusively for one or more of four specified conservation purposes,[10] and the conservation purpose is "protected in perpetuity."[11] A landowner may also claim a deduction for the donation component of a part sale or part gift ("bargain sale") of a CE.[12] The value of the CE for purposes of the deduction is generally equal to the difference between the fair market value of the land not encumbered by the easement and the fair market value of the land once encumbered.[13] Many states offer additional state tax benefits for CE donations.[14]

The Uniform Conservation Easement Act (UCEA) is a model conservation easement enabling statute that has been adopted in some form by almost half of the states in state enabling statutes.[15] The primary UCEA recommendation is that states enact provisions that override traditional common law impediments to the long-term validity of CEs, which are often held in gross.[16] However, state enabling statutes vary because they do not have to follow the UCEA or meet any national criteria. A state can enact laws that make it impossible to comply with portions of section 170(h). For example, in *Wachter v. Commissioner*,[17] the Tax Court held that the donation of the CEs in question, which were governed by North Dakota law mandating a maximum duration of 99 years for any easement, did not qualify for a deduction under section 170(h) because they were not "granted in perpetuity."

The UCEA also specifies conservation purposes of a CE, limits the organizations that can hold a CE, and provides provisions for authorizing third-party enforcement of CEs.[18] However, the UCEA does not offer guidance regarding how to craft resource-specific CEs or how to value the economic and conservation values of CEs according to the resource in question. Thus, the UCEA attempts to achieve uniformity within the CE system and related tax benefit, and to provide states, localities, and land trusts with guidance on CE implementation, but, like section 170(h), the UCEA does not offer guidance on different types of CEs that are implemented with different resources in mind, nor does it create a true national implementation system.

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

III. Major Front-End Abuses of the Section 170(h) Deduction

On some level, section 170(h) is to blame for the vast majority of abuse[19] surrounding CEs. On one hand, its generosity is almost certainly the reason for the widespread use of CEs as a voluntary conservation tool. At the same time, but for this generosity, potential CE donors would have far less incentive to abuse the tax system. As evidenced by the litigation in this context, two major forms of abuse of the section 170(h) deduction are the donation of CEs that (1) are either overvalued or (2) do not satisfy the conservation purposes tests speci ed in section 170(h). The discussion below is only a brief overview of these issues to help understand how CE specialization could address some section 170(h) pitfalls.

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

A. Valuation Abuses

To be eligible for a deduction under section 170(h) for the donation of a CE, the owner of the property must obtain a qualified appraisal of the CE.[20] The Treasury regulations interpreting section 170(h) provide that the amount of the deduction depends on the CE's fair market value at the time it is donated.[21] According to the Treasury regulations, the ideal way to determine the fair market value of an easement would be to use sales of comparable easements.[22] However, comparable CE sales are generally unavailable because CEs are generally not bought and sold in open markets,[23] and their terms and the properties they encumber are generally different (e.g., they are not "comparable").[24] Accordingly, appraisers are generally forced to use the Treasury regulation's "backup" method to determine value—the before-and-after method:

> [T]he fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction.[25]

Appraisers often assert high values for CEs because they are valued indirectly; differing valuation methods may be employed; there generally will be a range of plausible "before" and "after" values for the subject properties; and the appraisers are employed by the taxpayers. As a result, the IRS often disputes these asserted values and prepares or obtains its own appraisals, and rightfully so considering the size of the deductions that are claimed. For example, in *Palmer Ranch Holdings v. Commissioner*[26], the taxpayer originally claimed a $23.9 million deduction for the donation of a CE on just over 82 acres in Sarasota County, Florida (i.e., a deduction of $291,000 per acre).[27] Large numbers like those in *Palmer Ranch* are not uncommon, equating to large losses in federal tax revenue.[28]

B. Conservation Purpose Abuses

As noted, tax-deductible CEs can be donated for a wide variety of broadly stated conservation purposes.[29] Further, the regulations impose only generalized limitations on the retention of development and use rights that could have negative implications for the conservation purposes of a tax-deductible CE.[30] Subsequent litigation shows that this vague guidance lends itself to interpretation disputes. For example, in *Turner v. Commissioner*[31] and *Herman v. Commissioner*,[32] the Tax Court found that limitations on development in the taxpayers' CEs were not enough to support conservation purposes under section 170(h). In *Turner*, the taxpayer donated a CE that purported to reduce the number of residential lots on a 29.3-acre parcel located near President Washington's Mount Vernon estate from 62 to 30 lots.[33] However, approximately half the property was in a 100-year floodplain, which already limited development to only 30 lots under existing zoning laws.[34] In finding that the CE did nothing to protect open space or the historic character of the area, the Tax Court explained that the taxpayer "simply developed the . . . property to its maximum yield within the property's zoning classification."[35]

In *Herman*, the Tax Court disallowed a $21.8 million deduction claimed for a façade easement that purported to restrict the use of a portion of the development rights above a historic structure on Fifth Avenue in New York City.[36] The court found that the CE did not prevent demolition of the historic structure, and limiting the right to develop a portion of the airspace above the building did not preserve either the structure or a historically important land area.[37] Accordingly, the court found the façade easement did not satisfy the historic preservation conservation purpose test.[38] On the other hand, in *Glass v. Commissioner*,[39] the Sixth Circuit rejected the IRS's argument that the habitat protection conservation purposes test was not met because the grantors retained too many use rights in their easements on a small portion of a 10-acre parcel on the shore of Lake Michigan.[40] Despite the small size of the property and the grantors' retention of rights to recreate and build accommodating facilities like a boathouse and foot path on the property, the court found that potential high quality habitat for endangered eagles would continue to exist even when landowners exercised those rights; thus the CE was sufficient to support the conservation purposes test.[41]

The IRS made a similar argument regarding reserved rights in *Butler v. Commissioner*.[42] The taxpayers in *Butler* reserved significant development and use rights in the easements, including residential subdivision rights, as well as agricultural, commercial timbering, and recreational rights.[43] At trial, the taxpayers introduced evidence in the form of testimony from environmental consultants, demonstrating the habitat on the property would continue to be protected even at full exercise of all reserved rights.[44] The IRS failed to introduce any evidence to the contrary.[45] Consequently, the Tax Court found in favor of the taxpayers, concluding that, although the evidence on the issue was "sparse," the habitat would continue to be protected at full exercise of the reserved rights.[46]

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

IV. USDA Conservation Programs

The Natural Resources and Environment "Mission Area" of the U.S. Department of Agriculture is charged with ensuring the "health of the land through sustainable management."[47] The Mission Area's two agencies, the Forest Service (USFS) and the Natural Resources Conservation Service (NRCS), work to "prevent damage to natural resources and the environment, restore the resource base, and promote good management."[48] NRCS acts primarily as a technical and financial facilitator of land conservation, while the USFS acts as both a direct land manager of national forests and a technical assistant to forestland owners in a lesser capacity.[49] However, both agencies foster conservation of working resource systems intended to provide ecosystem services, rather than pure preservation that other federal agencies, such as the National Park Service, strive for. Thus, the underlying philosophy of these two agencies is generally to manage resources for long-term sustainable use beyond their inherent scenic, conservation, recreational, or historic qualities. Because CEs can be used to manage sustainable resources as well as protect conservation values, it follows that both agencies rely on CEs as a tool for land conservation.

Every four years, Congress passes a bundle of legislation governing the activities of the U.S. Department of Agriculture (USDA) known as the "Farm Bill." According to the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, the Farm Bill is "the single most important piece of legislation for improving the quality of life and economic vitality of our rural communities."[50] The 2008 Farm Bill included eight conservation programs intended to encourage conservation and provide more funding for technical assistance.[51] It also focused on cooperative conservation programs by allocating 6 percent of all program funds to carry out cooperative projects that bring together "producers, states, nonprofit organizations and other groups."[52] The final major bullet point in the 2008 Farm Bill's conservation initiatives limited participation in the USDA conservation programs to individuals whose gross adjusted income did not exceed $1 million annually, unless that income was derived from farming, ranching, or forestry.[53]

The 2012 Farm Bill purported to implement the "most significant reforms in agricultural policy in decades" and claimed it would reduce the national deficit by $23 billion by ending direct payments and streamlining and consolidating programs.[54] Taken together, the 2008 and 2012 Farm Bills drastically changed USDA's operations and policy and, in turn, dramatically increased their use of CEs as a conservation tool. The following sections detail the changes from the 2008 to 2012 Farm Bill with respect to CE implementation.

A. USFS and CEs

In addition to its direct management of federally held national forests, the USFS encourages healthy management of state and privately held forestlands. Because more than 57 percent of all forestland in the United States is privately owned, and is being converted for development at an alarming rate—over 10.3 million acres from 1982 to 1997—the federal government has a strong interest in promoting preservation on private lands.[55] This is an issue not only because of direct loss of forestlands but also because isolation of forest fragments can change or lessen the ability of private, state, and national forests to provide their ecological, economic, and social benefits to the fullest extent.[56]

Over the years, Congress has offered fairly direct production- and finance-centric incentives for forest sustainability and management, such as reforestation tax benefits or timber production exclusions from income taxation.[57] Incentives to acquire CEs are a valuable addition to these tax incentives because CEs can be used for less production-centric purposes. Unlike the forest-specific tax incentives, which focus on expenditures for the implementation of timber production, CEs can be used to conserve forest ecosystem services other than timber production, such as water, wildlife, fire preparedness, or erosion control.[58]

The Cooperative Forestry Assistance Act (CFAA),[59] enacted in 1978, recognizes the importance of protecting privately owned forestlands because "most" of the nation's forestlands are in private ownership and subject to increasing development and population pressures.[60] The CFAA emphasizes the importance of protecting working forests to provide not only products, including timber and other forest commodities, but also ecosystem services, like fish and wildlife habitat, watershed function and water supply, aesthetic qualities, historical and cultural resources, and recreational opportunities.[61] The CFAA started the momentum of federal involvement, beyond reforestation credits, in state and private forestland holdings. Because this momentum was started with the idea of protecting ecosystems, rather than just timber reserves, federal protection of state and private forest resources has been a more intentional, well-planned process, as evidenced by the evolution of its cooperative forestry programs.

Today, in the most recent offshoot of the CFAA, the USFS implements cooperative forestry programs to encourage healthy forest management on non-federal forestlands by working with states and private landowners to improve forest health.[62] There are four national programs within the cooperative forestry umbrella: Forest Stewardship; Forest Legacy; Community Forest; and Urban and Community Forestry.[63]

New policies in the 2008 Farm Bill prompted the USFS to "redesign" its cooperative forestry programs.[64] The stated purpose of the redesign was to focus on "the greatest threats to forest sustainability and accomplish meaningful change in high priority areas."[65] The USFS states that this new approach applies "progressive competitive strategies" to a portion of the federal funds devoted to state and private forest-protection projects.[66] To aid in this prioritization process, the USFS required each state to complete a statewide "Assessment and Strategy for Forest Resources," which analyzes forest conditions and trends in the state and delineates priority rural and urban forest landscape areas. The idea behind these assessments is to provide long-term plans for the investment of federal, state, and other resources where they will be most effective.[67]

The USFS's redesign noted that the nation's forests are experiencing new and significant health challenges, such as rising tree mortality due to disease and invasive pests, increased wildfire size and intensity, climate change disturbances, and conversion to non-forest uses.[68] The agency's focus on prioritization suggests that an increased budget is not matching the increasing threats at a comparable rate. Because CEs are a relatively affordable way to manage and protect large tracts of land, it makes sense that the USFS is incorporating them as a major tool to help meet the redesign's purpose: to "shape and influence forestland use on a scale, and in a way, that optimizes public health benefits from trees and forests for both current and future generations."[69]

The Forest Legacy Program

The USFS cooperative forestry program charged with CE implementation is the Forest Legacy Program (FLP).[70] The 2012 Farm Bill extended the FLP through 2017 and set a new authorized level of funding for the program at $200 million per year.[71] As it does with all cooperative forestry programs, the USFS partners with states to implement the FLP, which supports state efforts to protect environmentally sensitive forestlands that are threatened by development or other non-forest uses.[72] The broad goals of the FLP are to promote forestland protection, conservation opportunities, and ecological values such as "important scenic, cultural, wildlife, recreational, and riparian resources."[73] Land that falls within these goals can be protected either with a CE or by fee-simple purchase.[74] However, unlike section 170(h), the FLP is more narrow in scope as eligibility is further limited to states that prepare an "assessment of need" that shows, at a minimum, that there are environmentally important areas threatened by conversion to non-forest uses in the state.[75]

The FLP laid out the program's priorities in 2005 in its Five-year Strategic Direction, which outlines strategies for achieving the broad goals of the FLP, namely to improve accountability and performance of the program on a uniform national level with the intention of creating a national perspective.[76] The Strategic Direction's four main priorities for the FLP are to (1) promote strategic conservation of private forests; (2) conserve private forests that provide environmental and economic benefits to people and communities; (3) slow the conversion and segregation of environmentally and economically important private forests; and (4) continually improve FLP business practices.[77] These goals sound broad, but the Strategic Direction elaborates. For example, in promoting the strategic conservation of forests, the FLP looks for projects that contribute to "regional, landscape, or watershed-based efforts to protect important private forests, regardless of tract size."[78] Strategic conservation within the FLP's framework also means focusing on local conservation priorities, as determined by the state assessment plans, and attempting to "strategically link to other protected lands to create a cumulative conservation effect."[79]

What qualifies as benefits to people and communities under goal 2 of the Strategic Direction is further narrowed to the following three goals: protecting waters; providing economic activities; and conserving fish, wildlife, plants, and unique forest communities.[80] Additionally, it is a USFS priority to protect state and private lands that are adjacent to or within national forests because they often interact as a single ecosystem. Poor forest health of private inholdings or adjacent lands has the potential to damage the health of national forests by subjecting them to insect problems or wildfire.[81]

The Strategic Direction's "guiding principles" are as follows: striving for permanent protection of important forestlands; commitment to constant improvement; use of state assessment plans as a source of local input; use of partnerships to purchase CEs or fee-simple forest properties; and encouragement of professional forest management and traditional forest uses that can coexist with the conservation purposes of a CE.[82] While the Strategic Direction encourages traditional forest uses, provided the users create multiple use management plans and use best management practices, "priority is given to lands which can be effectively protected and managed and that have important scenic or recreational values; riparian areas; fish and wildlife values, including threatened and endangered species; or other ecological values."[83]

Though its guiding principles are somewhat broad, the FLP's selection and acquisition of CEs are very intentional and specifically planned. The FLP uses a competitive ranking process involving state and federal committees to select CEs that best meet the program's goals.[84] The FLP is also deliberate and specific with respect to the resources it intends to protect. It identifies resources that are of national importance, like water, but also recognizes the importance of local input to identify resources of local importance, like lands connecting or expanding vital tracts or ecosystems.

Originally, the USFS negotiated the purchase of easements and fee-simple properties directly.[85] In 1996, Congress amended federal law to allow the USFS to make grants to states to allow the states to undertake the acquisitions themselves.[86] Currently, FLP funds are allocated via cost sharing with states for project or administrative grants. Under this system, grant applicants must provide at least 25 percent of the project cost and may not derive their portion of the cost from other federal funding.[87] Often the cost share is made in the form of a donation by the landowner. All projects that receive FLP funds are required to report their accomplishments in the Forest Legacy Information System to measure performance over time.[88] The FLP purports to be a great success, having conserved over 2.3 million acres of private forestland, and experiencing "solid growth in terms of budget."[89] According to the USFS, "[t]he program has been successful due to the clear national need for a conservation program that focuses on forests and to the hard work of state, local, and nonprofit partners to produce effective results."[90]

B. National Resources and Conservation Service and CEs

NRCS's broad mission is to provide farmers and ranchers with financial and technical assistance to promote conservation and sustainable agricultural activities.[91] Like the direct production benefits used to promote forest regeneration projects by private forestland owners, farm owners can apply for direct production benefits based on the crops they produce.[92] However, like the section 170(h) deduction, agricultural subsidies have become infamous for abuse.[93] Agricultural subsidies are criticized for harming the environment, disturbing the free market, and being a high cost to the government.[94] While it could be argued that CEs also disturb the free market,[95] NRCS's use of CEs can be seen as a less controversial way to allocate federal resources and, if done properly, with less potential for abuse.

Agricultural Conservation Easement Program

The most recent Farm Bill, the Agriculture Act of 2014, consolidated the Wetlands Reserve Program, the Farm and Ranch Lands Protection Program, and the Grassland Reserve Program into the Agricultural Conservation Easement Program (ACEP).[96] ACEP facilitates the acquisition of two types of CEs: agricultural land easements and wetland reserve easements.[97] Under the agricultural land easements component of ACEP, NRCS provides matching funds to state and local government, tribes, and quali ed conservation organizations to help them purchase easements protecting agricultural lands in perpetuity.[98] In contrast, under the wetland reserve easements component, NRCS purchases easements directly from landowners to protect the wetlands and associated lands either in perpetuity or for 30 years.[99]

Unlike the conservation purposes tests under section 170(h), the eligibility requirements for ACEP CEs are extensive and speci c. On a program-wide level, the following lands are ineligible: federal lands except those held in trust for Indian tribes; state-owned lands; land subject to an existing easement; and lands that have on-site or off-site conditions that would undermine the purpose of the program.[100] ACEP further limits eligibility within each of its two programs.

Another limiting factor is that available funding is based on the resource in question. Wetland and grassland easements, for example, are eligible for more funding from NRCS and require less from state or local organizations.[101] For agricultural land easements, ACEP requires local cooperative agreements, which lay out the procedures for purchasing the CEs, the speci c requirements for every easement, and the terms that must be included in the easements ("minimum deed terms").[102] The minimum deed terms help to ensure consistency in the funding, drafting, administration, enforcement, and interpretation of the CEs, including monitoring and reporting requirements, which are useful in enforcement, though not addressed in this article.[103]

Moreover, after eligibility is established, ACEP prioritizes projects by creating a ranking system for funding, in which parcels compete for assistance during a given funding period.[104] The national ranking criteria are quantitative and include factors such as percent of prime, unique soil grazing uses, and related conservation values to be protected; percent of cropland, pastureland, grassland, or rangeland in the overall parcel; ratio of the farm's overall size to the average size in the particular area; population growth in the area; proximity to other protected land; whether adjacent land is currently enrolled in a CE program or was previously enrolled in the past programs; and "other similar criteria."[105]

On a state level, state conservation and technical committees may consider "the location of a parcel in an area zoned for agricultural use, the eligible entity's performance in managing and enforcing easements, multifunctional bene ts of agricultural land protection, geographic regions where enrollment of particular lands may help achieve program objectives, and diversity of natural resources to be protected."[106] Because they will vary by locality, the state criteria outlined in the national rule document are more general.[107] The ranking system can also assign negative points for organizations that are delinquent on annual monitoring reports for CEs.[108]

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

V. Resource-Specific Land Trusts

Land trusts with resource-specific missions more closely mirror the federal programs discussed above. Nonprofit conservation organizations, most commonly state or local land trusts, acquire and hold CEs both within and outside of the federal programs. As of 2010, there were reportedly 1723 active land trusts, 4 of which were categorized as national land trusts.[109] The vast majority of land trusts appear to be location-specific, rather than resource-specific, meaning their mission is conservation generally in the place where they are located.[110] While these "general conservation" land trusts appear to be the most common, some local and national nonprofits accept and hold CEs only in accordance with their more resource-specific missions.

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

> The Conservancy today only will accept donations of conservation easements or purchase an easement on lands where significant conservation benefits are obtained . . . The Conservancy has often turned down offers of donations of conservation easements on lands that do not fulfill The Conservancy's mission, even though the lands may have important ecological values.[111]

Some land trusts even further narrow their missions with respect to specific resources. For example, Ducks Unlimited and its affiliate Wetlands America Trust implement and hold CEs to "ensure that large acreages of wetlands, riparian habitats and important uplands will be preserved for the benefit of waterfowl, other wildlife and the enjoyment of future generations."[112] Ducks Unlimited does not accept all CEs; rather, it concentrates its conservation efforts on areas of particular importance to waterfowl.[113] The Humane Society's Wildlife Land Trust limits its CEs to lands that can serve as permanent sanctuaries for wildlife.[114] In addition to screening potential properties for wildlife values, such as critical habitat or habitat linkages, all Wildlife Land Trust CEs prohibit recreational and commercial hunting or trapping, as well as development within protected areas.[115] Alabama's Freshwater Land Trust also narrows its mission and purpose for the CEs it holds to lands that are "critical for the protection of rivers and streams and that provide recreational opportunities for the community."[116] Another example, Vital Ground, is a land trust whose mission is "to protect and restore North America's grizzly bear populations by conserving wildlife habitat."[117] Like the federal programs, Vital Ground is "both selective and strategic" in its conservation strategies to connect fragmented lands that serve as important grizzly habitat.[118]

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

VI. Common Tools Used by Resource-Specific Programs

Resource-specific CE implementation could begin to address the two common forms of abuse of the section 170(h) deduction outlined above. The resource-specific USDA and land trust CE acquisition programs analyzed above overlap in their common use of National Environmental Policy Act (NEPA)-like front-end procedural mechanisms to acquire CEs. The use of these mechanisms is important because it does two major things that can minimize or reduce valuation abuse and failure to meet the conservation purposes test of section 170(h): (1) promote greater front-end consideration of each CE; and (2) use and build specific institutional knowledge within the CE implementation organizations. The following section discusses how the above programs promote these two values and, in turn, increase the likelihood of CEs that ensure conservation, while decreasing the likelihood for abuse.

A. Front-end Procedural Tools

Existing environmental laws act as a model, not only by incorporating resource speci cation, but also by recognizing the importance of forethought. NEPA, for example, intentionally imposes foresight requirements on government actions.[119] The Land Trust Alliance (LTA), the national umbrella organization for the nation's land trusts, has also addressed the need for forethought speci cally with respect to CEs. The LTA promotes "Strategic Conservation . . . a process that produces tools to aid decision makers in identifying, prioritizing, pursuing, and protecting those speci c tracts of land that will most effectively and ef ciently achieve the land trusts' mission."[120] For example, strategic plans for organizations that focus on freshwater resources help those land trusts target the protection of critical stream corridors, watersheds, and water supplies.[121] Strategic plans may also call for the mapping of areas to delineate places with low or high conservation values.[122] Front-end strategizing has also been coined as "green infrastructure," explained by the Conservation Fund as:

> [s]olutions that government leaders, conservationists, and others need to create systemic and lasting change—in major cities, watersheds, and even multi-state regions. Strategic conservation makes economic sense—establishing an environmental legacy for future generations in the most ef cient and cost effective manner.[123]

Like NEPA and the LTA's recommendations above, resource-speci c CE programs promote more intensive front-end planning to strategize resource use. Under NEPA, agencies that undertake a major federal action must take a "hard look" at the potential consequences at the earliest practicable time.[124] Broadly speaking, a "major federal action" includes signi cant allocations of federal funding or decisions made by federal agencies such as grants or denials of permits.[125] In contrast, under section 170(h) signi cant amounts of federal funding are allocated to CE acquisition without suf cient front-end procedural hurdles. The success of the programs analyzed in this article is partially due to promotion of NEPA-style front-end planning through prioritization of resource distribution and stringent eligibility requirements.

Resource Type Prioritization

Rather than accepting most or all CEs offered, the resource-speci c programs analyzed above prioritize the types of resources they aim to protect. For example, a major focus of the redesign of both of the federal programs was careful allocation of limited federal funding.[126] Both ACEP and the FLP prioritize their CE funding based on a competitive ranking system.[127] In this way, these systems are designed to ensure that the CEs they fund are best suited to accomplish the forestland, agricultural land, and wetland protection purposes of the programs.[128] In both programs, the amount of federal funding allocated depends not only on the reduction in the fair-market value of the property in question, as is the case with respect to section170(h), but may also depend on the resource being protected.

Land trusts with resource-speci c missions discussed above also wisely prioritize their CE acquisitions to meet their resource-speci c conservation goals. For example, the Alabama Freshwater Land Trust prioritizes its CE acquisitions based on freshwater resources and on location—aiming to meet its freshwater resource-speci c goals in particular counties.[129] Vital Ground is in some ways even more speci c, evaluating an individual bear's habitat to select geographically appropriate CEs.[130] The Humane Society's Wildlife Land Trust prioritizes based on speci c habitat values of land, rather than tract size.[131]

Hard-line Eligibility Requirements

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

In addition to the Farm Bill's general restrictions on the USDA, both the NRCS and USFS's eligibility requirements to participate in CE programs are based on resources. If states wish to participate in the FLP, they must submit an Assessment of Need showing that the resources are both important and threatened.[132] If an entity wishes to participate in ACEP or the FLP, it must provide a cash match to the government's contribution.[133] Not only does cash matching restrict the sheer number of eligible projects, it shows local investment in the project. This automatically decreases the likelihood of hostility toward federal control from local parties and increases the chances of success through local help with the process. Finally, unlike ACEP and the FLP, section 170(h) is not subject to cutbacks in federal funding, despite it costing federal taxpayers an estimated $1.5 billion per year.[134] Thus, the ACEP and FLP hard-line eligibility requirements weed out potential problem CEs before requiring analysis by the agencies of individual properties and posing high costs on the federal government, acting as an effective procedural hurdle without requiring much additional work on the part of the agencies.

B. Institutional Knowledge

In addition to prompting front-end planning, the other important component of resource specification is that it ensures each organization acquiring CEs will have increased institutional knowledge with respect to its resource of choice. Greater institutional knowledge increases resilience and the capacity to adapt over time, important here because, hopefully, CEs will preserve land in perpetuity.[135] More resilient organizations are better suited to select and draft more resilient CEs that will better withstand litigation and are more likely to implement successful long-term conservation. For obvious reasons, the USFS and NRCS almost certainly have a greater knowledge of what constitutes successful forest or farmland conservation than a small local land trust. However, the entire CE system does not need to be in federal hands to ensure more extensive institutional knowledge. The USDA programs and the resource-specific land trust programs discussed above have similar qualities that promote institutional knowledge. In addition to specifying resources, which will increase interaction with and knowledge of those resources, the programs are intentional in their incorporation of local knowledge, which ensures not only increased success with respect to a resource generally, but also increases the likelihood of success with respect to specific projects, as shown below.

Localized Approaches

This article promotes some national uniformity, but recognizes that implementation of localized approaches is also important because local institutional knowledge can help to address some of the national programs' issues. Local input within the resource-specific land trusts is almost second nature, but still important. Vital Ground, for example, approaches CEs on a case-by-case basis to look at specific bear habitat and must inherently work with local partners to gain knowledge to properly address that habitat.[136] However, even within the federal programs, in addition to resource-specific CE implementation, the programs gravitate toward or incorporate local input. In the Cooperative Forestry redesign, the USFS required states to complete and submit statewide assessment strategies of forest resources. Additionally, if states wish to participate in the FLP, they must also submit an Assessment of Need.[137] In ACEP, cooperative agreements with local agencies are required for all CEs. Both the FLP and ACEP's ranking programs require that projects are ranked first at a state level, so that projects of great local importance are funded, or funded first. Thus, even the large federal programs are careful to utilize specific local knowledge. Use of state ranking systems as a foundational source of local input also provides strength to these programs by ensuring that they are developed with the best knowledge of local conditions and local conservation needs.

VII. Recommendations

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

Thus, to be eligible for a federal deduction for the donation of a CE, both the grantor and grantee should be required to fulfill something equivalent to the NEPA "hard look" standard. This article suggests two potential front-end resource-specific mechanisms to instigate federal oversight and uniformity: (1) minimum deed terms; and (2) federal resource agency approval.

A. Minimum Deed Terms

As the federal purchase programs and many state CE purchase programs already do, all taxpayers should be required to use minimum deed terms in their section 170(h) deductible CEs. First, minimum deed terms would help to create uniformity and avoid potential CE drafting problems or loopholes, which is why they are most often used. Second, minimum deed terms could force CE implementation to be resource-specific. For example, the ACEP minimum deed terms impose different restrictions for agricultural viability versus grasslands or grazing uses.[138] The minimum deed terms require that different types of easements impose different terms for roads, permeable surfaces, and significant features, to name a few, depending on what is necessary to protect the resource in question.[139] In addition, minimum deed terms ensure that terms that should not vary from easement to easement (such as the terms relating to possible extinguishment of the easement and reimbursement of the federal government for its investment in such event) are uniform across the nation.

B. Federal Resource Agency Approval

Tax reform should also require that CEs donated to nonprofit land trusts or state or local government entities receive approval from the appropriate federal resource management agency to be eligible for the section 170(h) deduction. Thus, a landowner who wants to claim a deduction for the donation of a CE protecting farmland as open space would seek approval from NRCS, a CE protecting wildlife would need to be approved by the U.S. Fish and Wildlife Service (USFWS), and so on. By definition, federal resource agencies like NRCS, USFS, and USFWS employ experts concerning agricultural lands, forestlands, and wildlife, respectively. Additionally, these agencies have personnel that are experts with respect to CEs that are used to protect these resources, by way of ACEP and the FLP's, or USFWS's existing conservation programs.[140]

Thus, NRCS, USFS, and USFWS are qualified to evaluate conservation purposes, and, because they typically fund easement acquisitions, they also are qualified to evaluate the economic value of new easements. While this oversight would require more agency staff time, any increased cost to the agency would likely be less than the current cost of the federal tax program.[141] This oversight would incorporate the above similarities of successful programs by continuing to benefit from the local knowledge of the state and local land trusts and government entities, while enhancing front-end planning through use of the institutional knowledge and resource-specific expertise of the relevant federal agency.

VIII. Conclusion

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

Resource specification is an important part of the path toward the resolution of these issues. It uses a framework already created though decades of building on the common law by environmental and natural resources laws; and it is already used by federal resource protection programs. Resource specification creates more deliberate CE use by encouraging front-end planning and building institutional knowledge, which increase the likelihood that CEs will conserve more efficiently and with less potential for tax abuse.

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

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Endnotes

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

2 Elizabeth Byers & Karen Marchetti Ponte, Conservation Easement Handbook 7 (2d ed. 2005).

3 *Id.*

4 *Id.*

5 Frederico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and Complicated Mosaic of Law*, 1 J. L. Prop. & Soc'y 109, 134 (2015).

6 *See supra* note ii.

7 I.R.C. § 170(f)(3)(A), (B)(iii).

8 *Id.* § 170(h)(1)(A), (2)(C).

9 *Id.* § 170(h)(1)(B), (3).

10 *Id.* § 170(h)(1)(C), (4).

11 *Id.* § 170(h)(5).

12 *See, e.g.*, Browning v. Comm'r, 109 T.C. 303, 1 (1997) (holding that plaintiffs were entitled to claim a charitable contribution for the bargain sale of an easement to the county government).

13 Treas. Reg. § 1.170A-14(h)(3)(i).

14 Conservation Easement Handbook, *supra* note 2, at 11–12.

15 Uniform Law Comm'n, *Legislative Fact Sheet—Conservation Easement Act*, *available at* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation %20Easement*%20Act.*
16 *Id.*
17 142 T.C. 140 (2014).
18 Dana Joel Gattuso, *Conservation Easements: The Good, The Bad, and the Ugly*, Nat'l Ctr. Pub. Pol'y Res. (May 2008), *available at* http://www.nationalcenter.org/NPA569.html.
19 The term "abuse" refers to CE users' cashing in on huge tax bene ts without providing the intended conservation bene t or any burden on their land, either by overvaluing or under-protecting the land at issue. The abuses are commonly recognized by the IRS and by legal and tax professionals. *See, e.g.*, Joe Stephens, *IRS Starts Team on Easement Abuses*, Wash. Post, June 9, 2005, at A06.
20 Conservation Easement Handbook, *supra* note 2, at 23.
21 Treas. Reg. § 1.170A-(h)(3)(i).
22 *Id.* § 1.170A-(h)(3)(ii).
23 Browning v. C.I.R, 109 T.C. 303, 1 (1997) (holding that plaintiffs could introduce evidence of fair market value before and after CE donation where CEs sold as part of a county's bargain sale program did not provide accurate valuation).
24 Trout Ranch, L.L.C. v. C.I.R, 493 F. App'x 944, 955 (10th Cir. 2012) (af rming tax court valuation using the fair-market-value before and after method where comparables were "scarce" or were bargain sales).
25 Treas. Reg. § 1.170A-(h)(3)(i).
26 107 T.C.M. (CCH) 1408 (T.C. 2014).
27 *Id.* The court eventually allowed the taxpayer to claim a $19.9 million deduction, but the case is now on appeal.
28 *See, e.g.*, Kiva Dunes, L.L.C. v. C.I.R*.,* 97 T.C.M. (CCH) 1818 (T.C. 2009) (sustaining a $28.6 million deduction for the donation of a CE on a 140-acre golf course); Herman v. C.I.R., T.C. Memo. 2009-205 (disallowing a $21.8 million deduction claimed with regard to a façade easement restricting use of some of the development rights above a historic building on Fifth Avenue in New York City); Seventeen Seventy Sherman St. v. C.I.R., T.C. Memo. 2014-124 (disallowing a $7.1 million claimed deduction for the donation of interior and exterior easements on a shrine in downtown Denver); Belk v. C.I.R., 774 F.3d 221 (4th Cir. 2014) (af rming the Tax Court's disallowance of a $10.5 million deduction claimed with regard to a conservation easement encumbering a 184-acre golf course); Mountanos v. C.I.R., T.C. Memo. 2014-38 (disallowing a $4.6 million deduction claimed with regard to remote rugged undeveloped land in Lake County, California).
29 *See supra* note 1.
30 *See* Treas. Reg. § 1.170(d)(4)(v) (prohibiting deductions for easements that would permit a degree of development that would interfere with scenic qualities or governmental purpose of the easement); *Id*. § 1.170(e)(2), (3) (prohibiting deductions for CEs that would allow for the destruction of an important resource unless destruction of one resource is necessary to protect the resource the CE is intended to protect); *Id*. § 1.170(g)(1) (requiring that a CE prevent uses of the subject land that are inconsistent with the conservation purposes of the donation).
31 126 T.C. 299 (T.C. 2006).
32 98 T.C.M. (CCH) 197 (T.C. 2009).
33 *Turner*, 126 T.C. at 301.
34 *Id.* at 313.
35 *Id.* at 317.
36 98 T.C.M. (CCH) 197 (T.C. 2009).
37 *Id.* at 9.
38 *Id.* at 11.
39 471 F.3d 698, 708 (6th Cir. 2006).
40 *Id.* at 700.
41 *Id.* at 709.
42 *Butler*, 103 T.C.M. (CCH) 1359 at 4.
43 *Id.*
44 *Id.*
45 *Id.* at 9.
46 *Id.* at 35.
47 *USDA Mission Areas: Natural Resources and Environment*, U.S. Dep't of Agric. (May 28, 2013), http://www.usda.gov/wps/portal/usda/ usdahome?contentidonly=true&contentid=missionarea_NRE.xml.
48 *Id.*
49 *See generally About: Regulations and Policies*, U.S. Forest Serv., http://www.fs.fed.us/about-agency/regulations-policies.
50 *2008 Farm Bill*, U.S. Comm. on Agric., Nutrition, & Forestry, http://www.ag.senate.gov/issues/2008-farm-bill.
51 *Id.*
52 *Id.*
53 *Id.*
54 *Agriculture Reform, Food and Jobs Act of 2012*, U.S. Comm. on Agric., Nutrition, & Forestry, http://www.ag.senate.gov/issues/agriculture-reform-food-and-jobs-act-of-2012.
55 *Forest Legacy Plan: 5-Year Strategic Direction*, U.S.D.A. Forest Serv., FS-841 App. A. (2005), *available at* http://www.fs.fed.us/spf/coop/library/ p_

strategicdir.pdf [hereinafter *FLP Strategic Direction*]. Although the Strategic Direction was authored in 2005, it is the most recent update currently on the USFS website concerning the conceptual goals of the Forest Legacy Program.
56 *Id.* at 3.
57 John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm . . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 Fordham Envtl. L.J. 691 (1997).
58 *Id.*
59 16 U.S.C. § 2012 et seq. (2014).
60 *Forest Legacy Program Implementation Guidelines*, U.S.D.A. Forest Serv. 2 (June 30, 2003), http://www.fs.fed.us/spf/coop/library/fpl_guidelines.pdf.
61 *Id.*
62 *Cooperative Forestry*, U.S. Forest Serv. (July 15, 2014), http://www.fs.fed.us/spf/coop/.
63 *Id.*
64 *State and Private Forestry Redesign*, U.S. Forest Serv. (Feb. 9, 2015), http://www.fs.fed.us/spf/redesign/ [hereinafter *Redesign].*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.* The USFS redesign webpage states that forests are being permanently converted to non-forest uses at a rate of one million acres per year.
69 *Id.*
70 *Forest Legacy Program*, U.S. Forest Serv., http://www.fs.fed.us/cooperativeforestry/programs/loa/ p.shtml.
71 Agricultural Reform, Food, and Jobs Act of 2012: Section by Section Summary 44 (2012).
72 *Forest Legacy Program*, U.S. Forest Service, *supra* note 70.
73 *National S&PF Authorities and Guidance* (May 11, 2011), http://www.fs.fed.us/spf/redesign /spf%20 authorities.pdf.
74 *Id.*
75 Final Amended Forest Legacy Program Implementation Guidelines, USDA Forest Service Cooperative Forestry 8 (June 30, 2003, amended Dec. 21, 2011); *see also Guide to the Forest Legacy Program*, The Land Trust Alliance, http://www.landtrustalliance.org/ policy/public-funding/forest-legacy-guide.
76 *FLP Strategic Direction*, *supra* note 55 at app. A.
77 *Id.*
78 *Id.*
79 *Id.* at 6.
80 *Id.* at 7.
81 *See* Robert L. Glicksman, *Ecosystem Resilience to Disruptions Linked to Global Climate Change: An Adaptive Approach to Federal Land Management*, 87 Neb. L. Rev. 833, 897 (2009) (noting that problems faced by ecosystems will not "respect the political boundaries separating private from state or federal land").
82 *FLP Strategic Direction*, *supra* note 55 at 6.
83 *Id.*
84 *See Forest Legacy Program Users' Guide*, U.S.D.A. Forest Serv.: Cooperative Forestry, http://www.fs.fed.us/cooperativeforestry/library/ p_usersguide.pdf.
85 *Id.*
86 *Forest Legacy Program*, U.S. Forest Service, *supra* note 70; *Guide to the Forest Legacy Program,* The Land Trust Alliance, *supra* note at 75.
87 *Guide to the Forest Legacy Program*, The Land Trust Alliance, *supra* note 75.
88 *FLP Strategic Direction, supra* note 55 at 8.
89 *Id.* at 4; *Forest Legacy Program*, U.S. Forest Service, *supra* note 70.
90 *FLP Strategic Direction*, *supra* note 55 at 4.
91 *About NCRS*, U.S.D.A. Natural Res. Conservation Serv., http://www.nrcs.usda.gov/wps/ portal/nrcs/main/national/about/.
92 Marcelo Ostrea, *How U.S. Agricultural Subsides Harm the Environment, Taxpayers, and the Poor*, Nat'l Ctr. for Pol'y Analysis (Aug. 7, 2013), *available at* http://www.ncpa.org/pub/ib126.
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94 Ostrea, *supra* note 92.
95 *See* Vandlik, *supra* note 57.
96 *2014 Farm Bill*, U.S.D.A. Natural Res. Conservation Serv., http://www.nrcs.usda.gov/ wps/portal/nrcs/detail/national/programs/farmbill/?cid=stelprdb1242382.
97 Agricultural Conservation Easement Program (ACEP) Rule (Feb. 27, 2015), http://www. regulations.gov /#!docketDetail;D=NRCS-2014-0011 [hereinafter ACEP Final Rule]; *Summary of the Agriculture Reform, Food, and Jobs Act of 2013,* U.S. Senate Comm. on Agric. Nutrition & Forestry, http://www.ag.senate.gov/issues/farm-bill.
98 ACEP Final Rule, *supra* note 97.
99 *Id.*
100 *Id.*
101 ACEP Final Rule, *supra* note 97.

102 *Id.* Parties or entities under the Cooperative Agreements may be, "Indian Tribe, state government, local government, or a nongovernmental organization that has an agricultural land easement program. . ."
103 *See Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. Dep't Agric., *available at* http://www.nrcs.usda.gov/ wps/portal/nrcs/main/national/programs/easements/acep/.
104 ACEP Final Rule, *supra* note 97.
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *2010 National Land Trust Census*, The Land Trust Alliance, https://www.landtrustalliance.org/land-trusts/land-trust-census.
110 *Find a Land Trust,* The Land Trust Alliance, http://www.landtrustalliance.org/ nd-land-trust. *See, e.g.*, *Mission Statement*, The Montana Land Reliance, http://mtlandreliance.org/about-us/mission-statement/ ("The mission of The Montana Land Reliance is to partner with landowners to provide permanent protection for private lands that are signi cant for agricultural production, forest resources, sh and wildlife habitat, and open space.").
111 *Conservation Easements, Landowners with Whom The Conservancy Negotiates Easements*, The Nature Conservancy, http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml (explaining that the Nature Conservancy "uses a science-based planning process for each ecoregion across the world to assemble portfolios of conservation lands that collectively represent viable examples of all native species and plant communities within that ecoregion").
112 *Conservation Easement Program*, Ducks Unlimited, http://www.ducks.org/conservation/land-protection/conservation-easements.
113 *Id.*
114 *Qualifying Criteria,* Humane Soc'y Wildlife Land Trust, http://www.hswlt. org/how-you-can-help/protect-your-land/qualifying criteria.html?credit=web_id330717 619 [hereinafter Humane Soc'y].
115 *Conservation Options for Landowners*, Humane Soc'y Wildlife Land Trust, http://www.wildlifelandtrust.org/how-you-can-help/protect-your-land/conservation-options-for.html.
116 *About Us*, Freshwater Land Trust, http://www.freshwaterlandtrust.org/about-us-2/ [hereinafter *Freshwater Land Trust*].
117 *Our Vision*, Vital Ground, http://www.vitalground.org/about/about-us/foundation-info/ [hereinafter *Vital Ground*].
118 *Id.*
119 Mark A. Chertok, *Overview of the National Environmental Policy Act: Environmental Impact Assessments and Alternatives*, SR045 ALI-ABA 757, 775 (2005).
120 *Strategic Conservation*, The Land Trust Alliance, http://www.landtrustalliance.org/conservation/ strategic-conservation.
121 *Id.*
122 *Id.*
123 *Strategic Conservation Planning*, The Conservation Fund, http://www.conservationfund.org/what-we-do/strategic-conservation-planning.
124 Chertok, *supra* note 119, at 775.
125 *Id.*
126 *Redesign*, *supra* note 64.
127 ACEP Final Rule, *supra* note 97; *Redesign*, *supra* note 64.
128 *Id.*
129 Freshwater Land Trust, *supra* note cxvii.
130 *Vital Ground*, *supra* note 117.
131 Humane Soc'y, *supra* note 114.
132 *Redesign*, *supra* note 64.
133 ACEP Final Rule, *supra* note 97.
134 Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 Utah Envtl. L. Rev. 69 (2013).
135 *See generally* Fitrek Burkes & Nancy Turner, *Knowledge, Learning, and the Evolution of Conservation Practice for Social-Ecological System Resilience*, 34 Human Ecology 4, 479–94 (Aug. 2006).
136 *Vital Ground*, *supra* note 117.
137 *Redesign*, *supra* note 64.
138 *See Agricultural Conservation Easement Program Agricultural Land Easement Minimum Deed Terms for the Protection of Agricultural Use*, U.S. Dep't Agric., *available at* http://www.nrcs.usda.gov /wps/portal/nrcs/main/national/programs/easements/acep/.
139 *Id.*
140 USFWS implements, or partners with other agencies and organizations to implement wildlife conservation programs based on a particular species of need, endangered species, or species that depend on particular habitats. *See Partnerships in Conservation*, U.S. Fish & Wildlife Serv., *available at* http://www.fws.gov/endangered/what-we-do/fws-programs.html.
141 This would be especially true if the federal agencies CE oversight was not subject to additional statutory requirements (e.g., NEPA, ESA, and others).