WHAT RUINED CONSERVATION EASEMENTS? RENEWING EFFORTS TO BRING BACK GOALS OF THE PAST

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This Note takes the next step in changing conservation easement legislation for the better by diving into the purpose of why these are needed and how they can be used to maximize the social value of this tax break. New legislative changes have been implemented with the 2023 Conservation Easement Program Integrity Act, proposals to I.R.C. §§ 6011 and 6111, and IRS Notice 2023-30. This Note attempts to balance the social benefit conservation easements with the tax break offered for their creation. This Note makes three contributions to conservation easement literature. First, the taxable benefits post-legislation is sized up to determine the economic incentives for various groups of taxpayers. Second, the enforcement status of controlling conservation easements is addressed. Third, this Note proposes a focus for future legislation to narrow the language for conservation easements to enforce how land is being protected.

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INTRODUCTION

There are many ways to plan for reducing what you owe in tax season—some will find a tax advisor or pick out an organization to help, but others seek out tax shelters. A landowner looking for tax savings could also have a passion for conservation and that taxpayer's goals might align if they just so happen to own a backcountry slice of land that provides a home to a

local favorite western gray squirrel—a species threatened with extinction from wildfires destroying its habitat.[1] Lucky for the landowner, they can legally protect their furry friend through a conservation easement while also getting a tax break.

A conservation easement is a legal agreement between a landowner and the state Department of Natural Resources (DNR) or another recognized organization that permanently limits the land uses to protect the land's natural resources availability for habitat, agricultural, forest, recreational, or open-space use.[2] Conservation easements are used as a tool for preserving unique ecology and nature while also providing the donor tax benefits.[3] Federal and state governments reward landowners who decide to donate a conservation easement by providing tax incentives for the donor to lower their federal income taxes, federal gift taxes, federal estate taxes, and state property taxes.[4] At least, that's the idea.

Another tax planning idea was to use the sheltering tactic of a "syndicated conservation easement," where several investors would be involved in the buy-sell transaction of conservation easement membership interests to provide a taxpayer with a tax break.[5] The syndicated

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[1] Courtney Flatt, *Western Gray Squirrels Now Classified as Endangered Species in Washington State*, OPB (Nov. 19, 2023), https://www.opb.org/article/2023/11/19/western-gray-squirrel-endangered-species-washington-state.
[2] *Conservation Easements*, MINN. DEP'T OF NAT. RES., https://www.dnr.state.mn.us/lands_minerals/conservation-easements.html.
[3] Anson H. Asbury, *Understanding the Conservation Easement Tax Deduction*, 63 FED. LAW. 26, 27 (Mar. 2016).
[4] Maureen Rudolph & Adrian Gosch, *A Practitioner's Guide to Drafting Conservation Easements and the Tax Implications*, 4 GREAT PLAINS NAT. RES. J. 143 (2000).
[5] Jay Adkisson, *Unhappy Times for Syndicated Conservation Easements*, FORBES (Nov. 19, 2023), https://www.forbes.com/sites/jayadkisson/2023/11/19/unhappy-times-for-syndicated-conservation-easements (explaining what syndicated conservation easements are); Sarah Adkisson, *What Could Be Next for Syndicated Conservation Easements?*, BLOOMBERG TAX (Dec. 5, 2022), https://news.bloombergtax.com/tax-insights-and-commentary/what-could-be-next-for-syndicated-conservation-easements.

conservation loophole worked with an investor targeting idle land and hiring an appraiser.[6] The appraiser would aggressively claim that the land had "previously unrecognized development value—perhaps for luxury vacation homes or a solar farm."[7] A high-value land appraisal created an inflated market value price that the investor used to create a conservation easement at the heightened value.[8] In effect, this created a quick profit from a massive conservation easement deduction through charitable write-offs "that were four to six times their investment" and reached millions of dollars.[9]

The 2023 Conservation Easement Program Integrity Act was recently passed with language addressing conservation easements.[10] This is because the Internal Revenue Code (IRC) provisions authorized deductions from donations "with questionable preservation value to the public and high-profile instances of abuse."[11] There is a difference between well-meaning taxpayers utilizing a tax break for a genuine piece of land versus wealthy citizens taking a piece of environmentally neutral land, or even land actively bad for the environment, under the guise of conservation.[12] After countless audits, cumbersome threatened penalties, and criminal prosecutions of the users of syndicated conservation easements, this new legislation attempts to

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[6] Peter Elkind, *How Congress Finally Cracked Down on a Massive Tax Scam*, PROPUBLICA (Jan. 9, 2023), https://www.propublica.org/article/syndicated-conservation-easements-tax-scam-irs-biden.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021).
[11] Andrew Flynn, *Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection Through Internal Revenue Code Section 170(h)*, 40 STAN. ENV'T. L.J. 3 (2021).
[12] Norman Ho, *Ending the Exceptionalism of Conservation Easements*, 41 VA. ENV'T L.J. 166, 183 (2023) (statutory language for conservation easements can "restrict the landowner only to farming the land [which] can also cause great harm to natural ecosystems due to unending, constant resource exploitation by the farmer-landowner").

inhibit syndicated conservation easements while leaving genuine conservation easements intact.[13]

This new legislation changes the way aspects of conservation easements are regulated and attempts to fill in gaps that allowed abuse as tax shelters. The impact on conservation easements leads to a new exploration of how courts should apply the purpose of conservation in practice and what effect this legislation has on the procedural processes of conservation easement cases.[14]

This Note will investigate the impact of the recent conservation easement legislation and explore how the Internal Revenue Service (IRS) and the Department of the Treasury can better facilitate the purpose of conservation to address the social benefits these easements should provide.[15] With the legislation in place, this Note will address the non-abusive conservation easements that do not meet the social value and purposes of conservation easements that the tax break is given for.

In Part I of this Note, a foundational knowledge base introduces context to understand the new legislation. To determine whether taking the approach this new legislation has passed will address the problems that conservation easements have run into, this Note will analyze the history of policy goals through time from the beginning of conservation easements to the current state with predictions on what the new legislation attempts to do. Further, this Note will think back to the goals and purpose of conservation easements and determine whether that goal is still being achieved before and after this regulatory framework.

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[13] Elkind, *supra* note 6.
[14] *Omnibus Bill Limits Conservation Easements, But the Long-Requested Safe-Harbor Does Not Apply to Current Cases*, JD SUPRA (Dec. 21, 2022), https://www.jdsupra.com/legalnews/omnibus-bill-limits-conservation-3682506.
[15] *See id.* (explaining prospective effects of the conservation easement legislation changes).

Part II will analyze the changes that the legislation has made in the landscape of conservation easements. First, the analysis will consist of a deeper dive into three recent regulatory changes—the 2023 Conservation Easement Program Integrity Act, proposals to I.R.C. §§ 6011 and 6111, and IRS Notice 2023-30. This Note will analyze the policy goals through the regulatory framework, environmental goals, and background of caselaw that builds the foundation of what conservation easements are meant to protect and how the new regulatory changes have made improvements but have not achieved a way to limit conservation easements for use within only their intended goals. For each piece of legislation, Part II will explore what gaps and policy goals the change intends to fill and how it is doing so.[16]

Part III will discuss how bringing conservation easements back to their original purpose will provide a greater social benefit and justification for the tax break. First, Part III will briefly address what taxable benefits of conservation easements remain post-legislation. Next, Part III will provide feedback on the enforcement ability to align conservation easements back to their original policy purposes. Finally, Part III will look at the new legislation's connection with the historic policy goals.

PART I: A BRIEF HISTORY OF CONSERVATION EASEMENTS

This Part introduces conservation easements as a general concept with how they work and what the policy goals will be. Section A illustrates the history of conservation easements,

[16] Rachel L. Sears & David E. Bowers, *Landowners Nationwide with a Conservation Easement Should Revise Deeds by July 24*, JONES FOSTER (May 15, 2023), https://jonesfoster.com/our-perspective/conservation-easement-irs-tax-deadline; Chris Gaarder, *No Time to Ease Up on Easements*, GEO. ENV'T L. REV.: BLOG (Mar. 30, 2023), https://www.law.georgetown.edu/environmental-law-review/blog/no-time-to-ease-up-on-easements.

how conservation easements are taxed, and what benefits they can provide.[17] Section B looks at the policy goals that conservation easements were made to accomplish and what they are ideally used for.[18] These policy goals will include non-tax goals of the environmental foundation and the political background of conservation easements. Finally, Section C frames the road to abusive conservation easements and what the abuse looks like.

A. WHAT IS A CONSERVATION EASEMENT?

Conservation easements are pieces of land protected from development through a taxpayer donation, and they arose from historical property law with the first "conservation easement" protecting the Boston Greenways in the late 1880s.[19] Popularity grew in the early twentieth century when the National Park Service built the National Park System.[20] The term "conservation easement" was coined later in the 1950s to describe the practice of purchasing land as scenic easements.[21] Individual states then began to promote easement-enabling statutes, with California and New York leading the way.[22] Soon after, in 1964, the IRS created a federal

[17] Rudolph & Gosch, *supra* note 4; Burnett R. Maybank, III, *Tax Implications of Conservation Easements in South Carolina*, 7 S.C. ENV'T L.J. 1 (1998).
[18] *Conservation Easement*, WECONSERVEPA LIBR., https://library.weconservepa.org/guides/19-conservation-easement.
[19] Flynn, *supra* note 11; Asbury, *supra* note 3, at 27.
[20] Flynn, *supra* note 11.
[21] Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. SOC'Y 107 (2015), https://digitalcommons.du.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1033&context=law_facpub.
[22] *Id*. at 116 (enacting in 1959 for California in Cal. Gov't Code §6953 and 1960 for New York in N.Y. Gen. Mun. Law §247).

tax benefit deduction for conservation easements.[23] In 1980, Congress officially incorporated the conservation easement into I.R.C. § 170(h).[24]

To create an easement, the taxpayer chooses an entity to hold the interest of the land and then has the property inventoried or appraised to define the land's value.[25] Qualifying properties are brought to a qualifying organization that will hold the land and accept the obligations of upholding the conservation purpose.[26] When the conservation easement is donated, permanently enforceable rights attach to the land, and although the landowner still owns the land, they agree to use that property only within the parameters the easement permits.[27]

After a conservation easement is donated, the qualifying organization holding it will perform periodic inspections of the land and take action if it finds that any of the conservation objectives for the donated land are not being respected.[28] To be clear, the landowner still has ownership of the property and may sell or convey the property as they see fit, but the conservation easement will still be attached to the land.[29] As an example, if a community has the goal of protecting their local river that brings beauty and wildlife values to the area, a conservation easement could be an appropriate tool to protect the water quality and surrounding forests for the next generation to prevent future development in the area.[30]

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[23] *Id*. at 116.
[24] *See* I.R.C. § 170(h) ("[Meaning] a contribution—(A) of a qualified real property interest, (B) to a qualified organization, (C) exclusively for conservation purposes.").
[25] *Id*.
[26] Asbury, *supra* note 3, at 29; WECONSERVEPA LIBR., *supra* note 18.
[27] Jessica A. Steinberg, *Appraising Conservation Easement Donations: The Need for More Uniform Standards and Greater Oversight*, 37 ENV'T L. REP. 10841 (2007).
[28] WECONSERVEPA LIBR., *supra* note 18.
[29] Steinberg, *supra* note 27.
[30] WECONSERVEPA LIBR., *supra* note 18.

In order to claim the tax benefits for the conservation easement as a "qualified real property interest," the restricted use of the land must be effective permanently in perpetuity, and the landowner should properly plan and consider any desires for future developments.[31] The land with conservation easements attached typically will have a lower fair market value, as there is a restriction of rights given up for that land, which is where the tax benefits come in to recuperate the value the landowner has given up.[32]

There are specific requirements of state and federal law that must be met to create an easement that will qualify for tax benefits through state acts. First, a taxpayer must qualify by creating an applicable conservation easement, and then the easement is taxed from tax statutes depending on the qualifications given under the state act for the specific type, size, and value of the conservation easement.[33] The conservation easement then carries out its conservation purpose for donation over time under the watch of the qualifying organization in exchange for the tax break.[34]

B. GOALS OF CONSERVATION EASEMENTS

Conservation easements are rationalized with a wide range of goals including the preservation of historic landmarks, wild rivers, flood prevention or control of farmland, water quality, woodlands, or other scenic conservation.[35] The broad statutory language of I.R.C. § 170(h)(4)(A) outlines what counts as a potential conservation easement that the land "will yield

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[31] Todd Etzler, *Conservation Easements In Real Estate Development*, 41 RES GESTAE 24, 25 (Dec. 1997).
[32] *How Much Does a Conservation Easement Reduce Property Values?*, REALIZED (Dec. 19, 2022), https://www.realized1031.com/blog/how-much-does-a-conservation-easement-reduce-property-values ("[G]et some cash out of their land holdings while retaining ownership.").
[33] Etzler, *supra* note 31, at 25.
[34] Asbury, *supra* note 3, at 27.
[35] Etzler, *supra* note 31, at 26; WECONSERVEPA LIBR., *supra* note 18.

a significant public benefit."[36] Examples of this include outdoor recreation or education of the public, preservation of open space, scenic enjoyment, or historically important land or structure.[37] Over time, newer goals have inspired the use of conservation easements on the grounds of combating climate change, restoring local ecosystems from the effects of higher temperatures, protecting carbon sinks (forests, grasslands, or wetlands that help remove carbon in the atmosphere), and linking isolated habitats.[38]

The political purpose of conservation easements considers the environmental goals and preservation efforts, but beyond that, the Senate Report addresses the balance needed for leaving unrestricted land development in areas too.[39] The way to strike this balance was to direct the preservation to "unique" and "significant" land, and the Senate found that conservation easements can accomplish that.[40] Another factor of particular importance for a conservation easement is that there are opportunities for access by the general public when an easement's benefit is justified by scenic enjoyment.[41]

C. WHAT LED TO THE ABUSIVE TRANSACTIONS?

Although conservation easements have good intentions, some taxpayers and corporations have found loopholes to abuse their use through tax sheltering.[42] Enforcement efforts of the

[36] Flynn, *supra* note 11.
[37] *Id*.
[38] Molly Teague, *Conservation Options: Conservation Easements, Flexibility, and the "In Perpetuity" Requirement of IRC § 170(h)*, 75 VAND. L. REV. 1573 (2022), https://wp0.vanderbilt.edu/lawreview/2022/10/conservation-options-conservation-easements-flexibility-and-the-in-perpetuity-requirement-of-irc-§-170h.
[39] S. REP. NO. 96-1007, at 9 (1980).
[40] *Id*. at 9.
[41] *Id*. at 11.
[42] *See* Glade Creek Partners, LLC v. Comm'r, T.C. Memo 2023-82 (rejecting an appeal on "whether Glade Creek is entitled to deduct the fair market value of the easement or whether the amount of the easement deduction is limited to Glade Creek's adjusted basis in the property on

Department of Justice and the IRS are frequently brought partly because there is a billion-dollar industry profiting from conservation easements.[43] Between 2010 and 2017, transactions from syndicated conservation easements allowed an estimated $27 billion in charitable deductions.[44] The IRS has expressed plans to audit "over 80 percent of the partnerships involved in promoting syndicated conservation easements."[45] These desired suits and large sums illustrate how prevalent and pervasive this problem is by tying up the government in litigation.

This is where the background of prior attempts to resolve this issue comes in.[46] The state of abusive conservation easements can be shown through recent cases—*Equity Investment Associates, LLC v. United States, Turk v. Morris, Manning & Martin, LLP, and Green Valley Investors, LLC* v. *Commissioner*—all occurring before the 2023 legislation.

One case that showcases the high value of money at stake in a single conservation easement is a 2022 case *Equity Investment Associates*. Equity-owned land in Brunswick County, North Carolina, where they made a conservation easement donation of 1,297 acres to the North

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which the easement was granted"); Pine Mt. Pres. v. Comm'r, 978 F.3d 1200 (11th Cir. 2020) (overruling a conservation easement deduction denial and rejecting the valuation method of the lower court); Ashley Schapitl, *Wyden Announces Finance Committee Legislation to Bolster Retirement Savings, Shut Down Tax Shelters Included in Omnibus*, U.S. SENATE COMM. ON FIN. (Dec. 20, 2022), https://www.finance.senate.gov/chairmans-news/wyden-announces-finance-committee-legislation-to-bolster-retirement-savings-shut-down-tax-shelters-included-in-omnibus ("The abuse of syndicated conservation easements is one of the biggest tax shelters out there, and these scams threaten the integrity of legitimate conservation programs that protect critical habitat and open spaces we all enjoy.").

[43] Peter Elkind, *How Congress Finally Cracked Down on a Massive Tax Scam*, PROPUBLICA, (Jan. 9, 2023), https://www.propublica.org/article/syndicated-conservation-easements-tax-scam-irs-biden.

[44] *The DOJ and IRS Focus Enforcement on Syndicated Conservation Easements*, POLSINELLI (Sept. 22, 2022), https://www.polsinelli.com/publications/the-doj-and-irs-focus-enforcement-on-syndicated-conservation-easements.

[45] *Id*.

[46] Appraising Conservation Easement Donations: The Need for More Uniform Standards and Greater Oversight, 37 ELR 10841 (2007).

American Land Trust.[47] Taking the donation write-off, Equity submitted their 2018 tax return for a $223 million deduction for the conservation easement after they had the land appraised at $270 million; yet the land was valued at only $47 million once the conservation easement was in place.[48] In the criminal investigation side of the case, the accountants who prepared the 2018 tax return pled guilty to conspiring to defraud through selling conservation easement "investments" as tax shelters.[49] Equity's appeal to quash the summons issued against them was denied, and the IRS investigation was allowed to proceed in this action because there was not enough evidence that the district court abused its discretion in denying Equity's petition to stop the IRS summons.[50] This is just one example of a large conservation easement scheme that was prosecuted and shows the prevalence and high amounts of money involved in these schemes.

On the other hand, a less successful attempt to penalize a syndicated conservation easement is in *Green Valley Investors, LLC*.[51] Green Valley donated a conservation easement and claimed a $22.5 million deduction for making a charitable contribution in 2014.[52] The IRS applied a gross valuation misstatement penalty under I.R.C. § 6662(h), and in the alternative, the accuracy-related penalties for negligence and substantial valuation misstatement penalties under I.R.C. §§ 6662(c) and (e) for syndicated conservation easement schemes by Green Valley Investors.[53] On appeal, Green Valley challenged and won on a technicality because the IRS listed syndicated conservation easements on the reportable transaction list without following the

[47] Equity Inv. Assocs., LLC v. United States, 40 F.4th 156 (4th Cir. 2022).
[48] *Id*. at 160.
[49] *Id*. at 161 (citing Dep't of Justice, Press Release 20-1381, Atlanta Tax Professionals Plead Guilty to Promoting Syndicated Conservation Easement Tax Scheme Involving More Than $1.2 Billion in Fraudulent Charitable Deductions (Dec. 21, 2020)).
[50] *Id*. at 161.
[51] Green Valley Invs., LLC v. Comm'r, 159 T.C. 80 (Nov. 9, 2022).
[52] *Id*. at 83.
[53] *Id*. at 81.

Administrative Procedure Act (APA) notice and comment procedures.[54] This case inspired change for the IRS to propose new regulations.[55]

Another case shows a situation where individual taxpaying plaintiffs brought a case against the creators of a valuation system for conservation easements that the taxpayers relied on. In *Turk*, the Plaintiffs brought suit claiming that the Defendants promoted a "fraudulent scheme to induce [the Plaintiffs] and other investors to buy into a flawed tax strategy" of syndicated conservation easements.[56] The Plaintiffs thus dealt with the consequences of IRS scrutiny because they followed the advice of the Defendants.[57] The claims against the individual Defendants were mostly dismissed in this suit for being time-barred, and the claims for conspiracy were granted a motion to dismiss.[58]

With the high amount of money involved, unsuccessful plaintiffs, and failed penalties in the court system, Congress took action to take down the syndicated conservation easement market.[59] According to a February 2024 congressional tax correspondence by the House Ways and Means Committee, the tax court docket still is "crowded with hundreds of conservation easement cases" and the IRS added around two hundred lawyers to specifically work on conservation easement litigation.[60] The IRS and the Department of Justice could not alone take on all of the abuse in conservation easements without a change to the law—especially with the

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[54] *Id*. at 103.
[55] *See* discussion *infra* Part II.B.
[56] Turk v. Morris, Manning & Martin, LLP, 593 F. Supp. 3d 1258 (N.D. Ga. 2022).
[57] *Id*. at 1274 (claiming that the IRS has made it clear that overvaluing conservation easements would not be tolerated).
[58] *Id*. at 1317.
[59] Elkind, *supra* note 43.
[60] Joseph Bishop-Henchman, *NTUF Outlines Possible Solutions to IRS Challenges*, TAX NOTES (Feb. 15, 2024), https://www.taxnotes.com/research/federal/legislative-documents/congressional-tax-correspondence/ntuf-outlines-possible-solutions-irs-challenges/7j770?highlight=conservation+easement.

time and cost necessary to fully litigate conservation easements.[61] The rise of these abusive conservation easements inspired calls for reform and action to be taken in the form of further legislation to address the issue.

PART II: LEGISLATION FRAMEWORK CHANGES OF 2023

Part II will analyze the changes that the legislation has made in the landscape of conservation easements. First, this analysis will look at three recent enactments from 2023 including the 2023 Conservation Easement Program Integrity Act, proposals to I.R.C. § 6011 and § 6111, and IRS Notice 2023-30. For each change, Part II will explore what gaps and policy goals that legislation intends to fill and how it attempts to do so.[62] Part II will show what the new regulatory landscape for conservation easements will look like moving forward.

A. 2023 CONSERVATION EASEMENT PROGRAM INTEGRITY ACT

Rep. Mike Thompson proposed what became the new 2023 Conservation Easement Program Integrity Act on June 24, 2021.[63] The bill was lobbied for by eleven cosponsors including eight Democrats and three Republicans.[64] This Act utilized the backing of "Justice Department indictments, a bipartisan Senate Finance Committee report, and multiple formal

[61] Elkind, *supra* note 43 ("That [new conservation easement legislation] will effectively eliminate the profits that drive syndicated deals while allowing traditional conservation easements to continue."); *see, e.g.*, Green Valley Invs., LLC v. Comm'r, 159 T.C. 80 (Nov. 9, 2022) (showing the taxpayer taking a single conservation easement deduction of $223 million).
[62] *See* sources cited *supra* note 16.
[63] Charitable Conservation Easement Program Integrity Act of 2021 (2021 - H.R. 4164), GOVTRACK.US, https://www.govtrack.us/congress/bills/117/hr4164.
[64] *Id*.

statements issued by IRS."[65] For Rep. Mike Thompson, the hope that inspired this proposal was to protect the conservation of public lands and charitable giving.[66]

From the original 2021 proposal to the enacted changes, about seventy percent of the proposal was incorporated.[67] The changes from the original proposed bill added an exception for contributions to preserve certified historic structures, deleted an extension for certain adjustments made under prior law, added a reporting requirements section, and added a safe harbor provision.[68]

The leading change in the Conservation Easement Program Integrity Act begins with a change that affects syndicated easements that are appraised at over two-and-a-half times the land's purchase price where the easement will be deemed ineligible.[69] In other words, it

[65] Press Release, Mike Thompson, House of Representatives, Thompson Statement on Key Conservation Easement Provision in Government Funding Bill (Dec. 30, 2022), http://mikethompson.house.gov/newsroom/press-releases/thompson-secures-key-conservation-easement-provision-government-funding.
[66] Press Release, Mike Thompson, House of Representatives, Thompson Statement on Charitable Conservation Easement Program Integrity Act (June 24, 2021), http://mikethompson.house.gov/newsroom/press-releases/thompson-introduces-charitable-conservation-easement-program-integrity-act.
[67] For this Act to pass, it was incorporated into the Consolidated Appropriations Act of 2023, also called the SECURE 2.0 Act. The syndicated conservation easement market was a profitable industry where lobbyists fought to protect the tax shelter, but the Senate Finance Committee tied the syndicated conservation easement changes into a popular proposal for enhancing benefits for disabled police, firefighters, paramedics, and EMTs. It passed through the House on December 23, 2022, with fifty-three percent support, and the Senate passed the Act on December 22, 2022, with seventy percent support. *Id*.
[68] *Compare* Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021), *with* Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, H.R. 2617, 117th Cong. (2022) (adding new exceptions into the new 2023 language).
[69] Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, H.R. 2617, 117th Cong. (2022).

completely disallows any deductions on appraisals valued over two-and-a-half times.[70] This measure is not a limitation where the maximum is given and no more, but for a valuation that is over two-and-a-half times, it will result in zero dollar deduction for the donation.[71] Praise for this change included that it "attempts to dampen incentives for abuse without eliminating good easement deductions."[72] Three exceptions with caveats to the "2.5 Times Disallowance Rule" are for historic preservation easements, partnerships with individual family members holding the interest, and three-year holding period donations.[73]

Other aspects of this Act include adding safe harbor provisions to help alleviate a backlog of cases with deed issues and updating the penalties provision to remove the reasonable cause for taxpayers relying on an accountant or legal advice for a legitimate income tax deduction.[74] By creating a cut-off amount for acceptable conservation easement appraisals and allowing a safe harbor provision, this Act has structured an end to the abuse of conservation easements. Yet, Congress is not the only law-making body that has targeted conservation easements.

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[70] Hale Sheppard, *Conservation Easements – New Regulations, New Law, New Questions*, FORBES (Oct. 31, 2023), https://www.forbes.com/sites/halesheppard/2023/10/31/conservation-easements--new-regulations-new-law-new-questions.
[71] *Id*.
[72] Dominic Parker, *Congress Limits Conservation Easement Write-Offs — That's Good for Conservation and Taxpayers*, HILL (Jan. 11, 2023), https://thehill.com/opinion/energy-environment/3806213-congress-limits-conservation-easement-write-offs-thats-good-for-conservation-and-taxpayers; Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021).

[73] The Proposed § 1.6011–9(a) and (b) is the definitions section and Proposed § 1.6011–9(c)(4) is the 2.5 Times Rule. Sheppard, s*upra* note 70; G. Michelle Ferreira, Barbara T. Kaplan, Courtney A. Hopley, Jared E. Dwyer, Scott E. Fink, Shira Peleg, & Jennifer A. Vincent, *House Proposal Targets Charitable Deductions for Conservation Easements by Passthrough Entities*, GREENBERG TRAURIG LLP (Sept. 20, 2021), https://www.gtlaw.com/en/insights/2021/9/house-proposal-targets-charitable-deductions-for-conservation-easements-by-passthrough-entities (limiting the 2.5 times for historic preservation, familial relationships, and after three years after an interaction with a passthrough entity).
[74] *Omnibus Bill Limits Conservation Easements, supra* note 14.

B. PROPOSED REGULATIONS TO I.R.C. § 6011 AND § 6111

The Department of Treasury can promulgate regulations as the regulating body for conservation easements. Before the 2023 Conservation Easement Program Integrity Act, the Treasury was attempting to take action against the abusive syndicated easements with regulations on conservation easement definitions and with a version of the 2.5 Times Rule.[75] These proposals were published in the Federal Registrar on December 8, 2022.[76] They sought to include syndicated conservation easements as a listed transaction under I.R.C. § 6011 and § 6111, which means that it has been identified as a type of tax avoidance transaction with potential for abuse that will need to be clearly disclosed or penalties can be imposed.[77] The proposed regulations anticipate actions to avoid the 2.5 Times Rule and include a provision called the "Anti-Stuffing Rule" that contains the deduction to actual monetary value related only to the conservation easement and not beyond that amount.[78]

These proposals are based on the previous Notice 2017-10 which was ruled invalid by judicial decisions because the changes it made did not follow the proper notice and comment

[75] Sheppard, s*upra* note 70; Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. 75, 185 (Dec. 8, 2022) (to be codified at 26 C.F.R. 1).
[76] Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. 75, 185 (Dec. 8, 2022).
[77] Ray A. Knight, *Full Disclosure: When Tax Transactions Must Be Reported*, J. ACCT. (Feb. 1, 2022), https://www.journalofaccountancy.com/issues/2022/feb/when-tax-transactions-must-be-reported.html; Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. 75, 185 (Dec. 8, 2022) (to be codified at 26 C.F.R. 1).
[78] Sheppard, s*upra* note 70 (explaining the anti-stuffing rule helps to determine if the 2.5 Times Reporting Rule is triggered by checking if "a partner's capital contribution is limited to the amount attributable to the portion of real property on which a conservation easement is donated.").

procedure.[79] The proposed language aims to eliminate confusion with the requirements and to ensure that the federal tax regulations follow the Administrative Process Act.[80]

Like the Conservation Act, the regulatory changes are inspired by wanting to cut out the abuse of the conservation system. The main goal of these proposals according to the IRS is to "challenge the purported tax benefits" when significant overvaluation occurs.[81] The IRS continues that in addition, they may challenge issues other than overvaluation including failure to comply with the requirements of I.R.C. § 170 through lack of donative intent, lack of economic substance, lack of business purpose, or violation of the partnership anti-abuse rule as a few examples.[82]

C. NOTICE 2023-30

On April 10, 2023, the Treasury Department and the IRS released Notice 2023-30 as part of the requirements from the Conservation Easement Program Integrity Act, which created a safe harbor provision that allows taxpayers to amend provisions of certain conservation easements.[83] The idea behind it is to change extinguishment and boundary line adjustment clauses (clauses

[79] Sheppard, s*upra* note 70; *See, e.g.,* Mann Constr., Inc. v. United States, 27 F.4th 1138 (6th Cir. 2022), *and* Green Valley Invs., LLC v. Comm'r, 159 T.C. No. 5 (2022) (overturning the Congressional decision that the IRS can identify listed transactions without following notice and comment procedures).
[80] Statutory Disallowance of Deductions for Certain Qualified Conservation Contributions Made by Partnerships and S Corporations, 88 Fed. Reg. 80910 (Nov. 20, 2023) (to be codified at 26 C.F.R. pt. 1).
[81] Syndicated Conservation Easement Transactions as Listed Transactions, 87 Fed. Reg. 75, 185 (Dec. 8, 2022) (to be codified at 26 C.F.R. 1).
[82] *Id*.
[83] *Conservation Easements: Federal Safe Harbor Language for Extinguishment and Boundary Line Adjustments*, BROWNSTEIN HYATT FARBER SCHRECK (June 12, 2023), https://www.bhfs.com/insights/alerts-articles/2023/conservation-easements-federal-safe-harbor-language-for-extinguishment-and-boundary-line-adjustments.

that have historically been suspected to be included in syndicated easement tax shelters).[84] There was only a small window of time for this safe harbor to be in effect with a timeline allowing changes for ninety days from April 24, 2023, to July 24, 2023.[85] The Notice leaves an exception for reportable transactions, or abusive transactions from tax avoidance with § 6707A(c)(1), which is not an eligible easement deed under the safe harbor.[86]

The extinguishment clause language relates to the conservation purpose by treating the easement as "protected in perpetuity if (1) the restrictions are extinguished by judicial proceeding and (2) all of Donee's portion of the proceeds . . . from a subsequent sale or exchange of the property are used by the Donee in a manner consistent with the conservation purposes of the original contribution."[87] The rationale of this Notice was Congress pushing the IRS to create guidance on how taxpayers can correct any issues with conservation easement deeds that did not align especially with the new rules from the Conservation Easement Program Integrity Act.[88] Through the exceptions and limited time available, the Notice affects a very narrow scope of individual conservation easements and precludes any syndicated conservation easements from making changes.

Congress, the Treasury Department, and the IRS all created recent legislation regarding different aspects of conservation easements. Each change has similar motives to create a well-rounded approach to protecting conservation easements and preventing abuse from unrestrained syndicated conservation easements. Even so, these changes have not addressed whether the

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[84] I.R.S. News Release IR-2023-73 (April 10, 2023).
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] Ronald Levitt, *IRS Releases Notice 2023-30 with Guidance on Correcting Conservation Easement Deeds*, US TAX DISPUTES (May 22, 2023), https://www.ustaxdisputes.com/irs-releases-notice-2023-30-with-guidance-on-correcting-conservation-easement-deeds.

social benefit of conservation easements has been met in either past legislation or in the new legislation.

PART III: COSTS OF CONSERVATION EASEMENTS OUTWEIGH SOCIAL VALUE

Part III will bring all the background and analysis together by addressing the purpose and goals of conservation easements in comparison to the tax break given.[89] Although the legislation fixes a problem that developed in the use of conservation easements, it remains relevant to ask whether it is worth it to have these easements at all and if the purpose and goals of conservation are still prominent. This legislation has made necessary changes to stop an abusive loophole but has missed the point of why conservation easements were originally created. Part III will provide feedback on how the legislation changes the abusive conservation easement structure.

First, Part III will consider what taxable benefits of conservation easements remain post-legislation with a perspective from what an average taxpayer's and corporation's goals would likely be in forming a conservation easement. Next, Part III will look at how the enforcement ability to align conservation easements back to their original policy purposes has been left after these regulations from the government's perspective. Finally, Part III will look at the new legislation's connection with historic policy goals.

A. REMAINING TAXABLE BENEFITS?

The economic incentive of conservation easements in theory is a secondary benefit to reimburse the taxpayer to their financial state prior to the donation of the conservation easement

[89] *Landowners Nationwide With a Conservation Easement Should Revise Deeds by July 24*, JONES FOSTER, (May 15, 2023), https://jonesfoster.com/our-perspective/conservation-easement-irs-tax-deadline (explaining how to modify your deed to keep receiving charitable deductions).

and provide encouragement to make this type of donation.[90] When a common homeowner donates a conservation easement, the expected measure is that their land will be valued lower as part of the market rate, so the government will create the opportunity for a bonus taxation benefit in exchange for making this contribution and taking on the burdens of restricting the land.[91]

For landowning businesses, the 2023 Conservation Easement Act prevents an overvaluation of the land thus limiting the tax benefits that made a profitable tax industry out of syndicated conservation easements.[92] So, the profit margins legally available for conservation easements when abiding by Congressional and IRS standards have now been limited to two-and-a-half times the appraisal value.[93] A quirk remaining after the 2023 Conservation Easement Act is that the legislation allows individual taxpayers to donate above the 2.5 Times Disallowance Rule.[94] The most common abuser has been pushed out of the market for abusive transactions, but the perks and benefits that the corporate donors utilized to the point of abuse are still allowed for individual taxpayers. Leaving individual taxpayers with no limitation on valuation could potentially expand into a bigger problem if steps to prevent a repeated cycle are not taken. The appraisers and advisors who created a market for profit on businesses claiming conservation

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[90] *How Much Does a Conservation Easement Reduce Property Values?*, *supra* note 32 (showing that two appraisals are done on a property with the fair market value of the unencumbered land and that the value after the conservation easement is in place to determine the compensation value for the landowner for donating the conservation easement).
[91] *Id*.
[92] Partnerships, LLCs, and S Corps are common business entity types that would be involved in the syndicated conservation easement industry on both sides of transactions as the business taxpaying entity claiming the deduction or the company valuing conservation easements. Parker Agelasto, *Unpacking the Charitable Conservation Easement Integrity Act*, CAP. REGION LAND CONSERVANCY (Feb. 1, 2023), https://capitalregionland.org/2023/02/conservation-easement-integrity-act.
[93] *Id*.
[94] Hale Sheppard, *Conservation Easements – New Regulations, New Law, New Questions*, FORBES (Oct. 31, 2023), https://www.forbes.com/sites/halesheppard/2023/10/31/conservation-easements--new-regulations-new-law-new-questions.

easements, like in *Turk*, could try to continue the tax strategy on individual taxpayers but with less money at stake.[95] Still, with less access to large plots of land to donate and less ability to abuse the donation, the average conservation-donating taxpayer would likely not have to worry about issues of valuation that exceed the 2.5 Times Disallowance Rule.

This is not to imply that no taxable benefits should be given for conservation easements at all. If the system remains for conservation easements as a conservation tool, favorable monetary perks are the most likely way to get a common homeowner to restrict their land rights.[96] Conservation easement charitable contribution deduction tax benefits remain in the current law for granting under gift and estate tax purposes, so when state and federal law requirements are met, the same tax benefits are available, at a smaller scale with the cap for overvaluation.[97] With tax benefits available, the limitation of applying a cap of two-and-a-half times appraisal valuation would be in the best interest of continuing to keep conservation easements in check.

B. Enforcement Post-Legislation

A major area in looking at the new legislation is to assess how the newly disallowed practices will be enforced. The enforcement of the legislative changes will impact conservation easements significantly, which allows the Treasury and the IRS to target the previously overvalued syndicated conservation easement schemes directly for violating a clear capped limitation of two-and-a-half times their valuation.

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[95] Turk v. Morris, Manning & Martin, LLP, 593 F. Supp. 3d 1258, 1273 (N.D. Ga. 2022).
[96] Etzler, *supra* note 31, at 28–29.
[97] *Id*; Charitable Conservation Easement Program Integrity Act of 2021, H.R. 4164, 117th Cong. (2021).

The court system did not stop the abusive syndicated easements in the past.[98] To avoid technical foot faults like in the case of *Green Valley Investors*, the IRS has followed through with the APA requirements of notice and comment in the new proposed regulations to avoid future roadblocks in their litigation of these problems.[99] In other situations, the difficulty of prosecuting conservation easement cases was procedural hurdles as the IRS has broad powers for investigating criminal tax fraud, but when criminal activity is found, the IRS must refer the case to the Justice Department for prosecution and stay in an investigatory role.[100] Slowing the process down in this way adds time and cost to the litigation of the caseload. Some ease will hopefully come from the 2023 legislation with a clear path open for litigating situations of overvaluations with the clear number limitation of two-and-a-half times.

As for the outlook for litigation and consequences for violations, a point to consider is that the legislation does not retroactively apply to conservation easements made before December 29, 2022.[101] This means the hundreds of cases in the tax court docket will not be affected by this new Act.

The consequences of attempting to donate a conservation easement in violation of the 2.5 Times Disallowance Rule means that under the 2023 Conservation Easement Act Section 605(a)(2) accuracy-related penalties can be imposed as well as treating the violation as a gross valuation misstatement.[102] This means there is a greater risk of pushing the boundaries on gross errors in valuing conservation easements with higher monetary consequences at stake. Beyond

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[98] *See infra* Part I.C.
[99] *See infra* Part II.B.
[100] Equity Inv. Assocs., LLC v. United States, 40 F.4th 156, 164 (4th Cir. 2022).
[101] Sheppard, *supra* note 107.
[102] *Id*; Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, H.R. 2617, 117th Cong. (2022).

that, Section 605(a)(2)(C) inserts an exception prohibiting reasonable cause defenses used against a 2.5 times valuation charge.[103] This removes an avenue for defending a valuation of over 2.5 times by bringing evidence of a reasonable mistake in choosing to submit that valuation. Again, the risk is heightened for claiming deductions under these circumstances. These penalties attach significant financial sums for violating the new cap. Business entities like partnerships, LLCs, and S Corps will be closely scrutinized and the IRS will now be able to pinpoint and stop future abusers of this system.[104] These enforcement mechanics are an improvement to the conservation easement system by increasing the tax break's social utility.

Beyond enforcement of the Act, remaining is the question of the social benefit of this tax break itself. While the legislation has prevented a large cost factor of the overvalued syndicated conservation easements, this solution did not address the non-monetary impacts these abusive easements had on the environmental value.

C. MEETING POLICY GOALS?

Ideally, conservation easements are used to get a tax break for environmental, social, and charitable intent when donating a piece of unique and significant land for preservation.[105] Unfortunately, the practical, realistic way that conservation easements have been used falls into the nature of tax schemes motivated primarily through monetary means with a thin connection to

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[103] *Id*.

[104] Opinion Contributor Dominic Parker, *Congress Limits Conservation Easement Write-Offs — That's Good for Conservation and Taxpayers*, THE HILL, Jan. 11, 2023, https://thehill.com/opinion/energy-environment/3806213-congress-limits-conservation-easement-write-offs-thats-good-for-conservation-and-taxpayers; Elkind, *supra* note 43.

[105] WECONSERVEPA LIBR., *supra* note 18; Andrew Flynn, *Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection Through Internal Revenue Code Section 170(h)*, STANFORD LAW SCHOOL (2021), https://law.stanford.edu/publications/restoring-the-conservation-purpose-in-conservation-easements-ensuring-effective-and-equitable-land-protection-through-internal-revenue-code-section-170h; S. REP. NO. 96-1007, at 9 (1980).

actual conservation efforts.[106] In the note and comment process for the proposed regulations, "commentators largely criticized the IRS for past enforcement gone awry and urged future actions focused on the bigger picture of land conservation."[107]

The legislation of Congress, the Treasury Department, and the IRS creates a roadblock to limit the fraudulent uses of conservation easements as a listed transaction. Yet, the legislative corrective actions do not take a preventative stance on fully limiting conservation easements to conservation purposes only. What could have been added to the legislation was a bigger focus on the outcomes of land conservation by adjusting the definition and requirements of the types of land for the specific conservation goals.[108] This should be the route that conservation easements are used for and to make sure that they are used only for this purpose, the definition in I.R.C. § 170(h)(4) should be narrowed to capture the specific requirements that better serve the purpose of goals of conservation. I.R.C. § 170(h)(4) defines conservation purpose as the preservation of land for outdoor recreation or education, protection of ecosystems, preservation of open space including farmland and forests, governmental conservation policy, or preservation of historically important land.[109] The broad and open-ended language of the statute leaves conservation easements with a rubber-stamp-like consideration of the purpose as any savvy deed writer can easily find a slot for land to fall under a conservation purpose.

To narrow the definition, it would be useful to further refine what 'outdoor recreation' and 'open space' entail and how they must relate to an ecological or conservationist purpose. For purposes of 'education' and 'scenic enjoyment,' adding language that requires a secondary

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[106] *See supra* Part I.C.
[107] Sheppard, *supra* note 107.
[108] *See* I.R.C. § 170(h)(4) (defining conservation purpose).
[109] I.R.C. § 170(h); *See infra* Part I.B.

connection to environmental protection or preservation could encourage better quality conservation easements to be donated. Narrowing the purpose of conservation easements would not be effective on its own without enforcement, so this solution would continue the problem of needing the time, effort, and expense of enforcing and tracking noncompliance.

Although there are some strict rules around what counts as a conservation easement and "a general declaration of conservation goals" is not sufficient, documentation and requirements to prove that conservation easements coincide with the intended purpose of their use could be a key factor in creating a system for conservation easements to do what they are meant to in conserving the environment.[110]A balance would need to be struck with further regulating conservation easements to protect socially beneficial land more fully through this tax break and to prevent striking down the taxpayer's motivation to continue donating in this way.

Further, in looking to the future instead of being stuck with the past understandings of environmental issues, newer goals of conservation easements like combating climate change, restoring local ecosystems, and linking isolated habitats can occur under the definition of conservation easement goals, but they are not required with the broad statutory language allowing for "outdoor recreation" and "education of the general public."[111] Further, landowners can create conservation easements for private enjoyment in cases of preserving natural habitats or in the case of scenic enjoyment can restrict visibility by the public.[112] Agricultural farmland preservation under I.R.C. § 170(h)(4)(A)(iii) is a conservation purpose even when a common

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[110] Ho, *supra* note 12; *The DOJ and IRS Focus Enforcement on Syndicated Conservation Easements*, *supra* note 44.
[111] Molly Teague, *Conservation Options: Conservation Easements, Flexibility, and the "In Perpetuity" Requirement of IRC § 170(h)*, 75 VAND. L. REV. 1573 (2022), https://wp0.vanderbilt.edu/lawreview/2022/10/conservation-options-conservation-easements-flexibility-and-the-in-perpetuity-requirement-of-irc-§-170h.
[112] Etzler, *supra* note 31, at 26.

ecological viewpoint would not support agricultural impact as implicitly environmentally positive.[113] These examples arguably show purposes that do not align with a truly environmental focus. The environment is a growing concern in popular culture and the quality of conservation easements that are promoted should reflect and require the same level of regard as that changing social expectation.[114]

It was a long journey of action by the judicial, executive, IRS, and Treasury Department to take away the power of syndicated conservation easement users, but if the true purpose of conservation easements is for the land, then there is still room for improvement by focusing on the environmental and social benefit outcomes of the conservation easement.[115]

This legislation hopes to save the government billions of dollars that are spent on paying out tax benefits to overvalued syndicated conservation easements and tackling this problem is a worthy cause that needs to happen.[116] Still, when considering the problems that have occurred with conservation easements, the opportunity to clarify and return conservation easements to their original purpose was missed.

Syndicated conservation easements took advantage of overvaluing land that did not necessarily need protection for preservation purposes but to make a profit.[117] Now is the time to take preventative measures to eliminate the chances of more abuse to start to grow from conservation easements.

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[113] Ho, *supra* note 12.
[114] *2020 to present*, ENV'L HIST. (Jan. 10, 2020), https://environmentalhistory.org/21st-century/2020-present (showing various environmental events, concerns, and insights from 2020 to 2024.

[115] *See supra* Part I.C.
[116] *The DOJ and IRS Focus Enforcement on Syndicated Conservation Easements*, *supra* note 44.
[117] Elkind, *supra* note 43.

CONCLUSION

There is cause for hope that this legislation will bring change to conservation easements with an ambition to return to the original policy goals. Conservation easements are meant to protect historic landmarks, wild rivers, water quality, woodlands, or other scenic conservation.[118] The framework and background of cases have been asking for change, so with the new legislative work, there is an opportunity to remember what conservation easements were meant for and encourage stripping down the extensive use of conservation easements as a manipulable tax shelter into the conservation tool it was meant to be.[119] The new legislation in the 2023 Conservation Easement Program Integrity Act, proposals to I.R.C. § 6011 and § 6111, and IRS Notice 2023-30 changes the way aspects of conservation easements are regulated and attempts to fill in gaps that allowed abuse as tax shelters. The impact of this legislation on conservation easements reminds taxpayers to think about how they can apply the purpose of conservations in practice.[120] With no cap on individual taxpayer overvaluation, retroactive enforcement not allowed, and a strained connection to true conservation purposes, it is time to stop and think if conservation easements are truly able to provide the environmental and social benefit to outweigh the costs of the tax break when utilized by the average taxpayer and business ventures as the legislation stands even after the 2023 changes. The legislation has made great strides in changing the way conservations can be used, but with the widespread and powerful abuse and scheming that developed in the past, will the changes last?

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[118] I.R.C. § 170(h); WECONSERVEPA LIBR., *supra* note 18.
[119] *See infra* Part II.
[120] *Omnibus Bill Limits Conservation Easements, supra* note 14.