

Greedy Giving, Bad for Business: Examining Problems with Arbitrary Standards in Appraising Conservation Easements

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*We have become great because of the lavish use of our resources. But the time has come to inquire seriously what will happen when our forests are gone, when the coal, the iron, the oil, and the gas are exhausted, when the soils have still further impoverished and washed into the streams, polluting the rivers, denuding the fields and obstructing navigation.*¹

—President Theodore Roosevelt

I. INTRODUCTION

Industrialization in the United States has continuously transformed the land in positive and negative ways.² Upon the dawn of the Industrial Revolution, the nation's focus shifted away from subsistence agriculture and nature-friendly economic practices to city life, factory work, and commercial enterprise.³ Because of this evolution, land protection was not a priority, but an ever-growing necessity.⁴ In the late

1. *Theodore Roosevelt and Conservation*, NAT'L PARK SERV., <https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm> (last updated Nov. 6, 2017).

2. See David Grigg, *The Industrial Revolution and Land Transformation*, in *LAND TRANSFORMATION IN AGRICULTURE* 79, 90 (M. G. Wolman & F. G. A. Fournier eds., 1987), https://www-legacy.dge.carnegie-science.edu/SCOPE/SCOPE_32/SCOPE_32_1.4_Chapter4_79-109.pdf (giving examples of how “[a]griculture inevitably transforms the land” and the dramatic consequences industrialization has had on agricultural practices since 1800); Kees Klein Goldewijk & Navin Ramankutty, *Land Use Changes During the Past 300 Years*, in 1 *LAND USE, LAND COVER AND SOIL SCIENCES* 1, 2 (2010), https://www.researchgate.net/publication/242217587_Land_use_changes_during_the_past_300_years (“Since the dawn of civilization, humans have altered the face of the Earth while acquiring valuable resources such as food, fiber, and fresh water.”).

3. See Indep. Hall Ass'n, *Social Change and National Development, Economic Growth and the Early Industrial Revolution*, U.S. HIST., <https://www.ushistory.org/us/22a.asp> (last visited Oct. 31, 2020) (“[W]ith the shift from hand-made to machine-made products a new era of human experience began where increased productivity created a much higher standard of living than had ever been known in the pre-industrial world.”).

4. Grigg, *supra* note 2, at 90. Interestingly, the growth of agriculture and industrialization, while seemingly at different ends of the commercial spectrum, were

nineteenth century, the United States Legislature recognized the intense need to conserve land and the resources thereon. In response, the first National Park Service along with the first national parks and forests were established to ensure the land was conserved as a “pleasuring-ground for the benefit and enjoyment of the people.”⁵ Conservation greatly expanded in the early twentieth century as President Theodore Roosevelt championed protection efforts before, after, and throughout his presidential term.⁶

The United States government saw the need to protect the land and resources, and acted to do so, but it also saw the need to encourage private landowners to do the same.⁷ Today, one popular way landowners answer that call to conserve is to place conservation easements on their property and receive tax benefits from the Internal Revenue Service (“IRS”) in return. The practice of granting conservation easements is done pursuant to statutory regulation found in § 170(h) of the Internal

inherently linked regarding their respective growths. Industrial growth led to population growth, which in turn demanded agricultural growth to sustain the population. All of which greatly affected the land. *See also* Goldewijk & Ramankutty, *supra* note 2, at 3 (discussing the significant consequences large-scale changes in land use can have).

5. 16 U.S.C. § 21 (outlining the metes and bounds of the nation’s parks as “public park[s] or pleasuring-ground[s] for the benefit and enjoyment of the people” and thereby precluding their “settlement, occupancy, or sale under the laws of the United States”). Yellowstone National Park, Yosemite National Park, National Park Service were established in 1872, 1890, and 1916, respectively, to achieve Congress’s goal of preserving pleasuring grounds. *Birth of a National Park*, NAT’L PARK SER., <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> (last updated Feb. 5, 2020).

6. *See* NATIONAL PARK SERVICE, *supra* note 1 (describing President Roosevelt’s efforts to establish 230 million acres of public land, 6 national parks, and 18 national monuments during his presidency). Conservation has continued to expand quickly and fervently since President Roosevelt’s efforts, and now covers nearly 1 million square miles of land controlled by the United States. *Id.*; *see also* Sundra Chelsea Atitwa, *What Percentage of the United States Is Protected Land?*, WORLDATLAS (Dec. 6, 2018), <https://www.worldatlas.com/articles/what-percentage-of-the-area-of-the-united-states-is-protected-land.html> (noting that 499,800 square miles of land and 490,893 square miles of marine areas had been protected as of 2015).

7. *See* Atitwa, *supra* note 6; *infra* Part II.A (citing various legislative acts throughout showing the legislative history of § 170(h) establishing rules for the donation of conservation easements).

Revenue Code (“IRC”).⁸ However, the government’s language is complex and, at times, unclear as to the obligations and limitations that qualify the tax rules on conservation easements.⁹ Lack of clarity in any statutory scheme can leave room for mistakes in compliance with the relevant provision. It can also leave room for activities that, while seemingly permissible under the unclear letter of the statute, are not in line with the legislative intent and could therefore be abusive of the provision.

Such abuse is not merely a possibility. Currently, syndicated conservation easements represent rampant abuse that stems from a lack of full clarity in § 170(h).¹⁰ A syndicated conservation easement is one where the tax deduction a landowner receives after donating an easement has a higher value than the landowner’s initial investment into the property.¹¹ In such cases, the landowner has essentially turned a profit on a property investment solely from the tax deductions received after donation of an interest in the property.¹² The IRS has taken issue with landowners who participate in these transactions by disallowing deductions and altering conservation easement reporting in order to flag donations that may be considered syndicated.¹³ However, there is another

8. See I.R.C. § 170(h) (establishing the rules for granting conservation easements); Treas. Reg. § 1.170A-14 (2020) (establishing further regulations for qualified conservation Contributions). The charitable contribution tax deduction was renumbered to the current § 170 in 1954. See Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1062 (2003), <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1574&context=facpub>.

9. See *supra* note 8.

10. See *infra* Part III.A.

11. See W. William Weeks et al., *ABA RPTE Conservation Easement Task Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP., TR., & EST. L.J. 245, 331 (2019), <file:///C:/Users/becca/Downloads/SSRN-id3385453.pdf>; Timothy Lindstrom, *The Syndication of Conservation Easement Tax Deductions*, SAVING LAND, Summer 2015, <https://www.landtrustalliance.org/news/syndication-conservation-easement-tax-deductions>.

12. Lindstrom, *supra* note 11.

13. See IRS *Static Files Directory, Listing Notice—Syndicated Conservation Easement Transactions*, IRS (Dec. 23, 2016) [hereinafter Listing Notice], <https://www.irs.gov/pub/irs-drop/n-17-10.pdf>; Trout Ranch L.L.C. v. Comm’r, No. 14374-08, 2010 WL 5395108, at *18 (T.C. Dec. 27, 2010) (holding that the claimed

culprit in creating syndicated conservation easements: outrageous appraisals.¹⁴ In many cases valuations of conservation easements are incredibly disproportional to the value determined by the Tax Court upon being audited.¹⁵ This disproportionality stems from many variables used by appraisers and modest guidance given by the IRC to determine the “highest and best use” of the property.¹⁶

This Note will address issues of tax abuse arising from the syndication of conservation easements, specifically the needs to reject the current “highest and best use” standard used to value the land at issue. Instead, this Note will propose a new “actual or expected use standard” to determine property values and address the need to monitor and guide easement appraisals to protect the integrity of tax incentives and conservation efforts. Part II will provide background information on the nature of syndicated conservation easements and how they arise. Part III will be separated into the following sections to provide analysis: Part III.A will conceptualize the issue of overvaluation as a primary driving factor in syndicated conservation easements and tax deduction abuse. Part III.B will analyze the current “highest and best use” standard for valuing property and the issues that arise with its application. Part III.C will outline a proposed solution to deduction abuse that modifies the “highest and best use” standard to instead use a subjective, actual or expected use standard. Part IV will provide concluding thoughts and observations about the importance of reducing tax deduction abuse and protecting conservation efforts.

conservation easement tax deduction was overvalued and should be reduced by approximately \$1.6 million); *Triumph Mixed Use Invs. III, L.L.C. v. Comm’r*, No. 20412-14, 2018 WL 2228198, at *3 (T.C. May 15, 2018) (holding a reported conservation easement should be disallowed because of a quid pro quo agreement between the petitioner and local government); *Carroll v. Comm’r*, 146 T.C. 196, 219, 224 (2016) (holding that petitioners were liable for accuracy related penalties based on underpayment of taxes after reporting a conservation easement that did not comply with appropriate requirements).

14. See *infra* Part III.A.

15. See Listing Notice, *supra* note 13, at *1–3; see, e.g., *Trout Ranch*, 2010 WL 5395108, at *18; *Triumph Mixed Use*, 2018 WL 2228198, at *3; *Carroll*, 146 T.C. at 224.

16. Treas. Reg. § 1.170A-14(h)(3)(ii) (2020); see also *Trout Ranch*, 2010 WL 5395108, at *14–18 (showing an example of highly variable practices to determine conservation easement values).

II. BACKGROUND

General tax deductions for charitable giving were first established in 1917 to ensure that wealthy Americans would continue making contributions to charity despite an increase in taxes resulting from the United States' entrance into World War I.¹⁷ In 1976, Congress amended § 170 of the IRC to allow charitable contributions of partial interests in property including “a lease on, option to purchase, or easement with respect to real property.”¹⁸ This amendment provided the arena for conservation easements to begin protecting land; the easiest way to understand how the process works today is through a practical, hypothetical example as detailed below.¹⁹

A. The Conservation Easement Process

Sam Potter owns a 100-acre farm on which to live, raise cattle, grow and harvest crops to use for livestock feed, and maintain a large pond for personal enjoyment and as natural habitat for local wildlife. Sam has noticed that the once completely rural local community has become busier, with large businesses, corporations, and residential developments springing up with increasing frequency over the past decade. Sam's farm has been family-owned for three generations, and as the years pass, Sam questions what will happen to it as new generations take ownership. Sam decides that maintaining the land in its present condition will benefit wildlife and ensure the area remains a natural space amidst industrialization and development. Sam reaches out to a land trust to discuss placing restrictions on the property so that it cannot be developed.²⁰ The option Sam decides to pursue is to donate a

17. See War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300, 300–02; Steve Blum, *The Interesting History of the US Charitable Contribution Deduction*, STRATEGIC WEALTH PLAN., <http://awealthplan.com/the-interesting-history-of-the-us-charitable-contribution-deduction/> (Nov. 5, 2015); Lindsey, *supra* note 8, at 1061.

18. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1919.

19. See I.R.C. § 170(h). This hypothetical scenario will implicate and address only those tax provisions related to an individual's donation of a conservation easement pursuant to § 170(h). *Id.*

20. See generally Andrew Loza, *What Is a Land Trust*, WECONSERVEPA, https://conservationtools.org/library_items/1434/files/1768 (last updated May 3, 2018).

conservation easement to the land trust to restrict development and allow the trust to maintain the property in its current natural state.

First, Sam and the land trust must come to an agreement between themselves about how and to what extent the land will be protected. Sam must decide what rights to reserve to use the land without hindering the conservation value of the property.²¹ For conservation easements, the landowner generally conveys certain rights associated with the development of the property and therefore restricts the uses and activities that can still take place thereon.²² The rights conveyed to the land trust and relinquished by the landowner have serious implications on future uses of the land and future revenue that can be derived from the land because conservation easements must be granted in perpetuity.²³

The land trust must then visit the property to prepare a Baseline Documentation Report (“BDR”) which indicates the current condition of the land, any buildings and structures present, the types of animal and plant life present, and the ability of the land to provide habitat important to conservation goals at the time the gift of the easement is

21. *See generally* JANE ELLEN HAMILTON, CONSERVATION EASEMENT DRAFTING AND DOCUMENTATION 21 (Sylvia Bates ed., 2008) (giving points of guidance for conservation easements including the need to “protect[] a property’s conservation resources while permitting uses of the land that are non-inconsistent with such protection”).

22. *See id.* at 20.

23. *See* I.R.C. § 170(h)(2)(C). The perpetuity requirement was adopted by statute pursuant to the Tax Reduction and Simplification Act. *See* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126, 154. In general terms, a conservation easement must be granted with the intent to run with the land forever, surviving conveyance of the underlying property to new landowners. Theoretically, there should not be a mechanism in the agreement between the landowner and land trust conveying the conservation easement that allows extinguishment of the easement. Realistically, there is a statutorily permissible option to extinguish conservation easements, but only under the limited circumstances where the conservation purposes become “impossible or impractical” because of unexpected changes in the condition of the property. *See* Treas. Reg. § 1.170A-14(g)(6)(i) (2020). The statutory requirements of extinguishment are “strictly construed” to ensure conservation easements are not frivolously dissolved. *Maple Landing, L.L.C. v. Comm’r*, No. 1996-18, 2020 WL 3867221, at * 10 (T.C. July 9, 2020) (quoting *Carroll v. Comm’r*, 146 T.C. 196, 212 (2016)).

made.²⁴ The BDR also provides vital information to the land trust to maintain the natural value of the property.²⁵ This report will be the basis for the land trust to monitor and enforce the restrictions placed on the land to ensure continuation and conservation of the property.²⁶ The BDR provides important evidence that the property being protected qualifies for the relevant tax incentives by falling into one of four protectable categories of land: (1) land preserved for outdoor recreation; (2) natural habitat for wildlife; (3) open space for scenic enjoyment of the public; and (4) historically important land.²⁷ The parties must then draft a contract of conveyance or deed to reflect the rights that will be restricted by the conservation easement.²⁸

To continue the hypothetical, Sam must submit the documentation of the property's monetary value to receive the tax benefits that contribute to a landowner's decision to conserve his land rather than cash in on its highly valuable development potential. Sam must have a "qualified appraisal" conducted on the property to determine the fair market value of the conservation easement.²⁹ The fair market value of the easement must reflect "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable

24. See Treas. Reg. § 1.170A-14(g)(5)(i) (requiring documentation of the property conditions). Merely documenting the state of the property at the time of the gift is required by the regulation. The BDR is used most frequently by land trusts in the United States to comply with accreditation standards promulgated by the Land Trust Alliance. See Writing Baseline Documentation Reports for Conservation Easements, LAND TR. ALLIANCE, <https://tlc.lta.org/topclass/uploads/documents/725936/11B%20SPNHF%20BDR%20Procedures.pdf> (last updated Feb. 12, 2018).

25. See generally Writing Baseline Documentation Reports for Conservation Easements, *supra* note 24.

26. See HAMILTON, *supra* note 21, at 20–21.

27. See I.R.C. § 170(h)(4)(A)(i)–(iv); Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204.

28. Enabling legislation promulgated by states dictates the form by which the conveyance must be documented. See HAMILTON, *supra* note 21, at 23.

29. See I.R.C. § 170(f)(11); see generally Treas. Reg. § 1.170A-14(h). The requirement to obtain an appraisal was established through the Deficit Reduction Act of 1984 to ensure substantiation of tax incentives to the landowner. See also Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 691–93.

knowledge of relevant facts.”³⁰ Determining the fair market value of the conservation easement includes analyzing the values of comparable *easements* in the area.³¹ Typically this process is difficult or impossible to complete because of the many factors involved in the value of the easement.³² Therefore, the appraiser may employ a before-and-after approach where the difference in the value of the *property* before and after the easement was established reflects the value of the easement.³³

While the before-and-after approach is not the favored option for valuing easements,³⁴ it is more widely used.³⁵ Appraisers use several different approaches like the sales comparison and income capitalization, to determine the before-and-after value of the easement.³⁶ The sales comparison approach compares the previous sales prices for similar properties in the surrounding area.³⁷ The income capitalization method is less reliable because it has a complicated nature that accounts for variables that often contribute to the value of the property as developed.³⁸ Normally, appraisers using the income capitalization method

30. Treas. Reg. § 1.170A-1(c)(2); *see also* Kirsten Rabe Smolensky, *Defining Fair Market Value*, INT’L SOC’Y OF APPRAISERS (June 27, 2018), <https://www.isa-appraisers.org/about/blog/details/344/defining-fair-market-value>.

31. *See* Trout Ranch L.L.C. v. Comm’r, No. 14374–08, 2010 WL 5395108, at *14–17 (T.C. Dec. 27, 2010) (analyzing the sufficiency of conservation easements to determine the value of the conservation easement at issue).

32. *Id.*

33. *See* Treas. Reg. § 1.170A-14(h)(3)(i) (“If no substantial record of marketplace sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the 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.”).

34. *See id.*

35. *See* Weeks et al., *supra* note 11, at 332.

36. *See id.* The aforementioned ABA report also mentions the reproduction cost method but asserts that its use is so low to be negligible to discuss. *See generally*, Crimi v. Comm’r., Nos. 13252–09, 13262–09, 20519–09, 22374–09, 22417–09, 22531–09, 2013 WL 561347, at *22 (T.C. Feb. 14, 2013) (describing the method).

37. *See* Weeks et al., *supra* note 11, at 332.

38. *See id.* at 332–333. The value determined using the income capitalization method derives a value from the amount of income the property can generate after taking operating expenses and the capitalization rate into account. *See* Marshall Hargrave, *Income Approach*, INVESTOPEDIA (July 29, 2020),

must also use “subdivision development analysis,” which accounts for potential zoning, street and lot design, utility line placement, and other factors, all of which are theoretical at the time the appraisal takes place.³⁹ While the process of donating a conservation easement is quite complicated, arriving at a value for the easement is the most difficult part and accounts for the most issues.⁴⁰

Once this process has been completed, Sam and the land trust can close on the easement transaction. After closing on the transaction, the land trust becomes responsible for maintenance, periodic inspection of the property, and enforcement of the easement’s restrictions on Sam’s activities to ensure the conservation value of the land is maintained.⁴¹ The land trust’s role in maintaining a connection to the landowner and the property while important to protecting the land is integral to ensure continued compliance with IRS regulations and § 170(h).⁴² To fully see the value of the donated easement, Sam must report the donation of the conservation easement on the annual tax return Form 8283 to claim the value of the easement as a tax deduction.⁴³ Subsequently, Sam potentially can receive a tax deduction for up to 100 percent of the contribution base in the property.⁴⁴ If the value of the

<https://www.investopedia.com/terms/i/income-approach.asp>; *see also Crimi*, 2013 WL 561347, at *22.

39. *See Weeks et al., supra* note 11, at 333.

40. *See id.* The qualification of determining a value as a practice that raises issues within the conservation easement process is based on the practical *incomplexities* that have thus far been outlined in the example of Sam Potter prior to the valuation stage. Many of the preliminary steps in the conservation easement process previously discussed can, arguably, be categorized as “incomplexities,” in part, because of the settled nature of the particular concepts and areas of law that the steps incorporate (i.e., contract negotiation and property conveyances). *See id.*

41. *See* Treas. Reg. § 1.170A-14(c) (2020); HAMILTON, *supra* note 21, at 378 (discussing the land trust’s responsibility to enforce the conservation easement, generally called “stewardship”).

42. *See* Treas. Reg. § 1.170A-14(c)(1) (specifying that an eligible donee is one with “a commitment to protect the conservation purposes of the donation, and . . . the resources to enforce the restrictions”); *see also* I.R.C. § 170(h).

43. *See Form 8283, Noncash Charitable Contributions*, IRS, <https://www.irs.gov/pub/irs-pdf/f8283.pdf> (last updated Sept. 23, 2020).

44. In this hypothetical, Sam operates a farm on the property now encumbered by the conservation easement. As such, the easement would qualify for the special rule regarding donation of interest in agricultural land for farmers and ranchers,

easement based on the qualified appraisal exceeds Sam's contribution base, the excess can carryforward for up to fifteen years.⁴⁵

B. *Syndicated Conservation Easements*

"Syndication" was originally coined when real estate companies in charge of listing undeveloped properties began marketing campaigns that advertised the potential value of the property in its developed state, as well as its potential value as a charitable deduction through conservation easements.⁴⁶ In doing this, companies imply that both development and donation were viable and lucrative investment options.⁴⁷ Potential buyers would obtain the properties and place conservation

whereas the normal percentage available for deduction for conservation easements is fifty percent of the contribution base. *See* I.R.C. § 170(b)(1)(E)(iv)(I). This expansion of the deduction limit for farmers and ranchers was established through the Pension Protection Act for a limited amount of time. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 1068. The expansion of the percentage deductible was extended in 2012 and 2014 before being made permanent (not limited by timeframe) in 2016. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313, 2324; Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010, 4013; Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242, 3047. Contribution base is limited to adjusted gross income for the purposes of determining proper deductions available to landowners. *See also* I.R.C. § 170(b)(1)(H).

45. *See* I.R.C. § 170(b)(1)(E)(ii). The carryover timeframe was also expanded through § 1068 of the Pension Protection Act. In layman's terms, a carryover means that if the amount of the tax deduction is higher than what the taxpayer can receive in a year, the surplus amount would be available in concurrent years. For an example of how carryovers occur, if a taxpayer owns property that results in a capital loss of \$4,500 for the year, they can receive a capital loss deduction of \$3,000 in the first year of filing taxes, and they can receive the remaining \$1,500 as a deduction in the second year. *See, e.g.*, I.R.C. §§ 1211(b), 1212(b); *Topic No. 409 Capital Gains and Losses*, IRS, <https://www.irs.gov/taxtopics/tc409> (last updated Oct. 14, 2020).

46. *See, e.g.*, Peter Elkind, *The IRS Tried To Crack Down on Rich People Using an "Abusive" Tax Deduction. It Hasn't Gone So Well*, PROPUBLICA (Jan. 3, 2020), <https://www.propublica.org/article/the-irs-tried-to-crack-down-on-rich-people-using-an-abusive-tax-deduction-it-hasnt-gone-so-well> (giving an example of an Alabama promoter soliciting clients with advertisements of available tax deductions). Based on this example, the blatant origins of syndicated conservation easements have clearly not been eradicated. *See id.*

47. *See id.*

easements on the land, sometimes for the sole purpose of receiving the tax deduction that would otherwise have been extremely valuable if developed.⁴⁸ Recently, syndicated conservation easements have been addressed in the context of landowners who form limited liability companies (“LLC”) as pass-through entities to receive tax deductions that exceed the landowner’s initial investment in the property.⁴⁹

For example, if Sam Potter’s conservation easement was appraised and valued at \$1 million, and his relevant contribution base was \$30,000, then Sam could realize up to \$450,000 through § 170(h) tax deductions, out of the total \$1 million value of the conservation easement.⁵⁰ To ensure that the remaining \$550,000 in potential tax deductions is not lost, Sam could then decide to form an LLC with a business partner prior to granting the conservation easement. With more individuals involved in the transaction, there is the chance that more of the tax deduction, and potentially the maximum tax deduction could be realized by shareholders.⁵¹

However, federal law does not allow other people to receive excess tax deductions,⁵² nor does the federal government encourage deduction benefits that would potentially result in profits.⁵³ Therefore, when the IRS becomes aware of abusive donations (where the deduction claimed seems disproportionate to the value of the conservation

48. See Weeks et al., *supra* note 11, at 331; see also Lindstrom, *supra* note 11.

49. See Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019) (outlining plans to limit partner deductions for qualified conservation contributions, which are supported by the Land Trust Alliance).

50. The figures given in the example reflect one hundred percent of Sam’s adjusted gross income multiplied over fifteen years. See I.R.C. § 170(b)(1)(E)(ii), (E)(iv)(I), (H).

51. See Lindstrom, *supra* note 11 (illustrating exactly the way LLCs can be used to maximize the available tax deduction). For a case law example, see *United States v. Zak*, 426 F. Supp. 3d 1365, 1368 (N.D. Ga. 2019) (describing “eleven discrete steps that represent the ‘general pattern’ the defendants took in enacting their conservation easement offerings”).

52. See Lindstrom, *supra* note 11.

53. See Treas. Reg. § 1.170A-14(h)(3)(i) (2020) (“If, as a result of the donation of a perpetual conservation restriction, the donor or a related person receives, or can reasonably expect to receive, financial or economic benefits that are greater than those that will inure to the general public from the transfer, no deduction is allowable under this section.”).

easement), the taxpayer is audited.⁵⁴ The IRS, and the Tax Court on appeal if the decision reached upon audit is challenged, can reduce or even disallow deductions based on their findings of inaccurate reporting, appraisals, or abusive valuations.⁵⁵

III. ANALYSIS

The IRS has allowed syndicated conservation easements to find a foothold in conservation easement law because the current requirements laid out in the tax code are ambiguous.⁵⁶ The abuse stems, not from what is required, but from what is allowed. As this analysis will assert, the current standard of valuing property by the “highest and best use” is a lynchpin for bogus appraisals which may inevitably provide the IRS with a justification to reduce the tax deductions allowed under § 170(h). Continuing to employ the “highest and best use” standard may also lead to a reduction in the overall trend to support conservation. This harm facing national conservation efforts warrants, and arguably demands, a change in the standards used to value property.

A. Syndicated Conservation Easement Abuse

The IRS essentially discovers that syndicated conservation easements are abusive deductions when the amount of tax benefits received by a landowner raises a red flag.⁵⁷ Therefore, while it is important to address abuse based on the bad faith behavior of conservation easement donors, the most effective way for the IRS to address the abuse of conservation easement donation is to prevent overly high appraisals of easements during the donation process. High easement values do not originate from the LLCs being monitored by the IRS, they come from

54. See generally Lindstrom, *supra* note 11; *IRS Audits*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits> (last updated Sept. 23, 2020) (explaining that audits can be initiated when the information reported in a tax return does not match the “norms” of similar returns).

55. Treas. Reg. § 1.170A-14(i); see also I.R.C. § 6662.

56. See I.R.C. § 170(h); see also Treas. Reg. § 1.170A-14.

57. See Listing Notice, *supra* note 13, at *1–3 (designating conservation easements as syndicated and therefore “listed transactions” that give the donor a deduction that “equals or exceeds two and one-half times the amount of the investor’s [initial] investment”).

high appraisals, most of which are too high to be sufficiently substantiated.⁵⁸

The IRS and the Secretary of the Treasury have taken notice of the dangers presented by syndicated conservation easements.⁵⁹ Looking specifically at façade easements granted for conservation purposes from 1979 to 1981 and 1997 to 2016, an increasing trend of more egregious tax abuse becomes starkly apparent.⁶⁰ The average overstatement of available tax deductions from six conservation easements granted between 1979 and 1981 was \$102,100.⁶¹ The average overstatement from eleven cases between 1997 and 2016 was \$1.4 million.⁶² In response, the IRS has transitioned its focus to conservation easement transactions specifically involving “a promoter [who] offers prospective investors in a partnership or other pass-through entity the possibility of a charitable contribution deduction for donation of a conservation easement.”⁶³ In 2016, the IRS categorized syndicated conservation easements as “listed transactions.”⁶⁴ These transactions require more extensive reporting and higher threshold limits on purported values of conservation easements that will trigger IRS scrutiny.⁶⁵

58. See *Trout Ranch L.L.C. v. Comm’r*, No. 14374-08, 2010 WL 5395108, at *14–17 (T.C. Dec. 27, 2010) (holding that the claimed conservation easement tax deduction was overvalued and should be reduced by approximately \$1.6 million).

59. See Joshua Rosenberg, *Easement Abuse an IRS Enforcement Priority*, *Retig Says*, 2019 Law360 318-50 (Nov. 14, 2019).

60. See Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 249 (2016); I.R.C. § 170(h)(4)(A)(iv) (defining conservation purposes); see *IRS Static Files Directory, Façade Easement Brief*, IRS (Oct. 23, 2009), <https://www.irs.gov/pub/irs-wd/0943033.pdf> (describing a façade easement as one which “preserves an [sic] historical structure by restricting changes to the structure”).

61. McLaughlin, *supra* note 60, at 249.

62. *Id.*

63. Listing Notice, *supra* note 13, at *2; see also Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019) (outlining plans to limit partner deductions for qualified conservation contributions, which are supported by the Land Trust Alliance).

64. See Listing Notice, *supra* note 13, at *3 (describing listed transactions in the conservation easement context as those where the purported value of the easement is 2.5 times the amount of the taxpayer’s initial investment).

65. *Id.*

Current calls to reform the conservation easement and tax deduction process discusses options that are merely band-aid solutions for policing conservation easements instead of addressing why overvaluation occurs.⁶⁶ The IRS addressed syndicated conservation easements in reference to overvaluation, but its actions remain focused on policing types of donors instead of incorrect values in appraisals.⁶⁷ The focus on policing the donation of conservation easements from LLCs is misguided because it does not address situations where abuse occurs outside the realm of LLCs and pass-through entity donations of conservation easements.⁶⁸

In many cases where the IRS has altered the deduction upon audit (whether by reduction or disallowance), there have been extremely disproportionate valuations taken from the appraisals.⁶⁹ For example, in *Trout Ranch, LLC v. Commissioner*, the Tax Court reduced a tax deduction for a conservation easement donation from \$2,179,849 to \$560,000.⁷⁰ The property in question was inspected by three different appraisers prior to the donation of the conservation easement, all with different values and factors used to determine overall value.⁷¹ The court did not use or uphold any of the values presented by the appraisers

66. See Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019) (addressing LLCs as a main issue driving syndicated conservation easements); see also Listing Notice, *supra* note 13, at *1–3 (attempting to draw attention to syndicated conservation easements by classifying them as “listed transactions”). Addressing syndicated conservation easements solely in reference to LLCs or simply raising a red flag for certain donations is only a matter of policing the system. However, without addressing the root of the problem (overvaluation), policing truly only acts as a band-aid.

67. See Listing Notice, *supra* note 13, at *1–3 (mentioning overvaluation as a watchpoint for triggering syndicated conservation easement monitoring).

68. See Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019) (allowing an exception for family partnerships and directing legislative focus toward partnership donations of conservation easements).

69. See *Trout Ranch L.L.C. v. Comm’r*, No. 14374-08, 2010 WL 5395108, at *18 (T.C. Dec. 27, 2010).

70. *Id.*

71. *Id.* at *9–11.

but instead asserted its own based on the information from the three appraisals.⁷²

Based on the decision reached in *Trout Ranch*, there is clearly potential for landowners to receive multiple appraisals, none of which are sufficiently substantiated according to the IRS and the Tax Court.⁷³ Obtaining multiple appraisals would seemingly operate as a check on the accuracy of the amount claimed on the landowner's tax return. *Trout Ranch* directly contradicts that idea, implying that there is a level of uncertainty surrounding conservation easement valuation, and therefore entirely too much room for mistakes and outright abuse with the current standards and procedures employed.⁷⁴ There are cases where the Tax Court determined that an appraisal was substantiated by evidence on the record, and yet a reduction in tax benefits was still necessary.⁷⁵ The question is then raised, how many conservation easements have flown under the radar that the IRS and the Tax Court would have entirely altered despite the appraisal on the easement? It is apparent that there is a bigger and more pressing issue than LLCs simply claiming large tax deductions.

Most cases of overvaluation and syndicated conservation easements have been resolved in Tax Court, yet the issue has risen in importance and the IRS has taken a more aggressive stance on curtailing abuse, even seeking injunctions against abusive donors to stop syndicated conservation easement tax schemes.⁷⁶ In 2018, the Department

72. *Id.* at *18. Courts have addressed their authority to come to a wholly new value based on evidence in the record and to set aside values determined by appraisers. See *SWF Real Estate L.L.C. v. Comm'r*, No. 11190–11, 2015 WL 1477911, at *31 (T.C. Apr. 2, 2015) (“[The Court] may also reach a decision as to the value of property that is based on our own examination of the evidence in the record.”); see also *Silverman v. Comm'r*, 538 F.2d 927, 933 (2d Cir. 1976) (“[The Tax Court] may reach a determination of value based upon its own analysis of all the evidence in the record.”).

73. See *Trout Ranch*, 2010 WL 5395108, at *18.

74. See *Weeks et al.*, *supra* note 11, at 256–57 (discussing areas of concern within § 170(h) that have created confusion and uncertainty).

75. See *SWF Real Estate*, 2015 WL 1477911, at *31 (“[The Court] may also reach a decision as to the value of property that is based on our own examination of the evidence in the record.”).

76. See Press Release, Dep't of Just. Off. of Pub. Affs., Justice Department Sues to Shut Down Promoters of Conservation Easement Tax Scheme Operating out of Georgia, (Dec. 19, 2018), <https://www.justice.gov/opa/pr/justice-department-sues>

of Justice initiated a lawsuit against a group in Georgia who claimed “fraudulent conservation easement shelters, which . . . were based on willfully false valuations.”⁷⁷ In this particular case, the defendants claimed more than \$2 billion in tax deductions from overvalued conservation easements.⁷⁸

While it is heartening to see overvaluation addressed as the core issue, it is still an act of policing and punishment once the abuse has occurred. During the conservation easement donation process, landowners are responsible for obtaining the appraisals.⁷⁹ Cases show that tax abuse has become a big enough issue to actively seek injunctive relief against donors of abusive easements, and the Tax Court has disallowed deductions solely on its knowledge and discretion because of the abuse.⁸⁰ Therefore, it is no longer efficient or in good form to allow landowners, appraisers, and donee organizations to guess correct values based on confusing and uncertain standards and procedures.

At the time of publication, the Justice Department’s pending case shows that the IRS is becoming more concerned with abuse from syndicated conservation easements and its willingness to fight the abuse and retain the tax benefits of granting conservation easements.⁸¹ The continued existence and expansion of the available tax deduction further shows the government’s continued interest in supporting private conservation.⁸² Therefore, if the arena for abuse to occur is not limited,

shut-down-promoters-conservation-easement-tax-scheme-operating-out (discussing a recently filed Department of Justice case against individuals who joined to promote and sell “an allegedly abusive conservation easement syndication tax scheme”).

77. *Id.*

78. Complaint at 5, *United States v. Zak*, 426 F. Supp. 3d 1365, 1368 (N.D. Ga. 2019), <https://www.justice.gov/opa/press-release/file/1121451/download> (providing a detailed breakdown of the tax deductions claimed by each defendant, five of the six of which totaled over \$1.5 billion); *see also* Press Release, Dep’t of Just. Off. of Pub. Affs., *supra* note 76.

79. I.R.C. § 170(f)(11)(C).

80. *See supra* notes 70 and 73.

81. Press Release, Dep’t of Just. Off. of Pub. Affs., *supra* note 76; *see also* Complaint, *supra* note 76, at 5.

82. *See* Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204; Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 1068 (establishing permanence of the expanded percentages available to landowners); *see also* Weeks et al., *supra* note 11, at 256–257 (discussing how recent legislation making changes to the

the time may come when the government sees more harm to the public than good in allowing the deduction and could decrease the potential benefits or do away with them entirely.⁸³ It would logically follow that if incentives are taken away, the donation of conservation easements may reduce as well.

The IRS is in a tough position, however, because if it cracks down on landowners claiming seemingly abusive deductions, then conservation easement donation may become less attractive because of the potential for deduction disallowance and IRS audit. The IRS is stuck between becoming strict on abuse and leaving the deduction free to attract landowners to conserve land and receive deductions.⁸⁴ The current path taken by the IRS is to penalize the landowner as syndication is discovered.⁸⁵ If the standards instead addressed overvaluation on the front end, the IRS would not need to take such an involved interest in monitoring landowners after a conservation easement has been created

tax code could have the effect of depressing conservation easement donation, and therefore, such effects should be monitored and further incentives to grant conservation easements given to counter any depressive effect); Elkind, *supra* note 46 (categorizing the conservation easement deduction as “the single most generous charitable deduction in the tax code”).

83. See Press Release, Internal Revenue Serv., Abusive Tax Shelters, Trusts, Conservation Easements Make IRS’ 2019 “Dirty Dozen” List of Tax Scams To Avoid (Mar. 19, 2019), <https://www.irs.gov/newsroom/abusive-tax-shelters-trusts-conservation-easements-make-irs-2019-dirty-dozen-list-of-tax-scams-to-avoid> (describing syndicated conservation easements as tools “to produce benefits that are too good to be true and ultimately seriously compromise the taxpayer”).

84. Recent American Bar Association research discusses the general desire to at least maintain private conservation easement donation. See Weeks et al., *supra* note 11, at 256–257. Further, 40 million acres of conserved land in the United States comes from conservation easements, and that number represents only 60% of the reported easements in the country. See *Conservation Easements and the National Conservation Easement Database*, NAT’L CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us/storymap/index.html> (last visited Oct. 31, 2020) (compiling voluntarily submitted information from landowners regarding conservation easement donations across the United States).

85. See *Trout Ranch L.L.C. v. Comm’r*, No. 14374-08, 2010 WL 5395108, at *18 (T.C. Dec. 27, 2010) (holding that an overvaluation of a property on which a conservation easement was granted necessitated a reduction in the claimed deduction); Press Release, Dep’t of Just. Off. of Pub. Affs., *supra* note 76 (showing the increased concern developing around conservation-easement-based tax abuse scams).

and taxes have been filed.⁸⁶ The focus on retroactive remedies to abuse highlights the drain on judicial and IRS resources that the current standard causes.⁸⁷ There must be a way to passively cut down on the space for abuse to occur, while maintaining attractiveness to landowners.

The percentages of available deductions could be reduced to lower the amount of claimable tax benefits, but that would contradict the legislative history of increasing the percentages to further incentivize donations.⁸⁸ Capping deductions in this way may reduce instances where tax benefits are claimed that are either equal or exceed two and one-half times the claimant's initial investment.⁸⁹ However, capping deductions would certainly discourage landowners from choosing conservation over development, and it is ultimately unnecessary when a reevaluation of the current appraisal standard would more efficiently address the problem.⁹⁰

B. The Current Standard: "Highest and Best Use"

Currently, tax regulations and § 170(h) mandate that appraisals and conservation easement values be determined by looking at the "highest and best use" of the property before and after the gift is granted.⁹¹ In many cases, appraisers deduce this value according to the

86. See INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK 73 (2019), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> (showing that the IRS spent \$4,670,691 in 2018 and \$4,618,703 in 2019 on enforcement procedures).

87. *Id.*

88. Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204; Pension Protection Act, 120 Stat. at 1068 (making permanent the expanded percentages available to landowners).

89. See Listing Notice, *supra* note 13, at *3 (designating conservation easements as syndicated and therefore "listed transactions" that give the donor a deduction that "equals or exceeds . . . two and one-half times the amount of the investor's initial investment," which shows the level of egregiousness the IRS is concerned with).

90. See John H. Lavelle, *Conservation Easements: The Top Tax Tool in the Farmer's Estate Planning Toolbox*, CORNELL C. OF AGRIC. AND LIFE SCI. (Apr. 3, 2017), <https://smallfarms.cornell.edu/2017/04/conservation-easements>. Considering the numerous reasons landowners (especially small operation farmers) create conservation easements, a simple cap placed on the amount of deductions available would lower deductions and incentives such that it could seem like a punishment. See *id.*

91. See Treas. Reg. § 1.170A-14(h)(3)(ii) (2020).

property's use and development potential.⁹² Cases show that in reality, this translates to appraisers looking at undeveloped land and determining the exact development that could, and should, be done on the land (i.e., lot size, lot number, use of potential structures).⁹³ However, while appraisal of a property through the use of comparable ones is an inexact science, translating the value of one property into a value for an entirely different property is fancifully difficult and uncertain.

Trout Ranch provides an example of this, as the appraisals employed the income approach, effectively determining the value of undeveloped land by looking at the profits made from similar properties.⁹⁴ The appraisals asserted values of theoretical lots on the subject property based on the sale prices and market factors that affected developed communities.⁹⁵ In that case, the resulting values were reported as approximately \$300,000 for a 1.25–2 acre lot.⁹⁶ It is striking, however, that this particular value was not determined by comparing other properties of 1.25–2 acre lots.⁹⁷ To make their valuations, appraisers and the court used 'comparable' developments of roughly 2 to 15 times the size of the parcel at issue and developments with different features.⁹⁸

In *Alli v. Commissioner*, the appraisals obtained on two donated apartment buildings were ruled insufficient and the claimed tax deduction disallowed.⁹⁹ The apartment buildings were in significant disrepair,¹⁰⁰ yet the appraisal submitted to corroborate the claimed tax deduction based the value of the property on "the renovated marketing

92. See *Crimi v. Comm'r.*, Nos. 13252-09, 13262-09, 20519-09, 22374-09, 22417-09, 22531-09, 2013 WL 561347, at *22 (T.C. Feb. 14, 2013); see also *Weeks et al.*, *supra* note 11, at 332.

93. See *e.g.*, *Trout Ranch L.L.C. v. Comm'r.*, No. 14374-08, 2010 WL 5395108, at *17–18 (T.C. Dec. 27, 2010) (discussing the different types of data used by the expert appraisers to arrive at values for the subject property donated as a conservation easement).

94. *Id.* at *21.

95. *Id.*

96. *Id.* at *47–49 (discussing the values that would be assumed based on evidence from the record, as the court did not accept any of the appraisals obtained by the landowner as sufficient.)

97. *Id.* at *29–31.

98. *Id.*

99. No. 24863-11, 2014 WL 288969, at *18–22 (T.C. Jan. 27, 2014).

100. *Id.* at *1–2.

position” of the property.¹⁰¹ While it stands to reason that the “highest and best use” of an apartment building would be a usable, livable, and renovated space, for a property to receive a tax deduction based on a value that likely would never be available is clearly abusive to an extreme degree.

The “highest and best use” standard is responsible for a large amount of the complexity and uncertainty surrounding the appraisal requirement of conservation easement donation. The “highest and best use” is described as “an objective assessment of how immediate or remote the likelihood is that the property . . . would in fact be developed.”¹⁰² However, when looking at large tracts of open, usually scenic land, there is often a vast range of uses that could be determined as the highest and best, and there may not be a limit to the potential value of the property’s development. A property could arguably be developed as an estate-type community, as a multi-story apartment complex, or a luxury resort.¹⁰³ The only limits on a determination of “highest and best use” are an appraiser’s discretion,¹⁰⁴ the fear of an IRS audit, and that any claimed use other than the current one be close in time and reasonably probable.¹⁰⁵ The inherent contradiction with this limitation is that a landowner pursuing a conservation easement has essentially

101. *Id.* at *4.

102. *See* Treas. Reg. § 1.170A-14(h)(3)(ii) (2020).

103. While zoning does affect the uses available for a property, zoning in rural areas is less often utilized and the number of available uses still may be more varied than in developed, urban areas. *See* KEVIN NELSON, ESSENTIAL SMART GROWTH FIXES FOR RURAL PLANNING, ZONING, AND DEVELOPMENT CODES 1 (2012), https://www.epa.gov/sites/production/files/documents/essential_smart_growth_fixes_rural_0.pdf (discussing planning options for rural communities saying “[s]ome rural parts of the United States do not engage in planning, zoning, or creating building codes”). Also, in the face of possible development and thus possible revenue influx to the local rural economy, even areas that zone rural and agricultural areas may be more likely to allow variances or rezoning to encourage large scale development. *Id.*

104. *See* Elkind, *supra* note 46 (describing the appraiser’s role in conservation easement valuation as a use of the honor system).

105. *See* SWF Real Estate L.L.C. v. Comm’r, No. 11190–11, 2015 WL 1477911, at *31 (T.C. Apr. 2, 2015) (citing *Hilborn v. Comm’r*, 85 T.C. 677, 689 (1985)) (stating a proposed highest and best use requires “closeness in time” and “reasonable probability”).

made clear that any development potential the property has is not reasonably probable or remotely close in time.¹⁰⁶

The “highest and best use” standard has the practical effect of incentivizing higher-than-necessary appraisals to increase tax deductions by giving landowners and appraisers a statutorily granted vehicle to do so. The appraisal methods used to determine the before-and-after values of properties subject to conservation easements may not be reliable to yield consistent valuations. For example, in *Rolfs v. Commissioner*, the building was valued at \$76,000 based on a sales comparison approach.¹⁰⁷ However, the appraiser reported that using the reproduction cost approach, the value of the house was \$235,350.¹⁰⁸ Depending solely on the appraiser’s discretion and the honor system,¹⁰⁹ the owners could have received either of these amounts in deductions. Further, based on the court’s final decision to disallow the deduction, neither would have been correct.

Some may justify the continued use of the “highest and best use” standard because the rights granted when donating a conservation easement are conveyed in perpetuity.¹¹⁰ The conveyance of those rights may only be extinguished and regained by the landowner if the conditions surrounding the property make the continued use for conservation purposes impractical or impossible.¹¹¹ In instances where a property interest is conveyed, the interest is also transferred perpetually, but the owner is compensated based on the fair market value of the interest or property conveyed.¹¹² For example, Fifth Amendment takings are

106. See Lavelle, *supra* note 90 (discussing the many valuable reasons to consider conservation easements as an estate planning option).

107. 135 T.C. 471, 478 (2010).

108. *Id.*

109. See Elkind, *supra* note 46.

110. See I.R.C. § 170(h)(2)(C) (establishing the perpetuity requirement); see also Treas. Reg. § 1.170A-14(a) (2020) (“To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity.”).

111. See Treas. Reg. § 1.170A-14(g)(6)(i).

112. See I.R.C. § 170(h)(2)(C) (requiring conservation easements be donated in perpetuity); see also Treas. Reg. § 1.170A-14(h)(3)(i) (requiring the perpetual conservation easement value be determined based around the fair market value).

conveyances of interest whereby the compensation required is judged by the fair market value of the property at the time of the taking.¹¹³

Further, while easements can be removed from a property,¹¹⁴ the rate of that occurring is likely low. In the case of Fifth Amendment takings, as well as the general granting of easements, compensation is required or freely given.¹¹⁵ At first blush, it is tempting to argue that because conservation easements differ from takings, where compensation is mandated, these easements require some incentive because they *cannot* be compensated and must be donated.¹¹⁶ However, the availability of extremely valuable tax deductions could be seen as a form of compensation, and it is this idea that landowners are harmed by losing development potential that has led to the issues of tax abuse discussed thus far. Even if the perpetual nature of the conservation easement is a minor justification behind maintaining a “highest and best use” standard, at the very least, the current standard requires clarification and application guidelines to limit the current level of tax abuse.¹¹⁷

113. Fair market value in the eminent domain context has been described as the amount a “willing buyer would pay in cash to a willing seller’ at time of property’s taking.” *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

114. See James Kimmons, *How to Get Rid of Real Estate Easements*, THE BALANCE SMALL BUS. (May 8, 2019), <https://www.thebalancesmb.com/ways-to-terminate-real-estate-easements-2866977> (giving a simple overview of ways to remove easements from property).

115. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

116. See Treas. Reg. § 1.170A-14(h)(3)(i) (2020) (stipulating that no deduction is allowed if the donation of the conservation easement could reasonably result in “financial or economic benefits that are greater than those that will inure to the general public from the transfer.”); see also *Rolfs v. Comm’r*, 135 T.C. 471, 494–95 (2010) (discussing the bar to deductions when a quid pro quo transaction occurs involving property donation).

117. This need for clarification has been expounded upon, however does not go far enough to end tax deduction abuse, only to hamper it. See, e.g., Weeks et al., *supra* note 11, at 331–34 (outlining certain recommendations for addressing overvaluation); McLaughlin, *supra* note 60, at 249.

C. *The Recommended Standard: Actual or Expected Use*

The “highest and best use” standard to value conservation easements is statutorily established but problematically applied. There are instances of charitable contributions of property (not for conservation) where the value is determined with some regard to how the owner *plans* to use the property, not only how the property could best be used.¹¹⁸ Again in *Rolfs v. Commissioner*, a couple purchased property which included a home that they wanted to demolish and rebuild.¹¹⁹ The couple completed a charitable donation of the house to the local volunteer fire department for training purposes.¹²⁰ The owners then attempted to claim the full appraisal value of the house as a charitable deduction.¹²¹ Upon audit, the court entirely disallowed the deduction.¹²²

The Tax Court’s decision in *Rolfs* depended, in large part, on the facts that the particular donation was for the house severed from the property and the specific conditions placed on the donation.¹²³ However, the court highlighted the value of the home “as donated.”¹²⁴ If the “highest and best use” standard were applied to this case, it is foreseeable, close in time, and reasonably probable that the house could have been lived in and therefore had value to be received as a tax deduction.¹²⁵ Yet, in such circumstances, it would be unequivocally abusive to allow such a deduction for a demolished structure. The court recognized the absurdity of valuing the property in such a way, and instead determined the value, or lack thereof, based on how the owners expected to use the house.

The establishment of an actual or expected use standard is further supported by the decision in *Alli v. Commissioner*, where the court placed heavy scrutiny on the sufficiency of the appraisal because it “did

118. *Rolfs*, 135 T.C. at 491 (finding the appraisal at issue unpersuasive because as to a value of the house as \$76,000 when it was donated to be demolished).

119. *Id.* at 473.

120. *Id.* at 473–74.

121. *Id.* at 475–76.

122. *Id.* at 495.

123. *Id.* at 490.

124. *Id.*

125. See *SWF Real Estate L.L.C. v. Comm’r*, No. 11190-11, 2015 WL 1477911, at *31 (T.C. Apr. 2, 2015) (citing *Hilborn v. Comm’r*, 85 T.C. 677, 689 (1985)).

not describe [the property] *as it existed*.”¹²⁶ The *Alli* court held the appraisal was insufficient¹²⁷ and did not fulfill the appraisal requirement,¹²⁸ indicating that there is implicit support for the fact that such appraisals are inherently insufficient. Even without directly opposing the use of the highest and best use standard, the *Alli* court undermines the validity of a standard that ignores a property as it is and instead welcomes abusive valuations based on what it may never be.

The previously mentioned cases prove that courts already make decisions, at least in part, regarding conservation easement valuation based on a standard other than the “highest and best use.”¹²⁹ The statutory standard needs a change that reflects the real world, common sense approach to exactly how valuable a conservation easement, and by extension, the available tax deduction is. Such a change would likely reduce the rising amount of abuse stemming from overvaluation. If the standard were changed, appraisals and the reported values of the conservation easements would not be based on the values of properties that are inherently not similar and therefore not comparable.¹³⁰ Nor would they continue to be dependent on market factors that are not applicable to the subject property in its present state at the time of donation; instead depending on the reality of the land’s use.¹³¹

Establishing an actual or expected use standard to conservation easement valuation would not change the available means and methods

126. No. 24863–11, 2014 WL 288969, at *11 (T.C. Jan. 27, 2014) (emphasis added).

127. *See id.* at 20, 58.

128. *See* Treas. Reg. § 1.170(f)(11)(C)–(E) (2020) (outlining the rules for qualified appraisers and appraisals used to determine the fair market value of the property). The fair market value of the property determined by the qualified appraisal is used to fulfill the requirement in § 1.170A-14(h)(3)(i).

129. *See, e.g., Rolfs*, 135 T.C. at 491; *Alli*, 2014 WL 288969, at *11; *SWF Real Estate*, 2015 WL 1477911, at *31.

130. *See* Treas. Reg. § 1.170A-14(h)(3)(i). This inference is meant to contradict the effectiveness of the method asserted by the tax regulations, which is to use before-and-after valuation methods and use comparable properties to determine the value of the conservation easement thus the deduction.

131. *See Trout Ranch L.L.C. v. Comm’r*, No. 14374–08, 2010 WL 5395108, at *14–18 (T.C. Dec. 27, 2010) (outlining the factors looked at in the case of one conservation easement).

for determining the easement value.¹³² Instead, it would provide a limit to the practically unlimited value that can be deduced from a property's "highest and best use." For example, if the "highest and best use" standard is used, the before value of Sam Potter's hypothetical 100-acre farm would be determined by choosing a "highest and best use" of the farm before the easement's donation and then guessing at the value and the "highest and best use" of the property as developed. The truth of the matter is, in these situations, the development is likely to never occur. If an actual or expected use standard were used, Sam's farm could be valued per acre as if there were a willing buyer looking to develop the land, signifying the value of the property before the easement. It could then be valued per acre as if there were a willing buyer looking to operate the farm in its undeveloped state, signifying the value of the property after the easement. This would be different from the current process where the land would be compared to other parcels that are not actually comparable, or an appraiser would guess at all the features and improvements that could, might, or should be done on the land to make it truly valuable in the eyes of a single person.

Using a limiting standard on the front end of conservation easement donation would also reduce the need for policing easements that are reported with excessively high values. Admittedly, changing the standard would likely lower values generally, as the new standard would provide less basis and opportunity from the beginning of the donation process to create and have an outrageous and abusive appraisal. Despite providing a mechanism to essentially lower valuations across the board, any effect on the incentive to conserve will be minimized. Further, landowners will have no reason to be concerned with having their deduction denied or reduced because valuations under the new standard will not be so high that they raise a red flag to the IRS.¹³³

132. See Treas. Reg. § 1.170A-14(h)(3)(i) (establishing the rules for donation of conservation easements); *Crimi v. Comm'r*, Nos. 13252-09, 13262-09, 20519-09, 22374-09, 22417-09, 22531-09, 2013 WL 561347, at *12 (T.C. Feb. 14, 2013) (describing the process of the plaintiff to donate a conservation easement); see also *Weeks et al.*, *supra* note 11, at 332 (describing the methods appraisers use to value property). None of these sets of rules, regulations, or trends would have to change to reduce tax abuse from syndication and overvaluation if the standard were simply altered. See *Weeks et al.*, *supra* note 11, at 332.

133. See Listing Notice, *supra* note 13, at *3 (outlining the two and one-half times limit to an investor's initial investment and thus triggering IRS scrutiny).

Lowering the overall value of conservation easements will allow landowners to see the full potential of their donation without encouraging shady business practices.¹³⁴ Altering the standard will likely create a balance between ensuring compliance with the tax code while encouraging continued conservation.¹³⁵

IV. CONCLUSION

For centuries, the United States has increasingly relied on industrialization and development to increase economic productivity and prosperity.¹³⁶ Yet Congress has never lost sight of the importance of protecting undeveloped land.¹³⁷ The existence of a tax deduction for qualified conservation contributions shows the government's support for protection of land and its encouragement of private citizens to do so.¹³⁸ The continued expansion of the tax deduction and the available benefits have also continued to incentivize private landowners to participate in conservation easement practices.¹³⁹

The increase in abusive donations of syndicated conservation easements threatens not only those tax benefits but also the practice and trend of conservation.¹⁴⁰ While the IRS has focused on reducing abuse

134. *See id.* at *2 (addressing syndicated conservation easements in the context of LLCs and pass-through entities); *see also* Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019) (outlining plans to limit partner deductions for qualified conservation contributions, which are supported by the Land Trust Alliance).

135. *Why Conservation?*, FOUND. FOR NAT'L PARKS & WILDLIFE, <https://www.fnpw.org.au/about/why-conservation> (last visited Oct. 31, 2020).

136. *See supra* notes 2, 3, and accompanying text.

137. *See* Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204 (describing the extension of the Act to categorize the types of land uses that would be eligible for tax deductions for conservation easements).

138. *See, e.g., id.*; I.R.C. § 170(h); Treas. Reg. § 1.170A-14 (2020).

139. The percentage of the landowners' contribution base allowed for deduction was expanded and extended in 2012 and 2014 before being made permanent (not limited by timeframe) in 2016. *See, e.g.*, Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, 1068; American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313, 2324.

140. *See* Listing Notice, *supra* note 13, at *1 (addressing tax deduction abuse from conservation easement donation); Rosenberg, *supra* note 59; Press Release, Dep't of Just. Off. of Pub. Affs., *supra* note 76 (discussing a recently filed Department

in business practices and donations of syndicated conservation easements,¹⁴¹ a lack of attention has been paid to a significant contributor to tax abuse: the overvaluation and bogus appraisals allowed by the current tax regulations. Further, there has been a greater lack of attention paid to the statutorily permitted “highest and best use” standard that allows these bogus appraisals to occur by allowing appraisers to place an almost unchecked and unlimited value on the land being encumbered for conservation purposes.

As outlined above, the “highest and best use” standard should be abandoned for an “actual or expected use” standard, which would more accurately determine the value of the rights the landowner gives up through his donation. Ultimately, a change is warranted to protect the integrity of the tax deduction. Therefore, a change is warranted to protect the integrity of conservation practices, the value of our undeveloped and undisturbed land, and the “glorious heritage” which we have received.¹⁴²

of Justice case against individuals who joined to promote and sell “an allegedly abusive conservation easement syndication tax scheme”).

141. See Listing Notice, *supra* note 13, at *2; Charitable Conservation Easement Program Integrity Act of 2019, H.R. 1992, 116th Cong. (2019).

142. Rocio Lower, *Revel in Teddy Roosevelt’s Legacy*, NAT’L PARK FOUND., <https://www.nationalparks.org/connect/blog/revel-teddy-roosevelts-legacy> (last visited Oct. 31, 2020) (“We have fallen heirs to the most glorious heritage a people ever received, and each one must do his part if we wish to show that the nation is worthy of its good fortune.” (quoting President Theodore Roosevelt)).