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## Defining the Role of Agriculture in Agricultural Conservation Easements

Jess R. Phelps

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# Defining the Role of Agriculture in Agricultural Conservation Easements

Jess R. Phelps\*

*Farmland preservation has become an important pursuit for those seeking to protect the working landscape. One of the most common approaches for securing this protection is through the targeted use of agricultural conservation easements, typically perpetual land use agreements designed to limit incompatible activities in order to preserve future agricultural viability. Since the 1990s, agricultural conservation easements have protected millions of acres of land, and many of these donations have relied on the federal tax incentives provided by section 170(h) of the Internal Revenue Code to facilitate these transactions. Perhaps surprisingly given this high rate of utilization, securing farmland for future productive use is not an express objective of the Internal Revenue Code, which requires these donations to qualify on other grounds. This Article explores the impacts of this disconnect and examines options for how farmland preservation objectives could be better integrated into the current tax-incentivized conservation easement framework.*

|  |     |
|--|-----|
| Introduction.....  | 649 |
| I. The Rise of Federal Tax Incentivized Conservation Easements and the Farmland Preservation Movement..... | 653 |
| A. Agricultural Conservation Easements .....   | 654 |
| 1. Defining the Term.....  | 654 |
| 2. The Rise of the Conservation Easement .....   | 656 |
| 3. The Federal Tax Incentives—Origins and Codification .....   | 658 |
| 4. The Current State of Practice .....   | 659 |
| 5. Farmland Preservation: Adapting to a Changing Agriculture .....   | 662 |
| B. Farmland Preservation .....   | 665 |
| 1. U.S. Farm Policy: Origins and Evolution .....   | 666 |
| a. The New Deal .....  | 666 |
| b. The Post-War Period to the 1970s .....  | 667 |

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|  |     |
|--|-----|
| c. The Conservation Title and the 1985 Farm Bill.....                          | 667 |
| 2. Understanding the Contemporary Conservation Title .....                     | 668 |
| a. Working Lands Programs .....  | 669 |
| b. Land Retirement Programs .....  | 671 |
| c. Conservation Easement Programs.....   | 672 |
| 3. Farmland Preservation: Origins and Evolution.....                           | 674 |
| 4. Farmland Preservation as Federal Agricultural Policy .....                  | 676 |
| II. Agricultural Conservation Easements and the Internal Revenue Code.....     | 677 |
| A. Qualified Property Interest .....   | 678 |
| B. Qualified Easement Holder.....  | 678 |
| C. Conservation Purposes and Values .....                                      | 679 |
| 1. Preservation of a Significant, Relatively Natural Habitat .....             | 680 |
| 2. Historic Resources .....  | 681 |
| 3. Open Space .....  | 682 |
| a. Scenic Resources.....   | 682 |
| b. Open Space Pursuant to a Clearly Delineated<br>Governmental Policy.....     | 683 |
| c. Significant Public Benefit .....  | 685 |
| D. Other Requirements/Financial Considerations .....                           | 686 |
| 1. Addressing Inconsistent Use.....  | 687 |
| 2. Financial Impacts and Valuation.....  | 688 |
| III. Defining Agriculture within Agricultural Conservation Easements .....     | 691 |
| A. Preservation of the Status Quo .....  | 691 |
| B. Working within the Existing Regulatory Framework .....                      | 692 |
| 1. Adding Clarity to Farmland Qualifying as Open Space .....                   | 693 |
| 2. Addressing the Issue of Inconsistent Use .....                              | 693 |
| 3. Aligning the IRC with Other Funding Streams.....                            | 694 |
| A. Establishing Farmland Preservation as an Express Conservation<br>Value..... | 696 |
| 1. Protection of All Farmland .....  | 696 |
| 2. Securing Additional Social and Conservation Objectives .....                | 698 |
| Conclusion .....   | 700 |

*All over the country-side, away to the rolling hills around Aldershot, the little red and grey roofs of the farm-steadings peeped out from amidst the light green of the new foliage.<sup>1</sup>*

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1. SIR ARTHUR CONAN DOYLE, *The Adventure of the Copper Beeches*, in II THE ANNOTATED SHERLOCK HOLMES 114, 121 (William S. Baring-Gould ed. 1967) (1892).

## INTRODUCTION

Farmland preservation is an important objective for advocates interested in protecting open space and in promoting the continued viability of local food systems.<sup>2</sup> One of the primary tools used for protecting the working landscape is the agricultural conservation easement.<sup>3</sup> Agricultural conservation easements restrict the use of agricultural lands to keep these lands farmed or available for future productive activity.<sup>4</sup> Motivations for entering into agricultural conservation easements vary widely but include protecting domestic food security, encouraging succession planning, securing important environmental benefits, ensuring general agricultural viability, and improving the availability of local and regional food networks.<sup>5</sup> This diversity of foundational principles helps to channel additional funding into land protection, but also presents some problems—both manifest and latent—with regard to what these efforts are or should be seeking to achieve.<sup>6</sup> Is the idea to protect farmland for its productive qualities, to protect open space, or to encourage more environmentally aware stewardship and management?<sup>7</sup> There can be a substantial degree of variability depending upon the landowner, the entity that will ultimately protect these lands, the resource involved, and the nature of the farming operation.<sup>8</sup> All of these objectives, while often compatible, are not always aligned or achievable and may

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2. See, e.g., *Farmland*, AM. FARMLAND TRUST, <https://www.farmland.org/our-work/areas-of-focus/farmland> (last visited July 15, 2018); see also *APA Policy Guide On Agricultural Land Preservation*, AM. PLANNING ASS'N, <https://www.planning.org/policy/guides/adopted/agricultural.htm> (last visited July 15, 2018) (discussing the need and methods for protecting farmland within the planning community).

3. Carrie A. Scrufari, *Tackling the Tenure Problem: Promoting Land Access for New Farmers as Part of a Climate Change Solution*, 42 COLUM. J. ENVTL. L. 497, 508–12 (2017) (providing overview of agricultural conservation easements within the context of addressing climate change).

4. Henry Rodegerdts, *Land Trusts and Agricultural Conservation Easements*, 13 NAT. RESOURCES & ENV'T, 336, 336–37 (1998) (providing summary overview of this tool). For a variety of reasons, agricultural conservation easements do not typically require lands to be actively farmed, as this can present issues, but they do typically limit more intensive development. See Jane E. Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, SAVING LAND MAGAZINE (Summer 2013), <https://www.landtrustalliance.org/news/beyond-agricultural-conservation-easements-ensuring-future-agricultural-production> (discussing the challenges and options for keeping these lands in active productive use). As for terminology, there are a variety of terms utilized by states and advocates to define the type of restrictive agreement that is being referred to within this Article. For the purposes of this Article, the terms “agricultural conservation easement” or “conservation easement” will be used to broadly capture these property interests. For an extended discussion of the terminology utilized in the field, see Michael A. Wolf, *Conservation Easements and the “Term Creep” Problem*, 2013 UTAH L. REV. 787, 790–802 (2013).

5. SAMUEL N. STOKES ET AL., SAVING AMERICA'S COUNTRYSIDE: A GUIDE TO RURAL CONSERVATION 3–5 (2d ed. 1997) (discussing the various motivations behind these efforts).

6. Michael Bunce, *Thirty Years of Farmland Preservation in North America: Discourses and Ideologies of a Movement*, 14 J. RURAL STUD. 233, 235–43 (1998) (exploring the motivations behind farmland preservation efforts nationally).

7. See, e.g., *Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341 (2014) (resolving dispute regarding the interpretation of a working lands easement's balance between conservation and economic objectives).

8. Hamilton, *supra* note 4, at 7 (profiling organizational approaches and strategies).

even, at times, be in direct opposition.<sup>9</sup> The continually changing nature of the agricultural economy also exacerbates the degree of potential conflict between production and conservation-focused objectives.<sup>10</sup>

The Internal Revenue Code (IRC) has long supported these efforts by allowing landowners to claim charitable deductions for certain qualifying gifts of agricultural conservation easements (referred to in the IRC as partial interests in land) that secure these lands in perpetuity.<sup>11</sup> Since at least the early 1990s, the use of conservation easements to protect agricultural lands has become a particularly important strand of activity within the overall farmland preservation movement.<sup>12</sup> Governmental actors (at the federal, state, and local levels) and nonprofit organizations have mobilized to protect farmland through this market-based acquisition mechanism. They can rightly point to their successes in blunting some ill-considered development and in securing the future availability of these working lands.<sup>13</sup> As of 2018, farmland preservation advocates estimate that approximately five million acres of working lands have been protected through this mechanism.<sup>14</sup>

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9. Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 164 (2007) (explaining that “[m]any would dispute the claim that an intensive hog operation, for example, constitutes ‘open space.’ In fact, open space and farmland are very different”). Notably, given the intended multifunctionality of these agreements, many conservation easements do not rank or provide a mechanism for resolving these conflicts. See Adena Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 LAW & CONTEMP. PROBS. 145, 145–46 (2011) (noting this issue with easement design).

10. Matthew J. Mariola, *Losing Ground: Farmland Preservation, Economic Utilitarianism, and the Erosion of the Agrarian Ideal*, 22 AGRIC. AND HUMAN VALUES 209, 209–10 (2005) (discussing potential conflict or tension); see also Chuck Ross & Marli Rupe, *Agricultural Sources of Water Pollution: How Our History Informs Current Debate*, 17 VT. J. ENVTL. L. 811, 819–22, 824–27 (2016) (profiling agricultural change and the correlated impacts on Lake Champlain). These issues are further complicated by the unique status that agricultural production has within environmental law, leading to policy outcomes that are often highly favorable or tilted towards production interests. J. B. Ruhl, *Agriculture and Ecosystem Services: Strategies for State and Local Governments*, 17 N.Y.U. ENVTL. L.J. 424, 425–27 (2008).

11. See generally Jesse J. Richardson, Jr., *Maximizing Tax Benefits to Farmers and Ranchers Implementing Conservation and Environmental Plans*, 48 OKLA. L. REV. 449 (1995) (discussing tax incentives potentially available for agricultural conservation easement donations).

12. RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 230–32 (2003) (describing the nature and growth of farmland preservation as a strand of the greater conservation movement).

13. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easements—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 10–17 (2004) (profiling the development of the tax incentivized conservation easement). In addition to tax-incentivized conservation easements, state and federal governments also allocate substantial funds toward the purchase of agricultural conservation easements. See, e.g., Am. Farmland Tr., *Purchase of Agricultural Conservation Easements* at 1 (2015), [http://www.farmlandinfo.org/sites/default/files/PACE\\_Overview\\_AFT\\_FIC\\_2015\\_1.pdf](http://www.farmlandinfo.org/sites/default/files/PACE_Overview_AFT_FIC_2015_1.pdf) (profiling the use of purchase (“PACE”) programs nationally to secure working lands).

14. FAQs, AM. FARMLAND TR., <https://www.farmland.org/faq> (last visited July 15, 2018); see also Tom Daniels, *Saving Farms and Farmland*, PLANNING, Aug./Sept. 2009, at 38, 39–43 (2009) (charting the field’s growth and current role).

Perhaps surprisingly given this degree of use, farmland preservation is not, of itself, an express objective under the IRC.<sup>15</sup> As a result, agricultural conservation easement donations have to qualify under one of four designated conservation values to benefit from the available tax incentives—most commonly the “protection of open space pursuant to a clearly delineated governmental policy or purpose.”<sup>16</sup> But while protecting farmland can certainly qualify as protecting open space, these related goals will not always be aligned.<sup>17</sup> Depending upon the scale of agricultural operation and the need to provide flexibility for its unknown future productive needs, it may be unclear whether an agricultural operation will continue to provide the open space benefits.<sup>18</sup> What if the farmer wishes to substantially intensify his or her agricultural activity in the future, transitioning, for example, from row crop production to a greenhouse or to a concentrated livestock feeding operation?<sup>19</sup> Is this what most donors and farmland protection advocates are actually seeking to accomplish? Perhaps in some cases, but certainly not all.<sup>20</sup> Additionally, certain provisions within the IRC and implementing regulations may also prove problematic.<sup>21</sup> For example, what if future expansion of the operation is inconsistent with the underlying

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15. Paige M. Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 DUKE L.J. 1387, 1394–95 (2013) (discussing the tax deduction as applied to farmland conservation easements); see also William T. Hutton, *Agricultural Preservation: Contesting the Application of Revenue Ruling 78-384*, 3 THE BACK FORTY, Sept./Oct. 1992, at 12, 15–17 (exploring the IRS’s basis for rejecting farmland preservation as a basis for tax-exempt status).

16. STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS § 6.03 (4th ed. 1997) (discussing the initial debates over the open space protection prong of the conservation easement tax incentive and how farmland protection is addressed within the IRC).

17. Richardson, *supra* note 9, at 164–65 (profiling the tensions in these efforts); see also Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195, 1199–1204 (2016) (profiling the changes in agricultural operations within the context of the exemptions agriculture claims under many environmental laws).

18. Hamilton, *supra* note 4, at 7. Another way that programs attempt to ensure that open space benefits are actually being secured is through ranking criteria. For example, the Natural Resources Conservation Service (NRCS) includes as a consideration whether the farm is larger than the median farm size for the relative geographic area as a proxy for long-term agricultural viability. See 440 Conservation Programs Manual § 528.41(C)(1)(iii). Outside of federal policy, most if not all easement-holders have similar criteria and selection rubrics that guide their activities and acquisition priorities. See ELIZABETH BYERS & KARIN M. PONTE, THE CONSERVATION HANDBOOK 27–29 (2d. ed. 2005) (discussing the need for easement-holding entities to develop focused acquisition strategies in order to be effective advocates).

19. As will be explored in greater depth, these tensions can potentially come up in two directions: (1) wrestling with more intensive agricultural uses, and (2) trying to accommodate more localized production that includes retail space that is not typically associated with open space. Both challenge the agricultural status quo and the perpetual conservation easements that were drafted for its protection. The majority of challenges to date have related to on-farm retail operations. See, e.g., *In re Wetlands Am. Tr., Inc. v. White Cloud Nine Ventures, L.P.*, 88 Va. Cir. 341, 351–58 (2014) (dismissing easement holder’s attempt to enforce easement against substantial expansion of on-farm vineyard and related tasting room).

20. See, e.g., *Long Green Valley Ass’n v. Bellevalle Farms, Inc.*, 432 Md. 292, 296 (2013) (describing third party’s challenge to an easement holder’s approval of a creamery operation within protected land as impacting a protected viewshed).

21. See, e.g., Gentry, *supra* note 15, at 1387–92 (profiling the tensions within these agreements—within the context of easement amendments and the private benefit rule).

purpose of the donation; would this cause the donation to be at risk?<sup>22</sup> If so, the requirements associated with accessing the charitable deduction could, again, arguably deny a farmer's needed operational flexibility.<sup>23</sup>

Balancing the tensions between the protection of conservation attributes and operational concerns is the unresolved challenge of agricultural conservation easements for both farmers and the entities holding these interests.<sup>24</sup> As a result, relying on the current tax structure may create a long-term gap between what the owner of the land expects with regard to the farm's continued operation and what the land trust or governmental agency tasked with the stewardship of the protected parcel is attempting to secure—not to mention the general public's expectations of the benefits associated with its often considerable investment in farmland preservation.<sup>25</sup>

Recently, I explored how to better define the role of conservation within agricultural conservation easements, as these projects increasingly face the realities of a changing agricultural sector.<sup>26</sup> That Article offered a few thoughts regarding how conservation objectives could be better secured, if that is, in fact, the primary goal of the entity or organization seeking to protect that particular parcel of land.<sup>27</sup> This Article explores how to define agricultural activity within agricultural conservation easements, and more specifically explores the various ways that tax law could clarify the types of farmland preservation efforts that merit the deduction. I conclude with a proposal to add an additional conservation value to the tax code expressly designed for certain types of agricultural conservation easements.<sup>28</sup>

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22. Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, PROBATE & PROP., Sept./Oct. 2004, at 40, 41–42 (discussing inconsistent use and open space deductions generally).

23. There are likely ways to draft around this to a degree to minimize risk. See C. Timothy Lindstrom, *Income Tax Aspects of Conservation Easements*, 5 WYO. L. REV. 1, 15–17 (2005) (discussing inconsistent use and drafting strategies to comply with the IRC).

24. Judy Anderson & Jerry Cosgrove, *Agricultural Easements: Allowing a Working Landscape to Work*, LAND TRUST ALLIANCE EXCHANGE, Fall 1999, at 9, 9; see also Jesse J. Richardson, Jr., *Land Tenure and Sustainable Agriculture*, 3 TEX. A&M L. REV. 799, 813–15 (2016) (same).

25. See, e.g., Elizabeth Lokocz et al., *Motivations for Land Protection and Stewardship: Exploring Place Attachment and Rural Landscape Character in Massachusetts*, 99 LANDSCAPE & URBAN PLANNING 65, 69–73 (2011) (profiling the attributes of rural character communities value).

26. See Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 43 ECOLOGY L.Q. 627 (2017).

27. *Id.* at 674–80. There are admittedly other goals, also perfectly and equally valid, that farmland preservation advocates could be seeking to secure. Part of the widespread appeal of the farmland preservation movement is, in fact, its multifunctionality. As a result, some of this discussion is not so much exclusively a discussion of whether to protect these aspects, but how to prioritize these values. See Rissman, *supra* note 9, at 145–46 (exploring this issue).

28. This Article focuses on the tax incentives because these are a primary funding stream utilized by advocates in this area. Many commentators, however, legitimately question whether the tax incentives are the most efficient or productive way to protect working lands, and whether other funding models might be more effective. See, e.g., Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way?*, 74 LAW & CONTEMP. PROBS. 29, 32–49 (2011) (discussing the issues associated with the tax incentives and arguing for alternative structures—namely direct expenditures).

Part I considers the development and history of the IRC's recognized conservation values and how these values relate to and fit within the overall farmland protection movement as it has developed. Part II focuses on how land trusts and conservation agencies utilize the existing tax structure to protect working lands. Part III describes some options for better defining the appropriate use of conservation easements protecting agricultural lands. In an environment with potentially less financial support, farmland preservation advocates must take a fresh look at the design of one of our most important tools, the charitable deduction, in order to ensure that we understand what we are protecting, and why. A reexamination of the tax incentive structure can ensure that preservation efforts are appropriately prioritized, and that agricultural conservation easements provide the level of protection and societal benefit that is actually intended.<sup>29</sup>

#### I. THE RISE OF FEDERAL TAX INCENTIVIZED CONSERVATION EASEMENTS AND THE FARMLAND PRESERVATION MOVEMENT

Agricultural conservation easements are an important tool for protecting agricultural lands.<sup>30</sup> Although their benefits can and have been debated,<sup>31</sup> conservation easements have secured many millions of acres of farmland across the nation from more intensive development.<sup>32</sup> This Part profiles the development of agricultural conservation easements as a legal tool within the context of the overall farmland preservation movement.

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29. As of March 2018, the impact of the 2017 federal tax reforms remains unclear. See Lori Faeth, *What's All This About Tax Reform?*, LAND TRUST ALLIANCE: THE DIRT, (Sept. 29, 2017), <https://www.landtrustalliance.org/blog/whats-all-about-tax-reform>. Even if the actual deduction is not altered, any changes associated with the standard deduction amounts and income brackets could also reduce the donation levels in such a way to materially impact land conservation efforts. *Id.*

30. TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 145–48 (1997); see also Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 ANN. SURV. AM. L. 235, 254–63 (profiling the use of this tool nationally).

31. See, e.g., Paul Gottlieb et al., *Are Preserved Farms Actively Engaged in Agriculture and Conservation?*, 45 LAND USE POL'Y 103, 112 (2015) (exploring the challenges post-protection for these lands); Julia D. Mahoney, *Land Preservation and Institutional Design*, 23 J. ENVTL. L. & LITIG. 433, 442–46 (2008) (discussing the challenges within conservation easement practice generally over the longer-term). For an example within the agricultural conservation easement context, see Joshua M. Duke, *Participation in Agricultural Land Preservation Programs: Parcel Quality and a Complex Policy Environment*, 33 AGRIC. & ECON. REV. 34, 47–48 (profiling some of the challenges within this area within the context of the state of Delaware's efforts).

32. Am. Farmland Trust, *supra* note 14.

### A. Agricultural Conservation Easements

The agricultural conservation easement has a relatively recent history.<sup>33</sup> This subpart will provide an overview of the tool's developments, accomplishments, and current use.

#### 1. Defining the Term

Conservation easements of all forms are legal agreements between a landowner and an conservation easement holder (a land trust or governmental agency with sufficient resources and the commitment to monitor and enforce the terms of the agreement) whereby the owner gives up certain rights to develop or otherwise use, modify, or alter the property.<sup>34</sup> To provide a working frame, “[u]sing the traditional ‘bundle of sticks’ metaphor for property, we can describe the landowner as losing one of the sticks in her bundle. A[n] easement is in essence taking a stick out of the bundle and giving it someone else.”<sup>35</sup> Here, a conservation or farmland preservation organization or agency focused on protecting this specific type of resource.<sup>36</sup> Conservation easements can be tailored to protect different types of property including forest land, historic buildings, scenic views, wetlands, and productive farmland.<sup>37</sup> Subject to meeting the requirements of the state's enabling law and the requirements of the funding source, conservation easements can be relatively flexible in addressing the specific characteristics of the property that is being targeted for protection and the respective priorities of the landowner and the holder of the easement.<sup>38</sup> From a landowner's perspective, the benefits of this transaction are often not limited to the tax incentives, but may relate to their own conservation goals, preserving

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33. See, e.g., Edward J. Thompson, *Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, 6 PROP. & PROB. 13, 14 (1992) (charting the creation and use of this protective mechanism).

34. 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. LAW PROP. & SOC. 107, 111–12 (2015). Although conservation easements are often described as a private or relatively private legal agreement between the protective entity and the landowner, in reality, the public/private aspects of these agreements are often quite difficult to separate. See Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and A Troubled Future*, 73 DENV. U. L. REV. 1077, 1078–79 (1996) (describing the dichotomy as one of the many contradictions of the land trust movement and conservation easements).

35. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

36. AM. FARMLAND TR., *SAVING AMERICAN FARMLAND: WHAT WORKS* 35–37 (1997).

37. BYERS & PONTE, *supra* note 18, at 17. For an overview of the use of this tool within the agricultural space, see Kendra Johnson, *Conserving Farmland in California: For What and For Whom? How Agricultural Conservation Can Keep Farmland Farmed*, 9 SUSTAINABLE DEV. L. & POL'Y 45, 45–47 (discussing easements).

38. Cheever, *supra* note 34, at 1079–83; Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Uses*, 51 LAND USE POL'Y 76, 81–83 (2016) (discussing the increased complexity of negotiated easements tailored to landowner and land trust preferences).

a family legacy, securing operational funding, or transitioning the land to a new operator.<sup>39</sup>

As will be discussed in the following Subpart, conservation easements are a comparatively new legal development that allow conservation organizations to permanently protect resources without taking on the costs and other responsibilities associated with fee ownership.<sup>40</sup> Nonetheless, organizations acquiring donated conservation easements still face significant challenges.<sup>41</sup> The easement provides the holder access to the property to monitor as well as the authority to enforce the terms of the agreement.<sup>42</sup> The challenges associated with monitoring and enforcing these restrictions can be particularly acute when a property transitions from its original donor to subsequent landowners, as their goals are not necessarily going to be as aligned as under the original grant.<sup>43</sup> Additionally, as time passes from the original donation, the circumstances on the ground are likely to change, often substantially, which can present material challenges. Even the best drafted easement will not be capable of addressing all future land management changes and future disputes.<sup>44</sup>

Easements protecting farmland vary from other interests of this type in that they are seeking to protect lands that are intended to perform an expressly market-driven economic function.<sup>45</sup> From a drafting perspective, this presents

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39. See, e.g., *Donating an Easement*, VERMONT LAND TRUST, <https://www.vlt.org/donate-easement/> (last visited July 15, 2018).

40. Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2, 3 (1989). On a property to property basis, it will not always be clear to a conservation or preservation organization whether acquisition of the fee or protection through an easement will be the most effective strategy. This will depend, in large part, on the organization's goals for the property, the environmental and conservation profile of the property, and a host of other factors. Given the substantial loss of development value that can result in conjunction with a donation of a conservation easement, the acquisition cost of this partial interest may not be too different than the value of the property in fee. The difference then would largely hinge on the management of the property over time and which ownership structure best aligns costs and objectives of the conservation entity seeking to acquire this interest. See SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004* 11–13 (2005); Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 494–95 (2004) (discussing federal goals).

41. JEFF PIDOT, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 18–19 (2005) (discussing the work involved in monitoring and enforcing conservation easements once secured).

42. Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 VT. L. REV. 757, 760–63 (2005) (discussing enforcement mechanisms).

43. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 743–44 (2002) (noting this as a material problem within the concept of perpetual conservation easements); see also John G. Sprankling, *Property Law for the Anthropocene Era*, 59 ARIZ. L. REV. 737, 764–66 (2017) (arguing for time limits on property interests given the increasing pace of change—demonstrating the broader challenges perpetual restrictions on property may begin to face).

44. See, e.g., Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 128–30 (2011).

45. Judy Anderson & Jerry Cosgrove, *Drafting Conservation Easements for Agriculture*, 21 AGRIC. L. UPDATE, Apr. 2004, at 4, 4–5 (profiling challenges associated with agricultural conservation easements specifically); see also Anderson & Cosgrove, *supra* note 24, at 9 (exploring this challenge).

unique challenges in developing a perpetual easement.<sup>46</sup> Most conservation easements necessarily provide a general degree of flexibility to adapt to the unknown future, providing the holder discretion to approve changes under discretionary approval clauses or to issue compatible use authorizations.<sup>47</sup> These provisions are even more critical in the agricultural context. An agricultural conservation easement has to balance the various competing interests in play, including both the protection of the often significant scenic and conservation values provided by the property as well as the economic concerns and viability of the farm as a continuing business entity.<sup>48</sup> As noted, this gap is exacerbated by the fact that the agricultural production in the early twenty-first century looks very different from the agriculture of the mid-twentieth century, and it is likely that the sector will continue to evolve to meet the challenges of feeding a growing population and changing consumer preferences.<sup>49</sup>

## 2. *The Rise of the Conservation Easement*

Although there are isolated earlier examples, the use of conservation easements roughly dates to the 1960s when state legislatures began experimenting with enabling legislation to allow state agencies and eventually nongovernmental actors to perpetually protect important lands and resources through this form of land use restriction.<sup>50</sup> This move also allowed for negative

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46. BYERS & PONTE, *supra* note 18, at 199–206 (noting the challenges with working lands protection). Working forestland easements have similar issues. See Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RESOURCES L. REV. 47, 86–91 (2012).

47. STOKES, *supra* note 5, at 1–6 (providing an overview of agricultural conservation easements in practice).

48. Quinn, *supra* note 30, at 263–70; see also Renee Ciulla, *Saving the Farm: Conservation Easements*, RODALE INSTITUTE (Apr. 2, 2013), <https://rodaleinstitute.org/saving-the-farm-conservation-easements/> (profiling farmer motivations and concerns with conservation easements).

49. AM. FARMLAND TR., 25 YEARS OF PROTECTING FARMLAND: AN EVALUATION OF THE MARYLAND AGRICULTURAL LAND PRESERVATION FOUNDATION 23–25 (2003) (exploring these challenges within the context of an evolving agricultural easement portfolio); see also J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 328–33 (2000) (charting agricultural change within environmental law regulations); Neil D. Hamilton, *Farms, Food, and the Future: Legal Issues and Fifteen Years of the “New Agriculture”*, 26 J. ENVTL. L. & LITIG. 1, 1–9 (2011) (exploring the evolution of the agricultural sector over the last several decades). For a specific example, organic milk production has surged over the past decade to meet consumer demand, but is now experiencing a glut and dropping sales as consumers shift to almond milk and other milk substitutes. See Heather Haddon & Benjamin Parkin, *Dairies Are Awash in Organic Milk as Consumers Jump to Alternatives*, WALL. ST. J. (Jan. 3, 2017), <https://www.wsj.com/articles/dairy-producers-farmers-struggle-with-organic-milk-oversupply-1514889001>. As this consumer trend evolves, it could have landscape-level impacts.

50. Massachusetts was the first state to authorize the creation of conservation “restrictions” in 1956, and in 1969 expanded this authority to allow nongovernmental entities to secure properties through this mechanism. Peter Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RESOURCES J. 373, 385 (2001); see also Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 126–27 (2010) (exploring the development of easements within Massachusetts law). Beyond authorizing legislation, the federal government and some states experimented earlier with

easements (restricting use rather than providing a use right) and easements in gross (not tied to a specific, adjacent (appurtenant) parcel of land).<sup>51</sup> These shifts recognized that some of the common law dictums related to the free alienability of land were perhaps not as important in contemporary society when weighed in connection with the other benefits (namely conservation or open space protection) that could be obtained by allowing for more flexible property structures.<sup>52</sup> Land conservation advocates, within and outside of government, quickly recognized the benefit of having permanent control over land without taking on ownership responsibilities and sought to use this tool to leverage their conservation gains.<sup>53</sup> In 1981, the Uniform Laws Commission introduced the Uniform Conservation Easement Act in an attempt to establish some basic principles to govern conservation practice nationally, and this document has become the basis for enabling legislation in approximately half of the states.<sup>54</sup>

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conservation easements to secure scenic viewsheds. *See, e.g.*, John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. L. 319, 333–34 (1997) (discussing early NPS efforts to acquire easements surrounding the Blue Ridge Parkway); Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 167, 181–83 (1968) (exploring easement acquisition in other early parkway programs).

51. Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 543–44 (1979).

52. This recalibration of the common law doctrines is certainly not without controversy, as dead-hand control and the ability of a property owner, in connection with a qualified holder, to permanently restrict land is admittedly still relatively new and untried. *See* Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 ECOLOGY L.Q. 673, 704–08 (2007) (profiling the benefits and challenges associated with easements). The counterargument, however, is that allowing property to be developed is also a fairly permanent act (as property use is not typically undeveloped) and property law certainly allows this to occur. Some have argued that to bridge this gap there needs to be more of an oversight or approval role by state or local government to ensure that the resources that are being protected align with long-term land use priorities and avoid isolating protected lands and reducing their benefits. *See, e.g.*, Adena R. Rissman, *Designing Perpetual Conservation Agreements for Land Management*, 63 RANGELAND ECOLOGY MGMT., March 2010, at 167, 173–74 (2010) (exploring these linkages).

53. WILLIAM H. WHYTE, JR., URBAN LAND INST., SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 8–10 (1959). This shift was not without cost as conservation easement donations have likely minimized or displaced public land acquisition as a protective mechanism. *See generally* John Echeverria & Jeff Pidot, *Drawing the Line: Striking a Principled Balance Between Regulating and Paying to Protect the Land*, 39 ENVTL. L. REP. 10,868 (2009) (discussing this gap/dichotomy); Leigh Raymond & Sally K. Fairfax, *The ‘Shift to Privatization’ in Land Conservation: A Cautionary Essay*, 42 NAT. RESOURCES J. 599, 635–39 (2002) (profiling the challenges and issues associated with this shift).

54. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 185 (2008); Mary A. King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RESOURCES J. 65, 71–72 (2006); *see also* Theodore S. Sims, *Qualified Conservation Restrictions: Recollections of and Reflections on the Origins of Section 170(h)*, 2013 UTAH ENVTL. L. REV. 41, 43–48 (2013) (exploring the development of the partial interest rules).

Currently, all states allow conservation easements, with all but one, North Dakota,<sup>55</sup> allowing perpetual restrictions.<sup>56</sup>

### 3. *The Federal Tax Incentives—Origins and Codification*

For easements to be more widely utilized, funding streams were required to facilitate these transactions, and conservation advocates targeted the federal tax code as a possible funding source.<sup>57</sup> In the 1960s and 1970s, tax practitioners recognized that the charitable gift context might be a potential path to securing financial support for these projects.<sup>58</sup> This idea was supported by some early Internal Revenue Service (IRS) letter rulings analyzing and tentatively approving the deductibility of certain noncash charitable donations.<sup>59</sup> Although there were a few donations during this period, the lack of definitive guidance perhaps limited the use of the charitable deduction.<sup>60</sup>

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55. North Dakota's experience with conservation easements is particularly interesting. North Dakota, and its prairie potholes, have long been recognized for their importance to the waterfowl population within the Central Flyway—one of the major areas for duck populations in the United States and Canada. As a result, given the nesting populations in this area, the U.S. Fish and Wildlife Service has worked in the area in order to secure this habitat—in part through early efforts to use conservation easements to secure these lands. The agency's (along with Ducks Unlimited) widespread success in protecting hundreds of thousands of acres eventually led to pushback and changes in the state enabling law to restrict easements to 99 years. See Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 661 (1984); Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easement Charitable Contributions*, 87 N.D. L. REV. 343, 345 (2011).

56. See generally Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 2013 UTAH L. REV. 811 (2013) (noting state enabling legislation and proposing improvements to ensure the tool remains effective). Despite the UCEA, strong variability in enabling legislation remains nationally. See generally Nancy A. McLaughlin, UNIFORM CONSERVATION EASEMENT ACT STUDY COMMITTEE BACKGROUND REPORT, JUNE 11, 2017 (2017), [http://www.uniformlaws.org/shared/docs/conservation\\_easement/2017jun11\\_%20UCEA\\_Report%20and%20State%20Statutes\\_McLaughlin.pdf](http://www.uniformlaws.org/shared/docs/conservation_easement/2017jun11_%20UCEA_Report%20and%20State%20Statutes_McLaughlin.pdf).

57. FAIRFAX ET AL., *supra* note 40, at 182–83; see also Kingsbury Browne, Jr. & Walter G. Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX. LAW 69, 70–71 (1975) (exploring IRS revenue rulings and the potential for greater utilization of the charitable deduction for conservation-related transactions); KINGSBURY BROWNE, JR., *Taxes as a Form of Public Financing: Treasury's Open Space Protection Program*, in LAND-SAVING ACTION 147, 149 (Russell L. Brennehan & Sarah M. Bates eds., 1984) (same).

58. See, e.g., Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easements Deductions – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 10 (2004) (profiling the history of the tax incentives).

59. ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 4 (2007) (noting that the IRS first acknowledged the deductibility of easement donations in 1964); see also RUSSELL L. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 89–91 (1967) (discussing IRC. Revenue Ruling 64-205 with regard to the donation of an easement to protect scenic value adjacent to a public property and concluding that “[t]he principles set forth in this ruling would appear to be applicable to contributions to Sec. 501(c)(3) organizations as well as to donations to the United States”); Halperin, *supra* note 28, at 34–35 (profiling the emergence of this incentive).

60. FAIRFAX ET AL., *supra* note 40, at 83; Sims, *supra* note 54, at 732 n.25 (profiling the development of partial interests).

In 1980, Congress amended the IRC to add section 170(h), which expressly recognized the deductibility of certain kinds of qualifying partial interest gifts, including conservation easements.<sup>61</sup> The IRS subsequently published regulations which gave more guidance and established requirements for those seeking to claim deductions under this provision.<sup>62</sup> The availability of this financial support led, in significant measure, to the remarkable expansion of nonprofit land trusts—at the local, state, regional, and national levels—interested in protecting private lands through this mechanism.<sup>63</sup> On the conservation side, hundreds of land trusts formed to protect working lands.<sup>64</sup> Not all of this interest related to the availability of the tax incentive, since other factors such as increasing familiarity with easements as a protective option and conservation awareness were also important, but the tax incentives were catalytic in expanding the reach of this tool.<sup>65</sup> Within this greater context, farmland advocates similarly became engaged in determining how to best protect working lands, leading to the development of the modern agricultural conservation easement as a prominent land protection tool.<sup>66</sup>

#### 4. *The Current State of Practice*

From the 1960s to the present, conservation easements have protected millions of acres of land nationally.<sup>67</sup> This rate of use has not come without growing pains. There have been numerous actual and perceived abuses of the tax incentives,<sup>68</sup> and this tool has been criticized for lacking public benefit, helping

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61. Act of Dec. 17, 1980, Pub. L. No. 96-541, 94 Stat. 3204, 3206 (1980) (codified at 26 U.S.C. § 170(h)); I.R.C. § 170(h) (2012). Again, these amendments built upon earlier guidance by the IRS which suggested the ability of donors to claim these gifts as charitable donations, including IRS Revenue Ruling 64-205. See Browne & Van Dorn, *supra* note 57, at 70–71.

62. SMALL, *supra* note 16, at §§1.01–.07 (profiling the development of I.R.C. § 170(h) and its implementing regulations); see also Nancy A. McLaughlin, *Internal Revenue Code 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements: Part 1: The Standards*, 45 REAL PROP. TR. & EST. L.J. 473, 480–86 (2010) (charting the legislative history of 170(h) from the 1976 Tax Act through passage of permanent legislation in 1980).

63. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 423–24 (2005) (discussing this expansion); see also Jean Hocker, *Land Trusts: Key Elements in the Struggle Against Sprawl*, 15 NAT. RESOURCES & ENV'T 244, 244–45 (discussing growth of local land trusts).

64. See, e.g., Dominic P. Parker, *Land Trusts and the Choice to Conserve Land in Full Ownership or Conservation Easements*, 44 NAT. RESOURCES J. 483, 486–88 (2004).

65. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 33 UTAH ENVTL. L. REV. 1, 18–19 (2013); see also Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in PROTECTING THE LAND: CONSERVATION EASEMENTS IN THE PAST, PRESENT, AND FUTURE 56, 56–60 (Julie A. Gustanski & Roderick H. Squires eds., 2000) (same).

66. Anderson & Cosgrove, *supra* note 24, at 4–7 (providing overview of the contemporary agricultural conservation easement).

67. McLaughlin, *supra* note 63, at 423–24; see also Bray, *supra* note 50, at 128–30 (noting the motivations and factors behind this expansion).

68. Nancy A. McLaughlin, *Tax Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA TAX REV. 1, 3–4 (2017) (identifying media attention centered on transactions

to establish hobby farms, or protecting the viewsheds of “estate” properties.<sup>69</sup> In the mid-2000s, media and congressional attention threatened the continued availability of this tax incentive.<sup>70</sup> Despite continuing concerns, however, Congress eventually chose to strengthen rather than diminish the incentive.<sup>71</sup> For instance, in 2015 Congress made the “enhanced” tax incentive for conservation easements permanent, which allows certain donors a longer window to use their deduction.<sup>72</sup> This is particularly helpful within the agricultural context because some farmers’ asset value is almost exclusively based upon on their land’s valuation, leaving a high potential deduction without sufficient taxable income to fully benefit from the credit.<sup>73</sup>

This rate of growth is slowing, however, due to some degree of market saturation, and as result the priorities of the field are also beginning to change—perhaps demonstrating the increasing sophistication and professionalization of a maturing field.<sup>74</sup> Land trusts have been shifting attention and resources from

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“involving ‘wildly exaggerated’ easement appraisals, developments who received ‘shock[ing]’ tax deductions for donating easements encumbering golf course fairways or otherwise undevelopable land, and façade easements that merely duplicated restrictions already imposed by local law”).

69. Richardson, *supra* note 9, at 183 (exploring this issue and noting that “[i]f farmland protection is being used to subsidize the lifestyles of wealthy country estate owners, then credibility, and possibly all support in Congress, as well as state and local legislatures, may be lost”).

70. Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 29–37 (2012) (charting issues associated with these deductions); see also Jason A. Richardson, *Increased Scrutiny on Conservation Easement Donations: How a Crackdown on Tax Fraud by the IRS Could Impact Environmental Protection*, 1 ENVTL. & ENERGY L. & POL’Y J. 273, 274–77 (2005) (discussing IRS audit activity in light of media attention on donative abuses during this period).

71. McLaughlin, *supra* note 68, at 6 (“In making the enhancements to the incentive permanent, which is expected to significantly increase the cost of the incentive, Congress ignored the abuses revealed by the case law as well as the Treasury’s repeated calls for reforms to help curb abuses.”); see also Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 227, 227–31 (2016) (providing overview of issues with conservation easement donations, focusing on the difficult issue of how to value these donations). According to various commentators, “abusive” tax deductions involving conservation easement donations are again on the rise, involving grossly exaggerated appraisals or “selling the rights to claim charitable deductions to investors and using the proceeds to finance development . . . .” See ADAM LOONEY, BROOKINGS INST., CHARITABLE DEDUCTION OF CONSERVATION EASEMENTS 3 (2017) (discussing and exploring this trend).

72. *Now Permanent: Enhanced Federal Tax Incentive for Conservation Easement Donations*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/issues-action/take-action/tax-incentives> (last visited July 15, 2018).

73. Land Trust Alliance, *Using the Conservation Easement Tax Incentive* (2016), <http://s3.amazonaws.com/Landtrustalliance.org/ConservationEasementTaxIncentiveBrochure2016.pdf> (last visited July 15, 2018).

74. FAIRFAX ET AL., *supra* note 40, at 209 (noting that the Land Trust Alliance “stopped focusing on ‘growing’ the movement. Indeed, a shakeout was clearly evident by the end of the 1990s.”). A good example of this increasing sophistication is the recent move to develop a pooled risk fund to provide protection to land trusts enforcing easements against violations. See *About Terrafirma Risk Retention Group*, TERRAFIRMA RRG LLC, <https://terrafirma.org/> (last visited July 15, 2018). Enforcing a violation can be an extremely expensive and time-consuming affair and developing a shared risk platform allows land trusts to minimize their financial exposure and ensure that they have resources when necessary. See Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. L. 441, 487–96 (2000).

pure acquisition to improving practices and more effectively stewarding the resources under their protection.<sup>75</sup> The sector may also begin to move toward mergers and consolidations to avoid duplication of efforts.<sup>76</sup> Greater public accountability and transparency is also becoming paramount to protect the viability of easements.<sup>77</sup>

Within the farmland preservation movement specifically, organizations are now giving more thought both to project selection and design and to what objectives they want to advance, having learned lessons from their past projects and becoming more sophisticated in avoiding random acts of conservation.<sup>78</sup> For example, the Vermont Land Trust's mission has increasingly focused on providing beginning farmers with access to land and it is now starting to more strategically consider social justice and other societal goals as an integrated

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75. One indication of this shift to improve performance, as a result of growing pains within the field, is the move to establish formal accreditation standards for land trusts. *See Accreditation*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/topics/accreditation> (last visited July 15, 2018) (discussing the accreditation program established in 2006, which now covers land trusts that account for 75 percent of the land protected nationally by conservation easements and adopts best practices for these organizations and their protective efforts). Currently, accredited land trusts manage over 70 percent of all conserved lands in the United States—an impressive rate of adoption given that it has been in place for little more than a decade. *Id.* Another sign perhaps is the Land Trust Alliance's recent push to advocate for policy reforms to avoid easement donation types that it views as abusive. *See* Andrew Bowman, *Help Us Stop the Overindulgence*, LAND TRUST ALLIANCE, (Nov. 28, 2017), <https://www.landtrustalliance.org/blog/help-us-stop-overindulgence> (supporting recently proposed legislation designed to limit certain types of easement donations—"syndicated easement transactions in which pass-through entities promote conservation easements to passive investors using a promise of profits"). Although outside of the scope of this Article, the issue of syndicated conservation easements is becoming a hot-button issue within the land conservation community, and the large appraisals associated with these donations may be the next area of conflict between the IRS and conservation easement donors. *See* Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2017), <https://www.propublica.org/article/conservation-easements-the-billion-dollar-loophole> (discussing the issues associated with valuation and the donation of syndicated conservation easements generally).

76. *See, e.g., Rockingham, Seacoast Land Trusts Merge*, SEACOAST ONLINE (July 20, 2006), <http://www.seacoastonline.com/article/20060720/NEWS/307209988> (profiling a merger of New Hampshire land trusts).

77. *See* Nancy A. McLaughlin, *Tax Incentives for Conservation Easement Deductions: Learning from the U.S. Experience*, (forthcoming in *Tax and the Environment 2018*) (draft on file with author); Amy W. Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1238–43 (2009) (discussing the issues with transparency and the need to address this issue to ensure continued public trust); *see also National Conservation Easement Database*, U.S. ENDOWMENT FOR FORESTRY & CMTY.'S, <https://www.conservationeasement.us/> (last visited July 15, 2018) (providing a public website for accessing information about protected lands); Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROBLEMS. 1, 8–25 (2011) (profiling Maine's legislative reforms to improve state oversight of these protected lands).

78. BYERS & PONTE, *supra* note 18, at 27–29 (charting organizational growth); *see also* Owley & Rissman, *supra* note 38, at 76–84 (examining growth based upon “[c]ontract theory, diffusion of innovation, and organizational learning . . .”).

component of its work.<sup>79</sup> Other land trusts have taken similar approaches.<sup>80</sup> Overall, this is likely a trend that will continue as many farmland advocates seek to ensure that working lands are contributing to their local communities.

### 5. *Farmland Preservation: Adapting to a Changing Agriculture*

Within the confines of existing farmland preservation efforts, the field has now moved beyond its first generation efforts, and while the tools are expanding, conservation easements remain an important part of this mix (a combination of current use taxation, zoning, and voluntary incentive programs).<sup>81</sup> The challenge, however, is that the economic viability of these operations is highly variable with perpetual conservation easements as applied to ongoing economic operations.<sup>82</sup> Here are three specific potential future challenges.

One challenge is that while active farming may be the express expectation of the parties, the intended type of agricultural use may, in the future, not be financially feasible.<sup>83</sup> Failure to maintain land in active agricultural use can result in material changes in the appearance of the protected lands, which may or may not be desired by the parties to the restrictions as well as the general public.<sup>84</sup> Conversely, affirmative agricultural requirements can be viewed as burdensome, potentially unrealistic, and difficult to enforce against the grantor.<sup>85</sup> Some land trusts are actively exploring options to keep lands farmed short of affirmative agricultural requirements, and there are some regional successes with

79. *About Us*, VERMONT LAND TRUST, <https://www.vlt.org/about/> (last visited July 15, 2018). One way that the Vermont Land Trust has worked to accomplish this goal is by securing options to purchase at agricultural value in connection with new projects and going back to the owners of previously conserved tracts to acquire this right. See Alexis Peters, *The New Crop Growing on the Hillsides: Retaining Land in Agricultural Use Through the OPAV*, 18 VT. J. ENVTL. L. 485, 492, 498–508 (2017) (discussing the Vermont Land Trust’s focus on affordable farmland and use of options to purchase at agricultural value).

80. See generally Hamilton, *supra* note 4 (identifying similar efforts).

81. Am. Farmland Tr., *supra* note 33; see also 1 SUBDIVISION LAW AND GROWTH MGMT. § 2.14, AGRICULTURAL PRESERVATION (James A. Kushner ed., 2017) (profiling the array of tools utilized by advocates).

82. JULIAN CONRAD JURGENSMeyer ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, § 13.3, *The Changing Need to Protect Farmland* (2017) (profiling the ebbs and flows in farmland preservation and the varying motivations for pursuing this work); see also Abeyayehu Tegene et al., *Irreversible Investment Under Uncertainty: Conservation Easements and the Option to Develop Agricultural Land*, 50 J. AGRIC. ECON. 203, 204–06 (1999) (noting challenges of perpetual conservation easements within agricultural sector).

83. Peters, *supra* note 79, at 488–90 (discussing this issue within the Vermont landscape); see also BLAKE HARRISON, THE VIEW FROM VERMONT: TOURISM AND THE MAKING OF AN AMERICAN RURAL LANDSCAPE 1, 1–10 (2006) (noting the impacts of farming activity in shaping the agricultural image of Vermont).

84. Katie H. Michel, *Landless: Legal & Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards*, 39 VT. L. REV. 461, 475–78 (2014) (noting the challenges facing those seeking to gain access to land in competition with other land use forms); see also Todd W. Daloz, *Farm Preservation: A Vermont Land-Use Perspective*, 12 Vt. J. Env’tl. L. 427, 430–31 (discussing agriculture’s impact on Vermont’s identity and landscape).

85. Johnson, *supra* note 37, at 47–48 (discussing issues and challenges associated with keeping preserved land in active agricultural production).

the inclusion of lease options and other alternative concepts to minimize the burdens of keeping these lands under active management.<sup>86</sup>

A second challenge of using perpetual easements to protect farmland is that economic forces may compel farmers to adopt new agricultural practices that arguably may conflict with the parties' original intent.<sup>87</sup> The movement of much of the agricultural sector over the past few decades has been toward increasingly more concentrated operations that are more input-driven and have the potential for more drastic and localized landscape change.<sup>88</sup> Within the farmland preservation context, "many would dispute the fact that an intensive hog operation, for example, constitutes 'open space,'" and open space and farmland preservation are not going to be perfectly aligned in all circumstances.<sup>89</sup> Although allowing the concentrated hog operation may not be supported in all circumstances by all farmland preservation advocates, the relative benefits or other related uses of other more emergent agricultural activities are even more difficult for easement holders to grapple with—for example, whether to allow a tasting room or on-farm retail space to support the local food movement and agri-tourism efforts.<sup>90</sup> As these agreements are comparatively static, this shift in agricultural models can lead to unintended consequences and conflict regarding the future operations of the farm.<sup>91</sup>

A third challenge is that even if the easement holder does not object to the proposed use, the easement may be too prohibitive to accommodate new uses. The changes may be outside what was originally anticipated, and amendment or termination of an easement to reflect changed circumstances can be highly

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86. See generally Hamilton, *supra* note 4 (profiling various land trust efforts in this regard).

87. Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 211–14 (1993) (noting shifts in agricultural production); see also Peter Lehner & Nathan A. Rosenberg, *Legal Pathways to Carbon-Neutral Agriculture*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,845, 10,846–48 (discussing climate change impacts of agricultural production); John C. Becker, *Promoting Agricultural Development through Land Use Planning Limits*, 36 REAL PROP. PROB. & TR. J. 619, 621–23 (2002) (discussing increase of agricultural impacts and development of new land use issues).

88. William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 228–31, fig.1, 251–73 (2009); see also J.B. Ruhl, *Farmland Stewardship: Can Ecosystems Stand Any More of It?*, 9 WASH. U. J. L. & POL'Y 1, 9–12 (2002) (discussing environmental impacts of the current prevailing agricultural production system).

89. Richardson, *supra* note 9, at 164; see also Mariola, *supra* note 10, at 218–19 (identifying the potential environmental impacts of farmland preservation efforts and the lack of attention to this issue).

90. Neil D. Hamilton, *Keeping the Farm and Farmer in Food Policy and Law*, 11 J. FOOD L. & POL'Y 9, 11–12 (2015) (profiling the divergence within the field).

91. See, e.g., *Long Green Valley Ass'n v. Bellevalle Farms, Inc.*, 432 Md. 202 (Md. Ct. App. 2013). These impacts also occur when agricultural activities return to more urbanized locations. See Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 239–46 (2012) (identifying legal obstacles the local food movement has faced within the land use context). These changes will potentially become even more dramatic in the future as agriculture continues to evolve. See, e.g., Stephen R. Miller, *Financing Local Food Factories*, 43 FORDHAM URBAN L.J. 377, 385–87 (2016) (describing potential industrialization of urban agriculture).

complex and costly.<sup>92</sup> For example, an easement that has a broad prohibition against commercial use forecloses a farmer's ability to potentially capitalize on a revenue stream, even when the new activity does not impact the easement's conservation values and would actually make it more likely that the property would continue in agricultural production.<sup>93</sup> It is impossible to avoid some degree of presentism in drafting against current perceived problems rather than those of the future.<sup>94</sup> Technological change may, however, render some of our more problematic barriers, such as telecommunications, less of an issue.<sup>95</sup> Some concerns regarding changing conditions or economic uses could be better addressed within the terms of the actual easements, but even the best tailored easement is not going to be capable, within the working lands context, of meeting all future agricultural uses.<sup>96</sup>

Balancing competing priorities within an easement that is designed to achieve multiple objectives makes the use of agricultural conservation easements particularly challenging.<sup>97</sup> Advocates for farmland preservation come at this work for varied reasons and, while these reasons are highly compatible, they are also capable of diverging under certain circumstances.<sup>98</sup> This complexity is perhaps heightened even more by the comparatively narrow lane through which

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92. Anderson & Cosgrove, *supra* note 24, at 9 (profiling the challenges and the need to balance interests within this form of conservation easement).

93. Gentry, *supra* note 15, at 1388 (providing the example of a potential conflict with regard to a commercial use—allowing the installation of a cellular tower or antennas inside of a grain silo on a protected farm).

94. See Land Trust Alliance, *Practical Pointers Series* (2013), <https://woods.stanford.edu/sites/default/files/documents/Conservation%20Easement%20Pointers.pdf> (last visited July 15, 2018) (providing best practices and suggestions for how to avoid unduly restricting a property's long term use); see also Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 601–04 (2004) (raising issues associated with perpetual conservation easements).

95. See generally, e.g., Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 LSU J. ENERGY L. & RESOURCES 101, 102 (2014) (discussing relationship between new energy technologies and agricultural easements); see also Jacob P. Byl, *Conserving a Place for Renewable Power*, 29 J. ENVTL. L. & LITIG. 303, 314–16 (2014) (same).

96. See Jesse J. Richardson, Jr., *Conservation Easements and Adaptive Management*, 3 SEA GRANT L. & POL'Y J. 31, 43–44 (2010) (evaluating the challenges and attempts to use integrated planning to address long-term management); but see Tom Slayton, *Celebrating Forty Years of Learning and Growing on the Land: Changes in Farm Conservation*, PANORAMA, Spring 2017, at 7, 7–8 (discussing the evolution of one Vermont Land Trust protected farm's agricultural operations within a relatively short window).

97. See Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Uses*, 51 LAND USE POL'Y 76, 81 (2016) (discussing challenge of having multiple purposes within a conservation easement without clarity regarding which should take precedence); see also Elia Machado et al., *Prioritizing Farmland Preservation Cost-Effectively for Multiple Objectives*, 61 J. SOIL & WATER CONSERVATION 250, 252–54 (2006) (profiling purposes); Duncan M. Greene, *Dynamic Conservation Easements: Facing the Problem of Perpetuity in Land Conservation*, 28 SEATTLE U. L. REV. 883, 901–05 (2005) (profiling challenges).

98. See, e.g., Neil D. Hamilton, *Rural Lands and Rural Livelihoods: Using Land and Natural Resources to Revitalize Rural America*, 13 DRAKE J. AGRIC. L. 179, 180 (2008) (profiling the changing values that define the agricultural sector and the challenges this presents from a policy perspective).

agricultural conservation easements can qualify for the available tax incentives, and by the consequences of failing to do so, discussed in more detail below.

In three short decades spanning from roughly the 1960s to the early 1990s, the contemporary farmland preservation movement gained roughly the current form.<sup>99</sup> Although the policies and tools vary based upon objectives, threats, and land-use forms, the agricultural conservation easement's contemporaneous development has provided a powerful tool for protecting lands that would otherwise not be subject to zoning or other land-use controls due to practical, financial, or constitutional considerations.<sup>100</sup> Thus, despite many challenges, these easements are likely to remain a primary mechanism for the farmland preservation movement.<sup>101</sup>

### B. Farmland Preservation

Farmland preservation efforts, of which agricultural conservation easements are an important part, generally are a relatively recent phenomenon.<sup>102</sup> Historically, the protection of agricultural lands was not given much attention, and to the extent efforts were made, the focus was on providing incentives to farmers in an attempt to blunt environmental harms, rather than affirmatively protect these lands against future development.<sup>103</sup> As environmental pressures have intensified, so has the interest in more structured and strategic policies to secure working lands from conversion to nonfarm use and in promoting better resource management.<sup>104</sup> This Part profiles the development of farmland protection efforts, focusing briefly on how farmland preservation became an important component of federal agricultural policy.<sup>105</sup>

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99. DANIELS & BOWERS, *supra* note 30, at 75–85. It is perhaps instructive to place the development of the farmland preservation movement in relief against the conservation movement and the environmental movement in their pre- and post-World War II forms. While all of these social causes are related, there are qualitative differences in their forms and goals which can be conflated within the protective scope of an agricultural conservation easement and are not capable of being easily unwound. *Id.*

100. See STOKES, *supra* note 5, at 3–5.

101. McLaughlin, *supra* note 65, at 1–5 (discussing the use, appeal of, and challenges associated with conservation easements generally).

102. Douglas P. Wheeler & Stephen F. Harper, *In Defense of Farmland*, 38 J. SOIL & WATER CONSERVATION, Jan/Feb 1983, at 4, 4 (discussing the growing need for farmland preservation efforts).

103. See, e.g., KEITH HIROKAWA, *Adapting Agriculture through Land Use Controls*, in RESEARCH HANDBOOK ON CLIMATE CHANGE AND AGRICULTURE 196 (2017) (noting that farmland preservation can result in setting land aside for future development activity).

104. Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591, 591–94 (1984) (profiling the pressures behind this policy effort).

105. This narrative is admittedly simplified to provide a working frame for assessing policy innovation over the past several decades. As with most topics, this historical narrative is subject to constant reevaluation and dispute. See Nathan A. Rosenberg & Bryce W. Stucki, *The Butz Stops Here: Why the Food Movement Needs to Rethink Agricultural History*, 13 J. FOOD LAW & POL'Y 12 (2017) (arguing that several components of the prevailing agricultural history narrative are foundational myths and advocating a more progressive farm policy agenda). Additionally, the regionalism embedded in farm operational structure also complicates efforts to provide a general overview that accurately reflects sectoral change for all types of farms nationally. See Jess Gilbert & Carolyn Howe, *Beyond "State v. Society": Theories*

### 1. U.S. Farm Policy: Origins and Evolution

This section provides the overview of the development of farm policy beginning with the New Deal and continuing through the 1985 Farm Bill and the creation of a standalone conservation title.

#### a. The New Deal

Farm policy has long been an important legislative focus given our nation's agrarian roots, but express consideration for the sector's conservation impacts was slow to emerge.<sup>106</sup> With antecedents at the state level, federal farm policy only really began to consider the need for publically supported conservation measures during the Dust Bowl (1930–1936).<sup>107</sup> A large number of policy solutions—ranging from commodity support programs to increase on-farm income to the relocation of farmers away from submarginal lands—emerged from a climate of policy experimentation.<sup>108</sup> Early New Deal efforts included demonstration stations and modeling conservation activities with the idea that the financial benefits of these efforts would be enough to convince producers to minimize soil loss and degradation.<sup>109</sup> Out of this policy mix came the Soil Conservation Service, the predecessor of the contemporary Natural Resources Conservation Service (NRCS) which would focus on addressing many of these issues.<sup>110</sup> More radical experiments such as submarginal land retirement and using federal land-use planning to relocate portions of the nation's agricultural population to alleviate social and conservation ills were not ultimately adopted—at least at scale.<sup>111</sup> While this left many submarginal lands in production, it laid

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*of State and New Deal Agricultural Policies*, 56 AM. SOCIOLOGICAL REV. 204, 209 (1991) (profiling these regional distinctions).

106. CAROLYN DIMITRI ET AL., U.S. DEP'T OF AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* 2–5 (2005) (profiling the changes in this policy sector).

107. Wayne D. Rasmussen, *New Deal Agricultural Policies After Fifty Years*, 68 MINN. L. REV. 353, 368–69 (1983); see also R. Douglas Hurt, *The National Grasslands: Origin and Development in the Dust Bowl*, 59 AGRIC. HISTORY 246, 246–48 (1985). Earlier policy struggles trace back to post-World War I, but these largely focused on trade policies and achieving a better balance between farm and nonfarm incomes. See Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 336–39 (1984); SARAH T. PHILLIPS, *THIS LAND, THIS NATION: CONSERVATION, RURAL AMERICA, AND THE NEW DEAL* 36–59 (2007) (profiling pre-New Deal conservation efforts).

108. See generally Wayne D. Rasmussen, *The New Deal Farm Programs: What They Were and Why They Survived*, 65 AM. J. AGRIC. ECON 1158 (1983) (profiling the adoption of New Deal era agricultural policy and its continuing impacts).

109. Douglas Helms, *Hugh Hammond Bennett and the Creation of the Soil Conservation Service*, 65 J. SOIL & WATER CONSERVATION, Mar/Apr. 2010, at 37A, 37A–40A (profiling the creation of the Soil Conservation Service and the agency's early soil conservation efforts).

110. The Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148; see also *More Than Eighty Years Helping People Held the Land: A Brief History of NRCS*, U.S. DEP'T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143\\_021392](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392) (last visited July 15, 2018) (providing summary of the history of this important agency).

111. TIM LEHMAN, *PUBLIC VALUES, PRIVATE LANDS: FARMLAND PRESERVATION POLICY, 1933-1985* 23–26 (1995); see also Robert A. McLeman et al., *What We Learned from the Dust Bowl: Lessons in Science, Policy and Adaptation*, 35 POPULATION AND ENV'T 417, 429–31 (2014) (charting and

the groundwork for future policies for protecting and promoting better use of working lands generally.<sup>112</sup>

*b. The Post-War Period to the 1970s*

As the New Deal lost momentum, the legislative focus moved away from this band of social objectives to a more production-centric approach.<sup>113</sup> A significant reason for this shift was technological—specifically, the combined impact of hybrid corn, improved machinery (moving from draft animal power to an almost entirely mechanized production over a few short decades), and advances in nitrogen fertilizer and other agricultural inputs that drastically increased commodity production during this period.<sup>114</sup> During this period of extreme belief in the ability of technological progress to address any social challenges, federal conservation policy accordingly focused on conservation as a way to increase on-farm productivity and production metrics.<sup>115</sup> Related to this objective, conservation programming of the 1940s through the 1960s largely focused on conservation as a tool to grow more crops and to keep agricultural input and domestic food prices low throughout the Cold War period, rather than on the attainment of conservation objectives for their own ends.<sup>116</sup>

*c. The Conservation Title and the 1985 Farm Bill*

In the 1970s, the focus began to change as the environmental movement gained traction and farm consolidation and operational farms presented different economic and environmental conditions than during, for example, the New Deal era.<sup>117</sup> Out of this concern, beginning with the 1985 Farm Bill, conservation

evaluating the arguments regarding the effectiveness of New Deal-era conservation planning and the long-term impacts of federal intervention into land management).

112. See, e.g., Sara M. Gregg, *Can We “Trust Uncle Sam”? Vermont and the Submarginal Lands Project, 1934-1936*, 69 VT. HISTORY 201, 201–04 (profiling this failed effort in the Vermont context based upon a number of factors, including the cultural impacts of losing many farms that had been cultivated, at that point, for generations); see also Neil Maher, “Crazy Quilt Farming on Round Land”: *The Great Depression, the Soil Conservation Service, and the Politics of Landscape Change on the Great Plains During the New Deal Era*, 31 W. HIST. Q. 319, 332–38 (2000) (discussing the ecological and political impacts of the New Deal within Great Plains farming communities).

113. LEHMAN, *supra* note 111, at 47–49 (explaining that the “[t]he mission of the agency shifted from protecting the soil from erosion to conserving soil for the sake of enhancing productivity”).

114. See generally PAUL K. CONKIN, *A REVOLUTION DOWN ON THE FARM: THE TRANSFORMATION OF AMERICAN AGRICULTURE SINCE 1929* (2008) (profiling many of these factors); see also DIMITRI ET AL., *supra* note 106, at 6–7 (discussing this change).

115. R. DOUGLAS HURT, *PROBLEMS OF PLENTY* 40 (2002) (profiling the changes in this sector); see also LEHMAN, *supra* note 111, at 47 (noting that “[t]he emotional temperature if the agency cooled, and its emphasis moved from ethical arguments to economic and soil science analysis”).

116. Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENVTL. L. 59, 80–83 (2016).

117. See William S. Eubanks II, *The Future of Federal Farm Policy: Steps for Achieving a More Sustainable Food System*, 37 VT. L. REV. 957 (2013) (proposing policy changes to encourage sustainability); see also Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of*

became more expressly incorporated into farm policy, with the inclusion of the act's standalone conservation title.<sup>118</sup> The 1985 Farm Bill also established conservation compliance, which conditions continued eligibility for participation in the United States Department of Agriculture's (USDA) programs on not draining certain kinds of qualifying wetlands or farming highly erodible lands without following an approved conservation plan.<sup>119</sup> To date, conservation compliance remains an important component of the overall policy mix designed to provide some degree of incentive structure to avoid the most negative impacts associated with intensification of farming activities, but it is not always clear how effective the conservation compliance requirements are in actual practice.<sup>120</sup>

## 2. *Understanding the Contemporary Conservation Title*

Since the 1985 Farm Bill, the conservation title has expanded the federal role in assisting and encouraging farmers to adopt conservation practices—recognizing a sort of shared responsibility for these working lands based upon the benefits that accrue from responsible land tenure and stewardship.<sup>121</sup> From the 1985 Farm Bill on, this programming can be roughly categorized by a few principal program types: (1) working lands programs, (2) land retirement programs, and (3) easement programs.<sup>122</sup> The mix of funding in each respective

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*Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563, 565–70 (2013) (profiling development of agricultural law).

118. See, e.g., J. Douglas Helms, *Leveraging Farm Policy for Conservation: Passage of the 1985 Farm Bill*, U.S. DEP'T OF AGRIC. 6 (2006), [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1044129.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1044129.pdf).

119. Linda A. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbuster, Swampbuster, and the Conservation Reserve*, 34 KAN. L. REV. 577, 580–94 (1986) (profiling the development of the 1985 Farm Bill and its conservation compliance requirements); see also ROGER CLAASSEN, USDA ERC, CONSERVATION AND ENVIRONMENTAL POLICIES, IN AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, at 183, 183–192 (providing overview and impacts of conservation compliance generally). For an overview of the creation of conservation compliance (swampbuster/sodbuster), see Daryn McBeth, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996*, 21 HARV. ENVTL. L. REV. 201 (1997).

120. *Highly Erodible Land Conservation Compliance Provisions*, U.S. DEP'T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/alphabetical/camr/?cid=nrcs143\\_008440](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/alphabetical/camr/?cid=nrcs143_008440) (last visited July 15, 2018) (profiling the requirements of conservation compliance currently); see also Ristino & Steier, *supra* note 116, at 96–102 (discussing the numerous challenges associated with enforcing conservation compliance provisions).

121. LEHMAN, *supra* note 111, at 5–68 (exploring the arch of farm programming from the New Deal, to the post-WWII focus on production, and ending with the push during the 1970s to focus on ecological and environmental objectives). This shared responsibility and compact has its limits as farmers have largely avoided the imposition of environmental regulation. See Ruhl, *supra* note 49, at 265–67 (discussing this policy gap); Linda Breggin & D. Bruce Myers, Jr., *Subsidies with Responsibilities: Placing Stewardship and Disclosure Conditions on Government Payments to Large-Scale Commodity Crop Operations*, 37 HARV. ENVTL. L. REV. 487, 521–22 (2013) (advocating for additional affirmative stewardship and disclosure requirements for larger-scale operations).

122. See MEGAN STUBBS., CONG. RESEARCH SERV., R43504, CONSERVATION PROVISIONS IN THE 2014 FARM BILL (P.L. 113-79) (2014) (utilizing roughly this categorization but also noting that

tranche will change depending upon the dynamics of the agricultural economy and political context associated with the negotiations of that specific farm bill (which is enacted roughly every four to five years).<sup>123</sup> “Over time, high commodity prices, changing land rental rates, and new conservation technologies have led to a shift in farm bill conservation policy away from the more traditional land retirement programs toward an increased focus on conservation working lands programs.”<sup>124</sup> While “[m]ost conservation and wildlife organizations support both land retirement and working lands programs[. . .] the appropriate ‘mix’ continues to be debated. Some are still divided between shorter-term land retirement programs such as [the Conservation Reserve Program] and longer-term easement programs such as the new wetland reserve easements under the Agriculture Conservation Easement Program (ACEP[-WRE]).”<sup>125</sup> The following Subpart will provide a short summary of each respective category and its current role in supporting conservation and farmland preservation objectives.

*a. Working Lands Programs*

One of the primary thrusts of the conservation title has been to provide financial assistance for the active management of working lands.<sup>126</sup> The conservation title currently addresses working lands in two ways: (1) providing cost-share assistance to farmers looking to implement conservation practices, and (2) allocating performance payments to farmers using specified environmentally sensitive management practices.<sup>127</sup>

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conservation compliance and some other programming, both within the Farm Bill and enacted separately also has conservation impacts on the working landscape).

123. See Neil D. Hamilton, *The 2014 Farm Bill: Lessons in Patience, Politics, and Persuasion*, 19 *DRAKE J. AGRIC. L.* 1, 1–9 (2014) (profiling the development of a farm bill generally and “setting” the stage leading up to the 2014 iteration); see also RENÉE JOHNSON & JIM MONKE, *CONG. RESEARCH SERV.*, RS22131, *WHAT IS THE FARM BILL?* 1–2 (2014) (providing an overview of the typical farm bill and the process involved with its enactment).

124. STUBBS, *supra* note 122, at 3; see also Roger Classen, *2014 Farm Act Continues Most Previous Trends in Conservation*, U.S. DEP’T OF AGRIC. (May 5, 2014), <https://www.ers.usda.gov/amber-waves/2014/may/2014-farm-act-continues-most-previous-trends-in-conservation/> (charting conservation title spending).

125. STUBBS, *supra* note 122, at 3; see also Alex Formuzis, *Here Today, Gone Tomorrow: USDA Conservation Program for Sensitive Cropland Wastes Billions of Tax Dollars*, ENVIRONMENTAL WORKING GROUP (June 7, 2017), <https://www.ewg.org/release/here-today-gone-tomorrow-usda-conservation-program-sensitive-cropland-wastes-billions-tax#.WlyoUK6nFhE> (discussing the transitive nature of the Conservation Reserve Program and the fleeting environmental gains that result).

126. See MEGAN STUBBS, *CONG. RESEARCH SERV.*, R40197, *ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (EQIP): STATUS AND ISSUES* 1–2 (2010); see also Ross & Rupe, *supra* note 10, at 831–32 (discussing EQIP funding of best management practices to facilitate); but see Christopher Koliba et al., *The Lake Champlain Basin as a Complex Adaptive System: Insights from the Research on Adaptation to Climate Change (“RACC”) Project*, 17 *VT. J. ENVTL. L.* 533, 550–51 (2016) (explaining that current levels of EQIP funding will likely not be enough to alone encourage the rates of participation needed to effect change in this ecosystem).

127. See generally STUBBS, *supra* note 122

The Environmental Quality Incentives Program (EQIP) provides upfront cost-share assistance for installing specific practices.<sup>128</sup> Under EQIP, the NRCS will provide substantial cost-share assistance (up to 75 percent of the cost of the applicable practice) to a farmer seeking to implement a conservation practice, ranging from building a new terrace or planting a vegetative strip to prevent soil erosion and runoff to purchasing anaerobic digesters to help deal with manure management on feedlots.<sup>129</sup> The allocation of funds under EQIP is guided by national, state, and local priorities, which are set by the agency and local stakeholders.<sup>130</sup> EQIP is the largest conservation program for working lands, receiving approximately 29 percent of conservation spending.<sup>131</sup> Although EQIP has positive impacts, commentators continue to call for greater targeting and prioritization of this funding stream to secure more beneficial land management outcomes.<sup>132</sup>

The Conservation Stewardship Program (CSP) provides funding to farmers for conservation stewardship and management of their lands.<sup>133</sup> Under the CSP, farmers are compensated by the USDA for the environmental management practices that are utilized within their operations (to reward good operators for utilizing beneficial practices to encourage even better stewardship or management).<sup>134</sup> To enroll in CSP, farmers execute a contract (currently for five years with an option to renew) with the NRCS and agree both to maintain the level of stewardship already in place and to implement additional conservation

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128. See *Environmental Quality Incentives Program*, NAT. RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/> (last visited July 15, 2018) (providing overview of the program and its current funding priorities).

129. 16 U.S.C. § 3839 aa-2 et seq. (2012); 7 C.F.R. § 1466.23. Some of these practices are criticized for supporting nonenvironmentally sensitive operational forms. See Peter Lehner & Nathan A. Rosenberg, *Legal Pathways to Carbon-Neutral Agriculture*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10845, 10865 (2017) (discussing EQIP's support of irrigation systems and waste storage facilities for concentrated animal feeding operations).

130. Robert Bonnie, *Financing Private Lands Conservation and Management through Conservation Incentives in the Farm Bill*, in FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 183, 186–89 (James N. Levitt ed., 2005) (discussing EQIP's ranking and the inefficiencies that result from an conservation perspective).

131. See Lehner *supra* note 129, at 10,864.

132. Ristino & Steier, *supra* note 116, at 104–05 (discussing this critique of EQIP's prioritization/funding efforts).

133. See 16 U.S.C. 3838d–3838g (2012); see also 7 C.F.R. § 1470. The CSP was created under the 2008 Farm Bill, and despite the large acreage involved, its effectiveness is potentially somewhat limited by the lack of funding and administrative challenges associated with program implementation. See Eubanks, *supra* note 117, at 978–80 (discussing CSP's creation and program challenges). The Conservation Stewardship Program replaced the former Conservation Security Program (created under the 2002 Farm Bill), which marked the beginning of working lands programming within USDA. See William J. Even, *Green Payments: The Next Generation of U.S. Farm Programs?*, 10 DRAKE J. AGRIC. L. 173, 196–98 (2005) (profiling this policy effort).

134. See Conservation Stewardship Program, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/csp/> (last visited Dec. 31, 2017) (profiling the CSP and current practices funded under executed contracts).

activities.<sup>135</sup> It is currently the largest program as far as acres enrolled, as over 70 million acres of working lands are participating in the program.<sup>136</sup> Overall, working land programs fit well within the current emphasis on market-based programming and constitute a large proportion of conservation funding under the 2014 Farm Bill.<sup>137</sup> From a farmland preservation perspective, working lands programs likely provide some indirect benefits (by providing some economic support to operations),<sup>138</sup> but this objective is not the primary focus on this policy spectrum.

*b. Land Retirement Programs*

On the other end of the spectrum are those programs that actually take lands out of production ostensibly to help the farm economy by reducing production while achieving temporary environmental gains.<sup>139</sup> USDA programs have long focused on land retirement—either voluntary or as a condition of continuing to receive subsidy payments.<sup>140</sup> Land retirement programming represented well over half of total conservation expenditures through 2003.<sup>141</sup> In recent years, funding has been shifting towards other programming, such as easement

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135. 7 C.F.R. § 1470.24. For a list of current enhancements eligible under CSP contracts, see *CSP Enhancements 2017*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/cspsearch/national/programs/financial/csp/> (last visited July 15, 2018).

136. See Conservation Stewardship Program, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/csp/> (last visited July 15, 2018).

137. See Jason J. Czarneski & Katherine Fiedler, *The Neoliberal Turn in Environmental Regulation*, 2016 UTAH L. REV. 1, 12-13 (profiling the 2014 Farm Bill and its reliance on economic and market-based policy mechanisms).

138. See *CSP Payments*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcseprd1297344> (last visited July 15, 2018).

139. Even though these gains are temporary as the land can be put back into production at the end of the contract term, programs such as CRP do offer conservation and habitat benefits and remain strongly supported by some conservation organizations. See MEGAN STUBBS, CONG. RESEARCH SERV., CONSERVATION RESERVE PROGRAM: STATUS AND ISSUES 1-4 (2014) (exploring the conservation gains achieved through this program and the impacts of recent reductions in acreage caps for the program); see also *CRP: Achieving Conservation Goals on Private Lands for 30 Years*, PHEASANTS FOREVER: PHEASANT STORIES (Dec. 22, 2015, 3:10:29 PM), <https://www.pheasantsforever.org/BlogLanding/Blogs/Field-Notes/CRP-Achieving-Farming-and-Conservation-Goals-on-Pr.aspx?feed=articles> (discussing the impacts of this program on the organization's habitat objectives).

140. See, e.g., J. Douglas Helms, *Brief History of the USDA Soil Bank Program*, 1 HISTORICAL INSIGHTS 1-3 (Jan. 1985), [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1045666.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045666.pdf) (last visited July 15, 2018) (discussing the motivations for and policy solutions designed to encourage and facilitate voluntary land retirement). Other similar programs include the annual land diversion requirements under the former Agricultural Conservation Program. See Dana Hoag et al., *Do Acreage Diversion Programs Encourage Farming Erodible Land? A Palouse Case Study*, 39 J. SOIL & WATER CONSERVATION 138 (Mar./Apr. 1984) (discussing this program and its conservation impacts in a 1984 case study).

141. AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 42-43 (Craig Osteen et. al eds., 2012), [https://www.ers.usda.gov/webdocs/publications/44690/30351\\_eib98.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/44690/30351_eib98.pdf?v=0).

acquisition and supporting working lands.<sup>142</sup> The primary program in this category, administered by the USDA's Farm Service Agency, is the Conservation Reserve Program (CRP), which provides farmers annual payments for taking their land out of production (typically for a ten-to-fifteen-year contract period) and supports habitat goals through specific funding initiatives under the program's umbrella.<sup>143</sup>

*c. Conservation Easement Programs*

The last focus is on securing longer-term protection of land through the acquisition of conservation easements.<sup>144</sup> NRCS easement programs fall into a few categories, which in the 2014 Farm Bill were consolidated into the Agricultural Conservation Easement Program (ACEP).<sup>145</sup> The USDA's longest standing conservation easement effort is its wetlands-focused easements (ACEP-WRE).<sup>146</sup> ACEP-WRE focuses on restoring wetlands that were placed (often

142. STUBBS, *supra* note 122, at 3. An issue with the funding of the CRP is that its popularity strongly ebbs and flows with the general agricultural economy. If commodity prices rise, producers tend to take lands out of the program. If prices fall, farmers tend to want to enroll their acreage in the program. *See, e.g.,* Anna McConnell, *Tough Competition for CRP Contracts*, SUCCESSFUL FARMING (Sept. 7, 2016), <https://www.agriculture.com/news/tough-competition-for-crp-contracts> (discussing the impacts on program demand of reduced funding and lower commodity prices).

143. *See Conservation Reserve Program*, FARM SERV. AGENCY, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/conservation-reserve-program/> (last visited July 15, 2018); *see also* Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 STAN. ENVTL L.J. 3, 12–16 (1993) (discussing the emergence of the CRP and its interaction with conservation compliance).

144. *See* Roger Claassen, *Emphasis Shifts in U.S. Conservation Policy*, AMBER WAVES, July 2006; Roger Claassen et al., *2014 Farm Bill Continues Most Previous Trends in Conservation*, AMBER WAVES, May 2014, at 1–10 (discussing these shifts from farm bill to farm bill and noting trends). USDA's wetlands and working lands (as a pilot) easement authorities both roughly date back to the 1990 Farm Bill. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, (104 Stat.) 3359 (1990); *see also* Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. L. REV. 401, 404 (1993) (discussing the role of these programs).

145. *See* Agricultural Act of 2014, P.L. 113-79, § 2301, 128 Stat. 665 (Feb. 7, 2014); *see also* Adam Reimer, *Ecological Modernization in U.S. Agri-Environmental Programs: Trends in the 2014 Farm Bill*, 47 LAND USE POLICY 209, 210–12, (2015) (discussing this consolidation effort). In addition to the consolidation of the agency's easement programs, the 2014 Farm Bill also established the Regional Conservation Partnership Program (RCPP). RCPP focuses on working with partners to leverage resources while working through existing statutory programs (primarily ACEP, CSP, EQIP, which are referred to as covered programs). The unique aspect of RCPP is the agency's flexibility to waive regulatory requirements applicable to the covered programs to the extent that it helps the agency and its partners to accomplish the specific objectives of the project, including for ACEP-ALE. *See* Bryan David, *The Regional Conservation Partnership Program: What's In It for Land Trusts?*, SAVING LAND (Winter 2016), <https://www.landtrustalliance.org/news/regional-conservation-partnership-program-whats-it-land-trusts> (last visited July 15, 2018) (providing land trust perspective on this policy initiative).

146. *See, e.g.,* Brian J. Oakey, *The Wetlands Reserve Program: Charting a Course through the WRP*, 8 DRAKE J. AGRIC. L. 631, 634–36 (2003) (exploring the history of NRCS's WRP program, the predecessor to the contemporary ACEP-WRE program); *see also* John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm. . . Forest, or Wetland? A Call for Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 FORDHAM ENVTL. L.J. 691, 699–701 (1997) (discussing the development and role of the WRP program).

improvidently) in agricultural production.<sup>147</sup> Under ACEP-WRE, NRCS pays the farmer for both the value of the land and for the restoration costs and ultimately NRCS will directly hold and administer these easements.<sup>148</sup> The other ACEP effort is the Agricultural Land Easement Program (ACEP-ALE), which focuses on protecting working farms.<sup>149</sup> ACEP-ALE has a different structure than ACEP-WRE in that NRCS works with qualified entities (land trusts or state agencies focusing on farmland protection) and will cost share up to 50 percent of the value of the easement.<sup>150</sup> These easements are held by the qualified entity instead of NRCS but are subject to a third-party right of enforcement, which allows NRCS to step into the role of the entity should the entity fail to enforce the easement's terms.<sup>151</sup> To summarize these easement programs, WRE focuses on taking lands out of production (typically poor agricultural land subject to flooding), restoring the habitat, and results in a very restrictive easement held by the NRCS. ALE focuses on protecting working lands, and results in a somewhat permissive easement (to allow operational flexibility) held by a third party subject to NRCS's third-party right of enforcement.<sup>152</sup> NRCS easement programs have become an increasingly significant portion of the agency's work, and have had the effect of reorienting at least a portion of the NRCS away from its traditional technical assistance role towards being a more active land management agency.<sup>153</sup>

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147. See generally Scott Yaich, *Wetlands and the Farm Bill*, DUCKS UNLIMITED, <http://www.ducks.org/conservation/public-policy/farm-bill/wetlands-and-the-farm-bill> (last visited July 15, 2018).

148. 2014 Farm Bill—Agricultural Conservation Easement Program, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=stelprdb1242695> (last visited July 15, 2018).

149. 16 U.S.C. § 3865b (2012).

150. *Id.*

151. *Id.* § 3865b(b)(4)(c)(ii). The right of enforcement has been an ongoing source of contention between the partnership entities and the NRCS and the balance between the federal governments and the entities' authority has slightly ebbed and flowed with time. For a sense of this debate, see Agricultural Conservation Easement Program, 81 FR 71818, 71824-25 (Oct. 18, 2016) (discussing comments from advocates with regard to NRCS's final rule for the ACEP-ALE program).

152. 7 C.F.R. § 1468.28(c).

153. STUBBS, *supra* note 122, at 3 (noting the allocations between the funding allocations over time). As the build up to the next farm bill begins, advocates are already expressing concerns regarding additional cuts to critical USDA funding for these programs. See, e.g., Rand Wentworth, *The Unstable Landscape of US Conservation Funding: An Op-Ed*, CONSERVATION FINANCE NETWORK (May 22, 2017), <https://www.conservationfinancenetwork.org/2017/05/22/the-unstable-landscape-of-us-conservation-funding-an-op-ed-by-rand-wentworth>. Despite advocates' support of these programs generally, there is a general frustration regarding the transparency of many of these programs owing to confidentiality restrictions placed within the 2008 Farm Bill. Specifically, Section 1619 of the Farm Bill limits the agency's ability to provide many types of information related to a farmer's operation. Section 1619 is highly restrictive regarding the agency's ability to disclose data provided by farmers, which advocates contend restricts efforts to assess the relative effectiveness of USDA programming. See Adena R. Rissman et al., *Public Access to Spatial Data on Private-Land Conservation*, 22 *ECOLOGY AND SOCIOLOGY* 24-28 (2017).

Overall, the primary mix of funding under the conservation title supports working lands, land retirement, and easement programming.<sup>154</sup> All of these programs have had varying degrees of impact as far as keeping lands from being converted to nonfarm use, but for the majority of these efforts, the focus has not so much been directly upon explicitly protecting farmland, but on helping farmers continue their operations.<sup>155</sup> Of the programs, the ACEP-ALE is best suited to advance farmland preservation objectives, as explored in more detail below.<sup>156</sup> The relative priorities of the appropriation and agricultural committees will strongly impact which of the various prongs of conservation title will be ascendant.<sup>157</sup> For example, the 2014 Farm Bill changed the mix of programming between these various programmatic areas, as most do, and the debate over the next Farm Bill will have important consequences on how much funding is targeted into land protection efforts versus other conservation and agricultural policy based considerations.<sup>158</sup>

### 3. Farmland Preservation: Origins and Evolution

Only over the past three to four decades has farmland preservation become a land-use concern of increasing priority.<sup>159</sup> As the post-World War II

154. MEGAN STUBBS, CONG. RESEARCH SERV., R40763, AGRICULTURAL CONSERVATION: A GUIDE TO PROGRAMS (2017) (discussing this mix). Others describe this balance slightly differently. See NORTH AMERICAN BIRD CONSERVATION INITIATIVE, U.S. COMMITTEE, 2014 FARM BILL GUIDE 21 (2015), [https://www.fws.gov/greatersagegrouse/documents/Landowners/2014\\_Farm\\_Bill\\_Guide%20to%20Fish%20and%22Wildlife%20Conservation.pdf](https://www.fws.gov/greatersagegrouse/documents/Landowners/2014_Farm_Bill_Guide%20to%20Fish%20and%22Wildlife%20Conservation.pdf) (describing the four “buckets” of programs as: (1) providing cost-share for improved farming practices; (2) conserving environmentally sensitive lands; (3) securing easements to protect farmland and wetlands; and (4) encouraging conservation partnerships).

155. Despite the substantial federal investment in these lands, it is also not clear what the impact of these policies have been in achieving their intended goals. See, e.g., Devan A. McGranahan et al., *Associating Conservation/Production Patterns in US Farm Policy with Agricultural Land-Use in Three Iowa, USA Townships 1933-2002*, 45 LAND USE POLICY 76 (May 2015) (profiling the impacts of federal farm policy and concluding that the reductions in commodity outputs expected did not materialize because it was offset by additional production, and that despite additional conservation programming, the linkages between the environmental externalities associated with on-farm production remain).

156. See, e.g., *Vermont Agricultural Land Easement (ALE)*, NAT. RES. CONSERVATION SERV. VT., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/easements/acep/?cid=nrcs142p2\\_010532](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/easements/acep/?cid=nrcs142p2_010532) (last visited July 15, 2018) (noting that over 72,000 acres of land have been protected through nearly 400 discrete transactions under the ACEP-ALE and its predecessor programs).

157. See *Farm Bill 2018: A Primer*, NAT'L SUSTAINABLE AGRIC. COAL. (2016), <http://www.safsf.org/wp-content/uploads/2016/12/2018-Farm-Bill-Primer-for-SAFSF1.pdf> (providing overview of the Farm Bill legislative process). Other factors, such as trade concerns, also impact the structure and configuration of the conservation title. See David Orden & Carl R. Zulauf, *Political Economy of the 2014 Farm Bill*, 97 AM. J. AGRIC. ECON. 1298, 1298–1311 (Oct. 2015) (discussing the impact of trade concerns on the Farm Bill's structure).

158. See Reimer, *supra* note 145, at 209–17. The Farm Bill is an increasingly hotly debated topic as the tensions between traditional farm policy advocates and an increasing array of new concerns increases. See, e.g., D. Lee Miller, *A Seat at the Table: New Voices Urge Farm Bill Reform*, 127 YALE L.J. FORUM 395 (2017).

159. See Julian C. Juergensmeyer, *Implementing Agricultural Preservation Programs: A Time to Consider a Novel Approach*, 20 GONZ. L. REV. 701 (Jan. 1, 1986) (charting the growth of farmland preservation programming). As noted earlier, there are a variety of reasons why farmland preservation has

automobile-based buildout rapidly took hold, highly productive farmland became a primary target for development activity.<sup>160</sup> This change dynamic, coupled perhaps with sufficient prosperity to be able to devote resources to this effort, allowed for meaningful attention to be channeled towards this arena.<sup>161</sup> In exploring the available options for affirmatively protecting farmland, advocates focused on developing incentive-based mechanisms to augment regulatory options as these generally presented material challenges.<sup>162</sup> William H. Whyte, a mid-century land-use theorist, observed these threats within the context of his native Chester County, Pennsylvania, and began to propose the more extensive use of conservation easements, along with other tools, as a way to blunt the development patterns that threatened to irrevocably alter the landscape of this and many other areas.<sup>163</sup>

In areas with some iconic agricultural economies, particularly those in proximity to intensive development threats and urbanized population centers, the desire to develop policy alternatives was particularly pressing.<sup>164</sup> In the late

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become a matter of serious policy attention. One of the earliest rationales was food security—the need to ensure that enough land is protected in order to provide a stable and sufficient food supply. While increasing agricultural productivity did not lead, in the short-term, to the conditions imagined, this is still an articulated basis for supporting these efforts. See, e.g., Rachel Armstrong, *On Infertile Ground: Growing a Local Food System Though Agricultural Conservation Easements*, 19 DRAKE J. AGRIC. L. 149, 153 (2014) (discussing the public’s motivations for supporting farmland protection).

160. Farmland was and is frequently targeted for development as it is often well-suited for building homes or other structures given its advantages, including, but not limited to, well-drained soils suitable for septic systems. See *Fact Sheet: Why Save Farmland?*, AM. FARMLAND TR. 1 (2003), [https://www.farmlandinfo.org/sites/default/files/Why\\_Save\\_Farmland\\_1-03\\_1.pdf](https://www.farmlandinfo.org/sites/default/files/Why_Save_Farmland_1-03_1.pdf); see also William W. Buzbee, *Sprawl’s Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URBAN L. 367, 370–72 (2000) (discussing the incentives for and costs of sprawl and the need for more density in land use planning as an optimal objective); Tamara Mullen, *The McMansion: Architecture’s Role in Facilitating Urban Sprawl and Farmland Loss*, 12 DRAKE J. AGRIC. L. 255, 263–65 (2007) (discussing the developmental impacts of the sprawl dynamic on farmland).

161. See generally Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URBAN L. 159 (1997), (discussing these impacts); Neil D. Hamilton, *Plowing New Ground: Emerging Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181, 192–94 (1997) (discussing views regarding the future use of this land).

162. See WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 15–32 (1969) (discussing the intense development pressures influencing farmer decisions with regard to future land use and concluding that acquisition-based efforts needed to play a role in devising better strategies for working lands and landscape level resource protection). Beyond acquisition-based models, other incentives had long been tried, including some forms of current use and differential taxation (not taxing agricultural land at its highest and best use, but rather at its value for forest or agricultural use to lessen the developmental pressure to convert to a more intensive land use alternative). See JULIAN C. JUERGENSMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 13.14 (2017) (noting that “[i]n most states, agricultural land is given special treatment regarding ad valorem taxes . . .” and explaining the farmland preservation rationale often utilized to support this from a policy perspective).

163. WHYTE, *supra* note 53, at 8–10. In *Securing Open Space*, Whyte is given credit for actually inventing the term “conservation easement.” See Gerald Korngold, *Private Conservation Easements: A Record of Achievements and the Challenges Ahead*, LAND LINES, Oct. 2009, at 8, 9.

164. See Thomas L. Daniels, *The Purchase of Development Rights: Preserving Agricultural Land and Open Space*, 57 J. AM. PLANNING ASSOC., 421, 421–23 (1991) (describing the growth of the purchase of development rights to limit sprawl).

1970s, areas such as Long Island, New York, Lancaster County, Pennsylvania, and Montgomery County, Maryland began experimenting with zoning, transfer of development programs, and the use of agricultural conservation easements.<sup>165</sup> These three leading early examples, admittedly in areas with particularized threats, served as success stories for other communities interested in protecting agricultural land.<sup>166</sup> Further assisting the growth of this movement, the American Farmland Trust, founded in 1980, promoted the use of agricultural conservation easements as a protective tool.<sup>167</sup> Beyond incentives in the tax code, the USDA and state and local programs provided funding streams that helped the movement begin to grow.<sup>168</sup> With hundreds of entities engaging in this work at the local and state level, and hundreds of thousands of acres of working land now under protection, agricultural conservation easements have become one of the primary tools for farming communities and farmland preservation advocates.<sup>169</sup>

#### 4. Farmland Preservation as Federal Agricultural Policy

As a matter of federal policy, farmland preservation was even slower to rise in relative priority than conservation more generally.<sup>170</sup> In 1980, the Farmland Protection Policy Act first established the protection of prime and unique farmland as a federal policy priority, but this legislation did not provide authority or support for land acquisition, and had limited effect.<sup>171</sup> In subsequent farm

165. See Jeffrey G. Buckland, *The History and Use of Purchase of Development Rights Programs in the United States*, 14 J. LANDSCAPE & URBAN PLANNING 237 (1987) (discussing the history of PDR programs and their role in farmland preservation efforts); see also Edward Thompson, Jr., "Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?, 23 WM. & MARY ENVTL. L. & POLICY REV. 831, 850–52 (1999) (charting a shift towards conservation easements to better balance between regulatory and incentive-based policies).

166. See David F. Newton & Molly Boast, *Preservation by Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVTL. L. 189, 189–91 (1978) (profiling early examples); see also FAIRFAX ET AL., *supra* note 40, at 174–76; John C. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RES. J. 119, 139–42 (1979) (discussing the early growth of acquisition programs).

167. See *Mission and History*, AM. FARMLAND TR., <https://www.farmland.org/mission-history> (last visited July 15, 2018); AM. FARMLAND TR., *supra* note 36, at xi–xiii (providing overview of the American Farmland Trust and the farmland preservation movement generally).

168. See Daloz, *supra* note 84, at 437–39 (discussing the growth of land trust activity within Vermont specifically).

169. See generally Henry Rodegerdts, *supra* note 4, at 336 (exploring the use of this tool); see also Tom Daniels & Lauren Payne-Riley, *Preserving Large Farming Landscapes: The Case of Lancaster County, Pennsylvania*, 17 J. AGRIC. FOOD SYS. & COMMUNITY DEVELOP. 67 (2017) (discussing the goals and effectiveness of farmland preservation efforts).

170. See Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RES. J. 591, 591–98 (1984) (charting the policy arguments in favor and against federal farmland preservation during the early 1980s); see also Quinn, *supra* note 30, at 235–39 (noting the contentious debate during this period of whether federal agricultural policy should play a role in these efforts).

171. See Tim Lehman, *Public Values, Private Lands: Origins and Ironies of Farmland Preservation in Congress*, 66 J. AGRIC. HISTORY 257, 257–60 (1992) (discussing the narrow window for Congress to pass more comprehensive land use laws during the 1970s and early 1980s and what actually resulted). The Farmland Protection Policy Act was a political compromise, and while it still applies to a narrow band of development projects undertaken by the federal government, it has not had much of an influence in

bills, as profiled above, conservation objectives became increasingly more important, leading to the creation of a conservation title and a number of programs directly focused on helping farmers address issues of conservation concern.<sup>172</sup> Easement programs built upon this base of conservation programming.<sup>173</sup> In the 1996 Farm Bill, Congress authorized the creation of the Farm and Ranchland Protection Program, which sought to protect working lands and expanded the agency's role into funding qualified entities (easement holders) seeking to protect farmland.<sup>174</sup> The 2014 Farm Bill repealed this program in favor of USDA's current consolidated ACEP.<sup>175</sup> As profiled in the preceding Subpart, this program, administered through the NRCS, provides considerable funding to governmental entities and nonprofit organizations to support their efforts to secure threatened farmland against conversion to nonagricultural use.<sup>176</sup>

## II. AGRICULTURAL CONSERVATION EASEMENTS AND THE INTERNAL REVENUE CODE

Agricultural conservation easements are a critical tool utilized by farmland preservation organizations to protect working lands, and the IRC provides an important funding stream to support these efforts.<sup>177</sup> To potentially qualify for

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stemming the loss of productive farmland—even those with prime or unique soils. See Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563 (1986) (profiling the limitations of this Act).

172. Ristino & Steier, *supra* note 116, at 109–10; see also Hamilton, *supra* note 161, at 13–15 (profiling the integration of farmland preservation into federal agricultural policy).

173. See, e.g., Jordan, *supra* 144, at 416–21 (charting the growth of farm bill easement programming). See also Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 479–82 (1986).

174. See Thomas L. Daniels, *A Trail Across Time: American Environmental Planning from City Beautiful to Sustainability*, 75 J. AM. PLANNING ASSOC. 178 (2009) (charting the growth of these programs within the conservation movement); Michael R. Eitel, *The Farm and Ranch Lands Protection Program: An Analysis of Federal Policy on United States Farmland Loss*, 8 DRAKE J. AGRIC. L. 591, 596–99 (2003) (providing an overview of the history of the Farm and Ranch Lands Protection Program).

175. Agricultural Act of 2014, Pub. L. 113-79, 128 Stat. 649, 731-32 (codified at 16 U.S.C. § 3865); see STUBBS, *supra* note 122, at 10–12 (discussing the changes in the working lands sections of the 2014 Farm Bill); see also Bradley Lubben & James Pease, *Conservation and the Agricultural Act of 2014*, 29 CHOICES 1 (2014) (profiling conservation programming and the impacts of the 2014 Farm Bill more generally).

176. See, e.g., Margaret C. Osswald, *Custom-Made Conservation: Resource-Specific Conservation Easement Implementation Unpaves the Path of Tax Abuses*, 32 J. ENVTL. L. & LITIG. 1, 18–20 (2016) (providing overview of ACEP-ALE and its operation). Beyond the traditional ACEP programming, the 2014 Farm Bill also included a new program, the Regional Conservation Partnership Program (RCPP). The RCPP replaced and consolidated many of NRCS's former regional programs and allows the agency, with partners, to ideally better identify and protect prime farmland. 16 U.S.C. § 3871. See also Jamie Konopacky & Laurie Ristino, *The Healthy Watershed Framework: A Blueprint for Restoring Nutrient-Impaired Waterbodies Through Integrated Clean Water Act and Farm Bill Conservation Planning and Implementation at the Subwatershed Level*, 47 ENVTL. L. 647, 681 (2017) (providing an overview of the RCPP within a comprehensive listing of current Farm Bill programming).

177. Janet E. Milne, *Watersheds: Runoff from the Tax Code*, 34 VT. L. REV. 883, 887–89 (2010) (noting the importance of the tax incentives in fueling this work); see also Federico Cheever, *Property*

the deduction under IRC 170(h), a donation has to meet three general requirements. The donation must: (1) be of a qualified property interest, (2) be made to a qualified easement-holder, and (3) be made exclusively for conservation purposes protected in perpetuity.<sup>178</sup> This Part will explore these requirements and some of the issues these present in practice.

### A. *Qualified Property Interest*

While the general rule is that partial-interest charitable gifts of all forms cannot be deducted,<sup>179</sup> an exception is made for certain qualified property interests—including perpetual conservation restrictions.<sup>180</sup> A perpetual conservation restriction is defined as “a restriction granted in perpetuity on the use which may be made of real property including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude).”<sup>181</sup> The perpetual status of this restriction is one of the hallmarks of the IRC requirements and failure to provide for perpetual protection will result in the deduction being disallowed.<sup>182</sup>

### B. *Qualified Easement Holder*

Within the farmland protection context, a qualified easement holder must: (1) be a nonprofit organization or governmental entity focused on a charitable mission,<sup>183</sup> and (2) have a sufficient commitment towards safeguarding the

*Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 444–45 (2002) (discussing the incentives provided by the IRC beyond section 170(h)).

178. 16 U.S.C. § 170(h). Not surprisingly, these factors are utilized by the Uniform Conservation Easement Act (“UCEA”) and most estate enabling laws. See Cheever & McLaughlin, *supra* note 34, at 184–85. Some state enabling laws, however, vary from these purposes in expressly allowing agricultural conservation easements. See Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements: Part 2: Comparison to State Law*, 46 REAL PROP. TR. & ESTATE L.J. 1 (2011) (exploring state enabling legislation).

179. 26 U.S.C. § 170(f)(3); Treas. Reg. § 1.170A-14(a).

180. See C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 15–16 (2008) (exploring the partial interest rule); William T. Hutton, *Conservation Easements and Other Partial-Interest Donations*, ALI-CLE, SU021 ALI-CLE, Oct. 17, 2012, at 1063 (profiling the issues/challenges with partial interest donations).

181. Treas. Reg. § 1.170A-14(b)(2).

182. See, e.g., B.V. Belk, Jr., 140 T.C. 1 (2013) (rejecting donation for failing to meet the perpetuity requirements); see also Nonprofit Blogger, *Belk v. Commissioner—4th Circuit Confirms that Swappable Conservation Easements Are Not Deductible*, NONPROFIT LAW PROF BLOG (Dec. 17, 2014), <http://lawprofessors.typepad.com/nonprofit/2014/12/belk-v-commissioner4th-circuit-confirms-that-swappable-conservation-easements-are-not-deductible.html>.

183. See BYERS & PONTE, *supra* note 18, at 85 (“[i]f an easement donor wishes to claim an income tax deduction for the value of the conservation easement donation, he or she must donate (or sell at a bargain price) the easement to a governmental unit described in IRC § 170(b)(1)(A)(v) or to a conservation or historic preservation organization that qualifies both as a tax-exempt organization under IRC § 501(c)(3) and either (i) meets the public support requirements of IRC §§ 170(b)(1)(A)(iv), 509(a)(1), or 509(a)(2), or (ii) is deemed a supporting organization in accordance with IRC § 509(a)(3).”); see also I.R.S. P.L.R. 2011-10020 (Mar. 11, 2011) (profiling the interconnection of IRC § 170(h) with the general requirements of tax exempt status under 501(c)(3)).

properties it agrees to protect.<sup>184</sup> Under the requirements of section 170(h), farmland preservation will not qualify as an entity's charitable purpose for the purposes of accepting tax-incentivized donations.<sup>185</sup> "Instead, land trusts can qualify for tax-exempt status if they preserve 'ecologically significant' farmland. The IRS views preserving ecologically significant farmland as a valid charitable purpose because doing so provides a significant public benefit and follows 'an express national policy of conserving the nation's unique natural resources,'" which allows most farmland preservation agencies and land trusts to qualify.<sup>186</sup>

On the second prong of this requirement, the sufficient commitment and resources to protect the conservation values associated with the donation,<sup>187</sup> tax specialist Tim Lindstrom has noted that "[w]hile the commitment requirement has not been tested, it imposes an objective standard on the holders of deductible conservation easements that provides a basis for the oversight and discipline of land trusts and government agencies alike."<sup>188</sup> Thus, the donation must be made to an entity focused on the protection of qualifying resources who is able to monitor and enforce the terms of the restrictions over the perpetual life of the agreement.<sup>189</sup> If the group lacks the requisite experience and commitment to conserving these lands, this could call into question the deduction itself—meriting close scrutiny of the donee organization before proceeding with a donation seeking to benefit from the federal tax incentives.<sup>190</sup>

### C. Conservation Purposes and Values

Last, conservation easements have to fall within an enumerated category in order to allow for deductibility.<sup>191</sup> There are a few primary ways that farmland

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184. Treas. Reg. § 1.170A-14(c)(1); *see also* McLaughlin & Pidot, *supra* note 56, at 818–20. For a list of easement-holders working in this area, see *Farmland Protection Directory*, FARMLAND INFO. CTR., AM. FARMLAND TR., <http://www.farmlandinfo.org/directory> (last visited July 15, 2018).

185. *See* Rev. Rul. 78-384, 1978-2 C.B. 174 (1978); *see also* Richardson, *supra* note 11, at 452–54 (discussing the debate of the breadth of this section).

186. Gentry, *supra* note 15, at 1394. *See also* Rev. Rul. 76-204, 1976-1 C.B. 152, 153 (1976) (explaining that "it is generally recognized that efforts to preserve the natural environment for the benefit of the public serve a charitable purpose").

187. Treas. Reg. § 1.170A-14(c)(1).

188. LINDSTROM, *supra* note 180, at 35. *See also* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1062–63 (2007) (discussing the challenges of holders generally). For a critique of Korngold's article, see Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561 (2008).

189. *See* I.R.S. P.L.R. 2011-10020, at 25 (Mar. 11, 2011) (discussing this requirement).

190. *See* Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH ENVTL. L. REV. 69, 73–75 (2013) (discussing the application of this requirement).

191. *See* I.R.C. § 170(h)(4) (2012); Treas. Reg. § 1.170A-14(d); SMALL, *supra* note 16, at § 6.03 (providing overview of the established conservation values under the IRC). Beyond fitting an established prong, the donation also has to be made for charitable purposes, or have donative intent. Cheever, *supra* note 34, at 1081–82 (discussing this requirement). For example, a donation made to gain planning approval or settle litigation would likely not qualify. *Id.*

efforts qualify under the IRC, specifically: (1) conservation of a relatively natural habitat, (2) conservation of open space (both scenic and open space designated pursuant to a clearly delineated purpose), and (3) conservation of historic land areas.<sup>192</sup> These prongs are addressed in turn.<sup>193</sup>

### *1. Preservation of a Significant, Relatively Natural Habitat*

Under the IRC, the protection of a significant, relatively natural habitat for fish, wildlife, or plants is a permissible conservation value as far as claiming a deduction.<sup>194</sup> If a parcel of farmland fits within this definition—for instance, a relatively low-intensity ranching operation with significant habitat—it may be able to qualify.<sup>195</sup> This conservation value, for example, is commonly used to protect ranches and grazing operations in the West, where the agricultural use is roughly compatible with the environmental benefits that are being protected.<sup>196</sup> In other agricultural contexts, such as row crop production or more intensive forms of production agriculture, this will not be possible.<sup>197</sup> As a result, while this prong is utilized for certain land resources, it is not the most common strategy for protecting working farms.<sup>198</sup>

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192. I.R.C. § 170(h) notes four different categories under which partial-interest gifts can qualify as charitable donations: (i) the preservation of land areas for outdoor recreation by, or the education of the general public; (ii) the protection of a relatively natural habitat of fish, wildlife, or plants of similar ecosystem; (iii) the preservation of open space (including farmland and forest land) where such is preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated federal, state, or local government conservation policy, and will yield a significant public benefit; or (iv) the preservation of a historically important land area or a certified historic structure. While the recreation/education prong could conceivably be utilized to qualify a donation, but it is very uncommon for farmland protection purposes and therefore is not specifically discussed. I.R.C. § 170(h).

193. It should also be noted that it is not uncommon for a donor to rely on multiple conservation values within the purposes section of its easement in order to better ensure that the donation will qualify for the tax incentives. Rissman, *supra* note 9, at 153–54. This makes sense from a tax-planning perspective, but may make it more difficult to administer over the longer-term and attention must be paid to ensure that the multiple purposes can all be met and to determine how potential conflicts should be addressed. *Id.*

194. I.R.C. § 170(h)(4)(a)(ii); Treas. Reg. § 1.170A-14(d)(3). For an interesting decision involving the interpretation of this prong, see Glass, 124 T.C. 258 (2005) (IRS challenge to a small easement donated to protect habitat of an endangered species for failure to meet the conservation purpose test). On appeal, both the tax court and appellate court rejected IRS's position. See *Glass v. C.I.R.*, 471 F.3d 698, 713 (6th Cir. 2006).

195. See Justin R. Ward & Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. J. NAT. RES. 271, 274 (1989).

196. See, e.g., Adena R. Rissman et. al, *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 711–13 (2007) (discussing the purposes used in conservation easement documents).

197. See Douglas R. Appler, *America's Converging Open Space Protection Policies: Evidence from New Hampshire, Virginia, and Oregon*, 36 URBAN LAWYER 341, 341–44 (2004) (exploring open space protection generally).

198. Gentry, *supra* note 15, at 1395.

## 2. *Historic Resources*

Farmland or related resources can also qualify for the deduction as a historic resource or as a historic land area.<sup>199</sup> Farm-related resources listed on the National Register of Historic Places qualify as an express category of eligibility either individually or as a contributing property to a qualifying National Register district.<sup>200</sup> Depending then upon the nature of the resource, for example, Civil War battlefields utilized as farm ground, there may be a path for supporting a charitable donation as well as aligning with the mission of the stewarding entity and landowner.<sup>201</sup> If historic significance is the basis for the transaction, and this fits within the donee organization's charitable purposes and expertise, the easement also will need to protect the characteristics associated with the property's significance, which generally will require that the future alterations comply with the Secretary of Interior's Standards for Historic Rehabilitation.<sup>202</sup> For this and a variety of others reasons, this category is not frequently utilized to support farmland preservation efforts.<sup>203</sup>

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199. I.R.C. § 170(h)(4)(A)(iv); Treas. Reg. § 1.170A-14(d)(5)(ii)-(iii). Under the Treasury Regulations, a historic land area includes the following: (A) an independently significant land area including any related historic structures (for example, an archeological site or a Civil War battlefield with related monuments, bridges, cannons, or houses) that meets the National Register Criteria for Evaluation in 36 C.F.R. 60.4; (B) any land within a registered historic district, including any buildings on the land area that contribute to its significance; and (C) any land area adjacent to a property individually listed on the National Register of Historic Places that contributes to its integrity. *Id.* For the limits of this prong, see Turner, 126 T.C. 299 (2006) (rejecting donation of lands trying to qualify as a historic land area).

200. Treas. Reg. § 1.170A-14(d)(5)(iii). See also SMALL, *supra* note 16, at § 4-4 (exploring the somewhat murky legislative history of the development of the historic preservation-related conservation value and its expansion in the 1980 amendments—intentional or otherwise).

201. See, e.g., I.R.S. P.L.R. 9603018 (Jan. 19, 1996) (allowing donation to qualify under this prong as contributing to significance of adjacent historic district).

202. See SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 534–39 (2012) (discussing historic preservation easement donations generally). Congress, in 2006, through the Pension Protection Act placed several new requirements on historic preservation-driven donations—including additional certifications, providing the appraisal to the IRS, and protection of the entire façade of a qualifying resource. See, e.g., NAT'L TR. FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP (2008) (profiling the motivations behind the organization's development of best practices to guide responsible easement-holding organizations). This added attention, and eventual legislation, was driven by widespread criticism of certain façade easement transactions during the late 1990s and early 2000s that garnered substantial media attention nationwide. See McLaughlin, *supra* note 71, at 249–65 (profiling the case law that has developed with regard to valuation of façade easements—with a particular focus on those projects already protected under the auspices of local historic district regulations).

203. An argument frequently heard in the farmland preservation context against protecting agricultural historic resources is the difficulty of requiring historic farm structures to conform with the Secretary of Interior's Standards for Historic Rehabilitation (or other appropriate standards depending upon treatment) for their future repair and preservation and that a more flexible treatment or preservation standard would be more suited to the ongoing maintenance and preservation of working buildings. Additionally, for a variety of reasons, land trusts often avoid taking on the responsibilities of protecting historic structures as these resources present a number of challenging management issues that may or may not align with the organization's mission. See, e.g., Valerie Talmage, *Lessons for Land Conservation*, FORUM J., Fall 2010, at 11 (discussing this disconnect).

### 3. Open Space

Although there are other paths under the IRC, the protection of open space is the most common path utilized for those seeking to deduct a donation of an easement designed to protect working farmland.<sup>204</sup> Under the open space prong of 170(h), there are two ways a donation can qualify—by protecting (1) scenic resources; and (2) protecting resources that advance a clearly delineated governmental conservation policy.<sup>205</sup> Given the degree of utilization, these two pathways will be explored in depth.<sup>206</sup>

#### a. Scenic Resources

Under the general rubric of open space preservation, the IRC allows easements designed to protect scenic resources to potentially qualify for the charitable deduction.<sup>207</sup> As explained under the Treasury Regulations, if the development of the land “would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, waterbody, trail, or historic structure or land area, and such area or transportation way is open to, or utilized by, the public,” it is potentially eligible.<sup>208</sup> The regulations lay out a number of factors to consider, which includes the compatibility of the land use with other land in the vicinity and the degree of contrast and variety provided by the scene.<sup>209</sup>

As far as allowing farmland to potentially qualify, there are meaningful restrictions that have limited its more widespread usage as a primary conservation tool.<sup>210</sup> First, the land has to actually be visible to the public.<sup>211</sup> This does not mean that the entire property must be visible but some meaningful portion must provide the public with visual access in order to allow the donation to qualify.<sup>212</sup> Depending upon the farmland at issue this may or may not be

204. See LINDSTROM, *supra* note 180, at 43 (profiling the degree of utilization as well the challenges of qualifying the donation under the existing regulatory requirements).

205. I.R.C. § 170(h)(4)(A)(iii); Treas. Reg. § 1.170A-14(d)(4)(i).

206. Gentry, *supra* note 15, at 1395 (profiling the tax incentives potentially available for conservation easements targeting working lands).

207. I.R.C. § 170(h)(4)(A)(iii)(I); Treas. Reg. § 1.170A-14(d)(4)(ii)(A). Scenic easements were actually one of the first easements to gain traction in protecting viewsheds near parks or parkways and predate the greater conservation easement movement that gained traction a generation later. See Harold C. Jordahl, Jr., *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343, 343–50 (1963) (charting the early use of this tool).

208. Treas. Reg. § 1.170A-14(d)(4)(ii)(A). See also LINDSTROM, *supra* note 180, at 45 (noting, “[i]n other words, you will know a scenic view when you see it”).

209. Treas. Reg. § 1.170A-14(d)(4)(ii)(A) (listing the various factors the IRS considers or evaluates within the open space donation context).

210. See, e.g., Richardson, *supra* note 11, at 452–54 (discussing the potential challenges of utilizing this prong for working land easements).

211. See LINDSTROM, *supra* note 180, at 43–44 (discussing the requirements for scenic resources).

212. SMALL, *supra* note 16, at § 7-3. Notably, physical access is not required, but visual access can be an issue with regard to qualifying the donation for some parcels and requires some attention in drafting and in considering whether deductibility is possible. See Hollingshead, *supra* note 50, at 324 (noting that

possible given topographical and land configuration issues.<sup>213</sup> Second, the easement itself will need to ensure that the scenic attributes are protected.<sup>214</sup> This may require terms that limit the nature of construction and land use to protect the nature of the landscape—which may or may not align well with the land use and landowner’s future plans for flexibility for the property.<sup>215</sup> Given the need for future operational flexibility, this will present substantial challenges from a project design and drafting perspective, which will likely reduce reliance on this specific prong of the open space conservation value.

*b. Open Space Pursuant to a Clearly Delineated Governmental Policy*

The most common way that land qualifies for the charitable deduction is by protecting open space pursuant to a clearly delineated governmental conservation policy.<sup>216</sup> Under this IRS-qualifying conservation value, if a local, state, or regional governmental entity has designated land conservation priorities, restricting land development within the parameters of those policies will potentially qualify for a charitable deduction.<sup>217</sup> Since many communities have established policies in support of farmland preservation, this standard enables deductions for many farmland preservation-focused easements.<sup>218</sup>

Farmland protection is a goal of many governments at the local, state, and federal levels.<sup>219</sup> Under the Treasury Regulations, however, the governmental policy must be sufficiently detailed and focused as to the types of land valued and that are being targeted for protection.<sup>220</sup> For example, a general state policy

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“[i]f the visible portion of the property is too small, the contribution may not provide a public benefit sufficient to qualify for the deduction”).

213. See Dialogue, *Conservation Easements in a Changing Climate*, 47 ELR 10731, 47 ENVTL. L. REP. NEWS & ANALYSIS, Sept. 2017, at 10731, 10732 (noting the rarity of easements that actually allow physical public access).

214. See LINDSTROM, *supra* note 180, at 45–48 (exploring these issues and providing examples of likely IRS treatment of some of these issues).

215. See, e.g., Treas. Reg. § 1.170-14(d)(4)(v) (imposing requirement against allowing “future development that would interfere with the essential scenic quality of the land or with the government conservation policy” which the easement was designed to achieve).

216. I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii)(A); see also Justin R. Ward & Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. ENVTL. L. J. 271, 274 (1989) (noting that this is the most important prong for agricultural easements).

217. See, e.g., Carroll, 146 T.C. 196, 207–10 (2016) (profiling the requirements for qualifying a donation under this prong); LINDSTROM, *supra* note 180, at 47–49 (discussing the requirements to qualify under this category of conservation easement).

218. DANIELS & BOWERS, *supra* note 30, at 75–103. For a list of current entities working in this area, see *Farmland Protection Directory*, FARMLAND INFORMATION CTR., AM. FARMLAND TR., <http://www.farmlandinfo.org/directory> (last visited July 15, 2018).

219. Gentry, *supra* note 15, at 1395.

220. C. Timothy Lindstrom, *A Guide to the Tax Aspects of Conservation Easement Contributions*, 7 WYO. L. REV. 441, 457–59 (2007) (providing examples of the level of specificity that might be required to qualify a donation); RATHKOPF’S THE LAW OF ZONING AND PLANNING § 82.19 (charting the requirements for identifying conservation lands under the Treasury Regulations).

declaring that farmland is important may not be enough.<sup>221</sup> The Treasury Regulations list examples for assessing the requisite level of delineation.<sup>222</sup> One recommendation is that donations advance a “specific, identified conservation project, such as the preservation of land within a state or local landmark district that is locally recognized as being significant to that district; the preservation of a wild or scenic river; the preservation of farmland pursuant to a state program for flood prevention and control; or the protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites.”<sup>223</sup>

Beyond requiring that a governmental policy be in place “[t]he IRS regulations governing easement deductibility further provide that the conservation policy or program must be backed by ‘significant commitment by the government’ to achieving the conservation objectives of that policy.”<sup>224</sup> This “significant commitment” can include governmental funding, tax breaks for keeping the land farmed, or a governmental body’s actual acquisition of the easement.<sup>225</sup> The governmental support prong is a bit amorphous as, to date, “[t]his is not an area where there have yet been any cases to provide guidance.”<sup>226</sup> Last, the taxpayer must demonstrate that the protected lands actually advance the governmental goal.<sup>227</sup> “One essential condition that must be satisfied for this to occur is that the land over which the easement is placed must be specifically identified by the governmental entity as deserving of conservation, or fall within the category of lands that have been officially so designated.”<sup>228</sup> IRS regulations provide a safe harbor for donations made pursuant to a local resolution stating that the lands that are being protected will further a clearly delineated goal.<sup>229</sup> Overall, given the strong degree of governmental support for farmland preservation, it is perhaps not surprising that this conservation value is so frequently utilized.<sup>230</sup>

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221. See Timothy J. Housal, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK. L. REV. 527, 538–40 (1990).

222. Treas. Reg. § 1.170A-14(d)(4)(vi); see also Lindstrom, *supra* note 180, at 47–49.

223. Treas. Reg. § 1.170A-14(d)(4)(iii)(A).

224. RATHKOPF’S THE LAW OF ZONING AND PLANNING § 82.20 (citing Treas. Reg. § 1.170A-14(d)(4)(iii)(A)).

225. See LINDSTROM, *supra* note 180, at 47–49.

226. *Id.* at 49.

227. I.R.C. § 170(h)(4)(A)(iii)(II); Treas. Reg. § 1.170A-14(d)(4)(iii)(A).

228. RATHKOPF’S THE LAW OF ZONING AND PLANNING § 82.21.

229. Treas. Reg. § 1.170A-14(d)(4)(iii)(A). See LINDSTROM, *supra* note 180, at 49 (discussing application of the safe harbor). Acceptance of the easement by a government holder is not, however, of itself evidence of a clearly delineated governmental purpose. The more rigorous a process of review that the donation goes through will help to establish the governmental interest or purpose, but without a separate resolution or action, this won’t meet the requisite requirement. See Treas. Reg. § 1.170A-14(d)(4)(iii)(B).

230. Gentry, *supra* note 15, at 1394–95.

*c. Significant Public Benefit*

In addition to qualifying a deduction as protecting a scenic view or pursuant to a clearly delineated conservation policy, the donation must also result in a significant public benefit.<sup>231</sup> A determination of whether the land provides a significant public benefit is case-specific. The Treasury Regulations, again, provide a list of factors.<sup>232</sup> While there is a degree of subjectivity involved in determining the degree of public benefit that results from a donation, there are guideposts.<sup>233</sup> For example, the Treasury Regulations note “that [t]he preservation of an ordinary tract of land would not in and of itself yield a significant public benefit.”<sup>234</sup> The benefit accruing from a donation “can probably best be shown by demonstrating that the land in question has some characteristic that distinguishes it from what might be called ‘ordinary’ land.”<sup>235</sup> The process for making this showing will also matter, which ties directly back to the governmental body’s work in crafting policy, as discussed above.<sup>236</sup> Although both the policy and benefit prongs must both be met, “[t]he more specific the governmental policy with respect to the particular site to be

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231. I.R.C. § 170(h)(4)(A)(iii). *See also* LINDSTROM, *supra* note 180, at 50–51 (discussing the public benefit requirement); William M. Silberstein, *Conservation Easements and Public Benefit*, SL053 ALI-ABA 137, 140–45 (Nov. 10, 2005) (exploring the history of the public benefit test).

232. Treas. Reg. § 1.170A-14(d)(4)(iv) (listing some factors to consider, including “(1) [t]he uniqueness of the property to the area; (2) [t]he intensity of land use development in the vicinity of the property (both existing development and foreseeable trends of development); (3) [t]he consistency of the proposed open space use with the public programs (whether Federal, state or local) for conservation in the region . . . ; (4) [t]he consistency of the proposed open space with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in § 1.170A-14(c)(1), in close proximity to the property; (5) [t]he likelihood that development of the property would lead to or contribute to the degradation of the scenic, natural or historic character of the area; (6) [t]he opportunity for the general public to use the property or to appreciate its scenic value; (7) [t]he importance of the property in preserving a local or regional landscape that attracts tourism or commerce to the area; (8) [t]he likelihood that the donee will acquire equally desirable and valuable substitute property or property rights; (9) [t]he cost to the donee of enforcing the terms of the conservation restriction; (10) The population density in the area of the property; and (11) [t]he consistency of the open space with a legislatively mandated program identifying particular parcels of land for future protection”). The inclusion of a reference to the cost of enforcing the terms of the restriction as a potential factor to consider is particularly interesting—reflecting the fact that the long-term value to the public may be undermined if a parcel cannot be effectively safeguarded.

233. *See* Silberstein, *supra* note 231, at 139–42 (summarizing the public benefit test and its application).

234. Treas. Reg. § 1.170A-14(d)(4)(iv)(B). Defining the parameters for what is a sufficient charitable benefit has been an ongoing challenge for the IRS to avoid abusive practices and has been the source of ongoing IRS guidance and attention. *See, e.g.*, IRS, Notice 2004-41, 2004 WL 1462264 (alerting donors of the IRS’s intent to reduce or disallow deductions claimed for conservation easements where the public benefit provided is not substantial). *See also* Quinn, *supra* note 30, at 250–52 (discussing the public benefits that must be obtained through this donation).

235. RATHKOPF’S THE LAW OF ZONING AND PLANNING § 82.22.

236. *See* Armstrong, *supra* note 159, at 155 (providing overview of private letter rulings addressing the public benefit of farmland easements and the characteristics the IRS has found acceptable).

protected, the more likely the government decision, by itself, will tend to establish the significant public benefit associated with the donation.”<sup>237</sup>

Overall, the open space conservation value is the most common justification used to advance the protection of farmland through the charitable deduction.<sup>238</sup> It is worth noting again that farmland preservation is not an independently available conservation value.<sup>239</sup> According to tax practitioner Steven Small, who was involved in its drafting, IRC 170(h)

is not a farmland preservation statute; the inclusion of farmland and forestland in the statute means that an open space easement on farmland or forestland will be tested against the same standards (clearly delineated governmental policy, scenic enjoyment, and significant public benefit . . .) as will an easement on a vacant downtown lot, or on open land between the highway and the ocean, or on fifty undeveloped acres lying in the path of advancing urban sprawl.<sup>240</sup>

While farmland preservation advocates have long objected, arguing that their preservation efforts provide a clear public benefit to society,<sup>241</sup> IRS policy rejects a broader interpretation.<sup>242</sup> Qualifying farmland preservation easements must both fall within the open space prong and also provide a substantial benefit.<sup>243</sup>

#### D. Other Requirements/Financial Considerations

Beyond meeting the conservation values test discussed above, the IRC and its implementing regulations impose additional requirements upon qualifying donations.<sup>244</sup> Failure to strictly comply with these requirements will result in the donation being disallowed and could also result in substantial accuracy-related penalties.<sup>245</sup> For context, this Subpart will focus on one of the most challenging

237. Treas. Reg. § 1.170A-14(d)(vi)(A).

238. Armstrong, *supra* note 159, at 152 (providing overview of this tax incentive).

239. 1 ENVTL. REG. OF LAND USE § 6.47 (2017).

240. *Id.*

241. *Id.* (providing the comments of conservation and preservation organizations on the proposed Treasury rule with respect to easements protecting farmland; although many of the comments appear to have been adopted in the final rule, the Service’s position on farmland protection writ large does not appear to have shifted much if at all).

242. *Id.* § 4-4.

243. See Lindstrom, *supra* note 180, at 50.

244. McLaughlin, *supra* note 22, at 42–43 (exploring IRS guidance on inconsistent use and reserved rights).

245. For example, for a conservation easement to be deductible, baseline documentation must be provided to the donee at the time of donation, outstanding mortgages must be subordinated to the easement at the time of donation, and the easement must be extinguishable only in a judicial proceeding, upon a finding that continuing to use the property for conservation purposes has become impossible or impractical, and with a payment of a share of proceeds to the holder to be used to replace lost conservation values. See, e.g., McLaughlin, *supra* note 68, at 6–8 (rejecting arguments that failure to comply with § 170(h) and the Treasury Regulation’s “perpetuity” requirements should be viewed as “technical foot faults” and noting that compliance with these requirements is essential to ensuring that tax-deductible

issues in drafting agricultural conservation easements (inconsistent use) as a representative example of the complexities involved in drafting as well as profile the financial impacts of this funding stream on conservation transactions reliant, in whole or part, on this tool.<sup>246</sup>

### 1. Addressing Inconsistent Use

Addressing inconsistent use is a difficult issue in drafting agricultural conservation easements.<sup>247</sup> Under the IRC, an easement protecting a parcel of land must contain a comprehensive prohibition against any future use of the property that impairs the values for which the parcel was conserved.<sup>248</sup> Additionally, “a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests.”<sup>249</sup> In short, a qualifying easement must both bar future activities that would impair the conservation values of the property while, at the same time, meaningfully protect all conservation values which the donation is seeking to secure through the grant.<sup>250</sup> Given that agricultural conservation easements often seek to advance multiple goals, drafting these easements requires close attention to avoid violating this rule.<sup>251</sup> The Treasury Regulations specifically provide an agricultural example. First, the regulations provide that a deduction will be denied if “a significant naturally occurring system could be injured or destroyed by the use of pesticides in the operation of the farm.”<sup>252</sup> As noted by Ward and Benfield, “[o]ther forms of poor stewardship, [such as allowing for] abusive cropping of highly erodible fields or natural wetland, should likewise disqualify conservation easement donations, even though such lands might fall under some indiscriminate government policy for farmland retention.”<sup>253</sup> Additionally, within the scenic context, the example of a situation where a house is built that would interfere with the scenic vista that is being protected by an open space easement could

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easements will actually protect the properties they encumber in perpetuity as Congress intended—that easement protections will be durable).

246. For a fairly comprehensive summary of the IRS regulations and recent tax decisions addressing these issues, see Nancy A. McLaughlin & Stephen J. Small, *Trying Times: Important Lessons to be Learned from Federal Tax Cases Involving Conservation Easement Donations*, TEX. TECH UNIV. ESTATE PLANNING & COMMUNITY PROP. L.J. (2017), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808234) (summarizing the myriad tax court decisions since 2005 in this area).

247. See generally LINDSTROM, *supra* note 180, at 71–73.

248. Treas. Reg. § 1.170A-14(e)(2). See Jessica Owley & Collin Doane, *Exploiting Conservation Lands: Can Hydrofracking Be Consistent with Conservation Easements?*, 66 U. KAN. L. REV. 93, 135–36 (2017) (exploring this issue within the context of fracking).

249. Treas. Reg. § 1.170A-14(e)(2).

250. For a more in-depth discussion of the inconsistent use rule and its potential application, see LINDSTROM, *supra* note 180, at 71–77.

251. See McLaughlin, *supra* note 13, at 54–55 (discussing inconsistent use and its potential application/scope).

252. Treas. Reg. § 1.170A-14(e)(2).

253. Ward & Benfield, *supra* note 195, at 278.

potentially invalidate a deduction.<sup>254</sup> Overall, given the potential breadth of the inconsistent use rules, careful attention should be paid to the relationship between the goals being advanced and the actual use of the land going forward to avoid causing issues with the deduction going forward.

## 2. *Financial Impacts and Valuation*

As noted above, the modern conservation easement really only began to develop once the IRS expressly acknowledged that qualifying donations could be claimed as charitable deductions, since this funding stream provided the financial backbone for the growth of this charitable sector.<sup>255</sup> Although the funding stream for farmland preservation activities is somewhat distinct from other conservation projects, agricultural conservation easements still rely on the tax incentives under 170(h).<sup>256</sup> Given the value of the land that is being protected and the potential for a significant loss in asset value by foregoing development activity (and the correlated value of the tax deduction), this economic value is often the critical driver for these efforts as farmers would otherwise be unlikely to convey these interests.<sup>257</sup> There are a few interrelated paths for securing the capital to finance these projects,<sup>258</sup> but this Subpart will exclusively focus on the impact of the federal charitable deduction with some

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254. Treas. Reg. § 1.170A-14(f)(3).

255. Halperin, *supra* note 28, at 29 (“The 1980 change in the tax law to codify this deduction is generally recognized as being the factor largely responsible for the tremendous growth in the donation of conservation easements.”); *see also* Parker, *supra* note 40, at 493–96 (discussing the growth of this strand of protective activity).

256. *See, e.g., FAQs*, AM. FARMLAND TRUST, <https://www.farmland.org/faq> (last visited July 15, 2018) (discussing donation and purchase options for agricultural conservation easements); ELIZABETH BYERS & KARIN M. PONTE, *THE CONSERVATION EASEMENT HANDBOOK 204-06* (2d ed. 2005) (profiling the funding mix for agricultural conservation easements—which utilize federal and state funding streams to create funding leverage); *Agricultural Conservation Easements*, FARMLAND INFORMATION CENTER (Jan. 2016), [https://www.farmlandinfo.org/sites/default/files/Agricultural\\_Conservation\\_Easements\\_AFT\\_FIC\\_01-2016.pdf](https://www.farmlandinfo.org/sites/default/files/Agricultural_Conservation_Easements_AFT_FIC_01-2016.pdf) (including a description of tax benefits associated with agricultural conservation easements).

257. *See Income Tax Incentives for Land Conservation*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation> (last visited July 15, 2018). Some commentators have noted the potential for the economic value of the charitable donation to actually exceed the marginal impacts on the donating party—which accounts for the rate of utilization exceeding other donative forms. *See* Josh Eagle, *Notional Generosity: Explaining Charitable Donors’ High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL. L. REV. 47, 69–75 (2011) (discussing this disconnect within the context of easement donations).

258. For an overview of some of the mechanisms through which working lands are being protected, *see* VERMONT LAND TRUST, ANNUAL REPORT 2016–17. The Vermont Land Trust’s annual report profiles the various land protection projects that it completes in a given year and provides information on the funding mix utilized to secure each parcel of either forest or agricultural land. The protective mix ranges from donated easements to purchases funded through federal agency grants and private and foundational support.

related discussion regarding how this funding can be layered with other funding streams to facilitate a project's completion.<sup>259</sup>

The federal tax incentive largely works like a donation of any other charitable asset.<sup>260</sup> Under the IRC, if a donation qualifies as charitable (meeting the requirements discussed above), it can be claimed as a tax deduction and used to offset the donor's tax liability.<sup>261</sup> One of the primary challenges associated with the donation of a conservation easement is the appropriate valuation of this donation.<sup>262</sup> The most common way to support the value of a donation is through a qualified appraisal that considers the before and after value of the parcel.<sup>263</sup> This comparison between the value of the property before the easement is in place and its value after the easement is in place results in a margin that can then be claimed as a charitable donation.<sup>264</sup> In operation, the tax incentive affords landowners the opportunity to claim a deduction for any lost value associated with protecting the resource.<sup>265</sup> For a simplified example, consider a farm property worth \$1,000,000. If the property is only worth \$400,000 after the conveyance (assuming that substantial development rights are foregone), the landowner can, in turn, claim a charitable deduction of \$600,000.<sup>266</sup> Depending upon the land use type and the landowner's taxable income, this deduction can be claimed across multiple tax years, which is often needed as many landowners

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259. See, e.g., Vince Tenorio & Spencer Meyer, *Launching the Conservation Finance Network Toolkit*, THE CONSERVATION FINANCE NETWORK (Nov. 27, 2017), <https://conservationfinance.network.org/2017/11/27/launching-the-conservation-finance-network-toolkit> (last visited July 15, 2018).

260. See, e.g., Nancy A. McLaughlin, *Tax Benefits of Conservation Easements*, 23 TAX MGMT., ESTATES, GIFTS, & TR. J. 253 (Nov. 1998) (providing overview of the tax incentives generally); see also Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Income Tax Rules*, 68 TAX LAW. 331 (2015). Beyond federal tax incentives, which are discussed herein, a number of states also provide substantial support through state-level tax incentives. See, e.g., Philip M. Hocker, *Transferable State Tax Credits as a Land Conservation Incentive*, in FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 124, 124–28 (James M. Levitt ed., 2005) (discussing this incentive structure in the context of Virginia's state tax credit).

261. I.R.C. § 170(f)(3)(b)(iii), § 170(h)(1).

262. See generally McLaughlin, *supra* note 71, at 225–29 (exploring the challenges of appropriately valuing these noncash donations).

263. Halperin, *supra* note 28, at 38–43 (profiling the issues associated with the value and public benefit associated with noncash charitable donations and the challenges that these donations present).

264. Valuation of conservation easements remains a difficult subject and care should be used in finding an appraiser with experience in valuing these unique property interests as overvaluation has been the result of many IRS challenges in recent years. For more information about appraising conservation easements generally, see RICHARD W. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 1–20 (2011).

265. Bray, *supra* note 50, at 135 (discussing this generally).

266. Some of the value obtained by virtue of the charitable deduction may be reduced by a required cash contribution to the nonprofit organization. Most organizations strongly suggest or require some form of endowment contribution in order to ensure that they have sufficient assets and reserves to cover the cost of monitoring the terms of the easement and, to bring an enforcement action. See, e.g., John A. McVicker, *Land Trusts: A Growing Conservation Institution*, 21 VT. B. J. & L. DIG. 33 (1995) (discussing the need for an endowment in order for a land trust to appropriately to take on the long-term management responsibilities within the context of a donation to the Stowe Land Trust).

lack the income to claim such a large donation in a single year.<sup>267</sup> In 2015, Congress made permanent what had been referred to as the “enhanced tax incentive” which extended the carryover period from five to fifteen years, and allowed qualifying farmers and ranchers to offset 100 percent of their income through the donation.<sup>268</sup> Given this increased carryover period and greater ability to offset taxable income, the federal tax incentive may be able to reach additional properties controlled by owners who otherwise would not have been interested given their income and tax status.<sup>269</sup>

Beyond direct donations, the federal tax incentives also play a larger role as a critical match for other funding streams.<sup>270</sup> For one example, take the federal ACEP-ALE program.<sup>271</sup> Through ACEP-ALE, NRCS offers qualified holders 50 percent of the cost of acquisition to support their efforts in purchasing agricultural conservation easements.<sup>272</sup> This requires the land trust or agency to raise capital to complete the acquisition.<sup>273</sup> One typical way to accomplish this is by the landowner donating a portion of their property value as a bargain sale, which NRCS policy provides for up to 25 percent of the purchase price.<sup>274</sup> This match allows the land trust to leverage their available capacity to essentially acquire the protection of important resources for approximately 25 percent of the acquisition cost.<sup>275</sup> Given that ACEP-ALE and its predecessor programs have

267. See, e.g., *Income Tax Incentives for Land Conservation*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/taxonomy/term/121> (last visited July 15, 2018) (explaining the enhanced tax deduction and its impact on conservation transactions/finance). See also Kristine A. Tidgren, *Farmers Weren't "Farmers" for the Purposes of Conservation Easement Donation Deduction*, THE AG DOCKET (Aug. 8, 2017), <https://www.calt.iastate.edu/blogpost/farmers-weren%E2%80%99t-%E2%80%9Cfarmers%E2%80%9D-purposes-conservation-easement-donation-deduction> (exploring the financial impact, here or nonapplication/impact of the enhanced conservation easement deduction within the context of the tax court's decision in *Rutkoske v. Comm'r*, 149 T.C. 6 (2017)).

268. See *Congress Votes to Make Tax Incentive Permanent*, LAND TRUST ALLIANCE (Dec. 18, 2015), <http://www.landtrustalliance.org/blog/congress-votes-make-tax-incentive-permanent>.

269. See Kate B. Deal, Note, *Incentivizing Conservation: Restructuring the Tax-Preferred Easement Acceptance Process to Maximize Overall Conservation Value*, 101 GEO. L.J. 1587, 1593 (Aug. 2013) (discussing the challenges with income-driven incentives).

270. See, e.g., *Farm Bill Conservation Programs: 2018 Farm Bill*, LAND TRUST ALLIANCE, <https://www.landtrustalliance.org/topics/federal-programs/farm-bill-conservation-programs> (last visited Dec. 31, 2017) (exploring the interconnectivity of Farm Bill programming and the federal tax incentives within the context of the upcoming Farm Bill debate); see also *Conservation Easements in a Changing Climate*, *supra* note 213, at 10738 (noting the complicated nature of many conservation transactions based upon the layers of funding involved to accomplish the acquisition of the targeted interests in land).

271. Agricultural Act of 2014 § 1265A; 7 C.F.R. § 1468.

272. 16 U.S.C. § 3834(2)(B). This match can go up to 75 percent for grassland areas of special significance. *Id.*

273. See, e.g., AM. FARMLAND TR., AGRICULTURAL CONSERVATION EASEMENT PROGRAM: FARM BILL POLICY RECOMMENDATIONS 2 (arguing for the removal of matching funds requirements as a bar to protecting important working lands).

274. AM. FARMLAND TR. & CONN. FARMLAND TR., CONSERVATION OPTIONS FOR CONNECTICUT FARMLAND: A GUIDE FOR LANDOWNERS, LAND TRUSTS, AND MUNICIPALITIES 8 (2015) (discussing the matching funds from the ACEP-ALE program and the bargain sale component).

275. See Gil Livingston, *Testimony to Vermont Milk Comm'n* (Nov. 7, 2017), <http://agriculture.vermont.gov/sites/ag/files/PDF/Vermont%20Land%20Trust%20Testimony.pdf> (profiling the impacts of farmland preservation in providing funding for Vermont's agricultural sector).

spent in excess of one billion dollars to support acquisitions since being established in the mid-1990s, this can provide a rough sense of the scale of utilization of the tax incentives and conservation easements more generally.<sup>276</sup>

### III. DEFINING AGRICULTURE WITHIN AGRICULTURAL CONSERVATION EASEMENTS

There are a variety of important objectives that farmland preservation advocates work to attain and these goals can appropriately differ by region, the type of agricultural production, the extent of development pressures, and the relative land values.<sup>277</sup> Increasingly, the focus of farmland preservation advocates has been on the acquisition of agricultural conservation easements as a primary protective mechanism.<sup>278</sup> The issue remains whether and how the IRC should incentivize agricultural conservation easements expressly designed to promote agricultural production.<sup>279</sup> As explored above, to date, the IRS has rejected a more expansive view of what types of agricultural conservation easements should qualify for the deduction (within the context of its existing authorities),<sup>280</sup> but this does not mean that these first principles should not be subject to reevaluation and even reinterpretation.<sup>281</sup> To consider this issue, this Part will assess the relative options for improving the operation of this important funding mechanism. Overall, there are several potential paths, ranging from maintaining the status quo, to modifying the Treasury Regulations to better address a more diverse range of objectives, to statutorily creating an independent conservation value specifically focused on the protection of farmland. These various options are explored in turn.

#### A. Preservation of the Status Quo

When dealing with something as well-established as the tax-incentivized conservation easement, there are likely risks to intervention. After several

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276. See AM. FARMLAND TR., AGRICULTURAL CONSERVATION EASEMENT PROGRAM: AGRICULTURAL LAND EASEMENTS 5 (Sept. 2015), [https://www.farmlandinfo.org/sites/default/files/Agricultural\\_Conservation\\_Easement\\_Program\\_Agricultural\\_Land\\_Easements\\_2015\\_AFT\\_FIC.pdf](https://www.farmlandinfo.org/sites/default/files/Agricultural_Conservation_Easement_Program_Agricultural_Land_Easements_2015_AFT_FIC.pdf) (providing overview of the use of this tool by advocates nationwide); see also Owley, *supra* note 44, at 140–42 (profiling the impacts of this and related incentives under the IRC).

277. STOKES, *supra* note 5, at 3–6 (exploring briefly the challenges and benefits of this multifaceted policy basis); see also *Frequently Asked Questions*, AM. FARMLAND TR., <https://www.farmland.org/faq> (last visited July 15, 2018) (providing several reasons for farmland preservation efforts).

278. See generally Adina M. Merenlender, *Land Trusts and Conservation Easements: Who Is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY, Feb. 2004, at 65, 66 (exploring this growth generally).

279. Gentry, *supra* note 15, at 1394–95.

280. SMALL, *supra* note 16, at § 6-4.03.

281. While the IRS has rulemaking authority, any amendment of the Treasury Regulations would have to stay within the agency's statutory authorities and comply with the Administrative Procedure Act. See, e.g., LAND TRUST ALLIANCE, WHITE PAPER REGARDING PROPOSED RULEMAKING PURSUANT TO 1.170A-14 TO ADDRESS CONSERVATION EASEMENT DEED AMENDMENTS, (Jan. 30, 2017).

decades of use, a working consensus has developed around what types of lands and governmental policies enable the donation of an agricultural conservation easement under 170(h).<sup>282</sup> Allowing landowners to claim deductions when their protected farmland provides a correlated open space, scenic, or historic preservation benefit has certainly worked to encourage donations. If this is the only policy goal, then the tax code does not merit wholesale reinvention.

There is also additional merit to sticking with the existing donation structure beyond avoiding unintended consequences. As discussed, the current requirement is that these lands must fit within another charitable prong—most typically, as open space protected pursuant to a clearly delineated governmental conservation policy.<sup>283</sup> This requires the farmland preservation advocate and landowner to demonstrate that their efforts align with the goals and objectives of the local community and that a significant public benefit will also result from the parcel's protection.<sup>284</sup> Leaving governmental bodies and land trusts in this leadership role has programmatic appeal as these actors are closest to both the resource and the community and are arguably best positioned to assess whether the proposed degree of protection for the specific parcel is in the community's long-term interest.<sup>285</sup> Imposing additional requirements at the national level may prove disruptive to regional efforts and conceivably could restrict operational freedom to advance targeted planning objectives.<sup>286</sup> Advocates should be cautious when reevaluating long-standing policy, which despite its flaws, has been an important tool for preserving farmland.<sup>287</sup>

### *B. Working within the Existing Regulatory Framework*

The existing regulatory framework should more appropriately define the types of farmland to be protected. In most situations, this would require rulemaking under the Administrative Procedure Act, which limits the scope of changes that the IRS can make.<sup>288</sup> Within the agency's existing statutory

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282. AM. FARMLAND TR., *supra* note 36, at 14–21 (profiling the movement that has developed around the protection of these lands).

283. I.R.C. § 170(h)(4)(A).

284. See LINDSTROM, *supra* note 180, at 50–51.

285. See R.M. Mundie, *Evaluating the Effectiveness of Local Government Farmland Protection Programs*, 6 GEOJOURNAL 513, 514 (1982) (examining the merits of locally led farmland preservation programs). Some advocates, however, point to an even more clear need to align conservation easement donation activity with local land use planning. See Jesse J. Richardson, Jr. & Amanda C. Bernard, *Zoning for Conservation Easements*, 74 LAW & CONTEMPORARY PROBLEMS 83, 89–91 (2011) (discussing the disconnect between land use planning and conservation action).

286. Some of this risk, in the case of adding a new conservation value for farmland, would be mitigated if donors were allowed to continue to use the current open space prong when desired.

287. McLaughlin, *supra* note 13 at 109–12 (charting some of the issues regarding the functioning of the tax-incentivized conservation easement and the challenges with altering the incentive structure in a conscientious manner).

288. See, e.g., Kirstin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1732–35 (2007) (providing overview of these requirements).

mandate, the IRS could take the following steps: (1) better define the role of farmland within the existing open space classification, (2) address the issue of inconsistent use, and (3) align IRC § 170(h) with other funding streams.

### 1. *Adding Clarity to Farmland Qualifying as Open Space*

The factors and requirements related specifically to farmland qualifying as open space pursuant to a clearly delineated governmental conservation policy could be better articulated. For example, for this subset of open space, the IRS could add factors focused on the parcel's suitability for agricultural activity (whether it is prime farmland) and its long-term viability for agricultural use (including whether there are sufficient other agricultural operations still in the area and the tract's size).<sup>289</sup> This would overlay with the existing IRC requirements, but also ensure that a base level of farmland preservation benefit accrues from the deduction. For this type of donation, the significant public benefit could be expanded from its limited focus on open space protection to address other social values. Adding consideration of the other productive values of farmland would better define or even establish a subcategory of open space for farmland protection and help to more appropriately tailor the regulations to better suit this unique land use form and preservation effort.

### 2. *Addressing the Issue of Inconsistent Use*

The application of the prohibition against inconsistent use for working lands easements could also be clarified. As discussed above, under the IRC, even if a donation advances one of the four permissible conservation purposes, it will be disallowed if the easement itself permits the loss or destruction of these values.<sup>290</sup> This can present material challenges to a working lands advocate. For example, if a grassland easement relies on the conservation prong to support the donation, what does this mean with regard to the application of pesticides or the management of the land as an agricultural operation? There is at least a risk of this practice being deemed inconsistent and placing the donation in jeopardy. While the Treasury Regulations expressly note that the inconsistent use requirement is not intended to impair land uses that do not significantly impact the targeted conservation values—such as allowing some forms of selective harvest of timber and some forms of agricultural activity—having a better sense of how this requirement applies to working lands would be helpful to donors and land trusts seeking to remain fully compliant with this regulatory requirement.<sup>291</sup> A possible solution would be to provide a safe harbor for working lands applying

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289. See, e.g., U.S. DEP'T OF AGRIC., Title 440: CONSERVATION PROGRAMS MANUAL 528.33 [hereinafter CONSERVATION PROGRAMS MANUAL] (providing the land characteristics required for ACEP-ALE eligibility).

290. Treas. Reg. § 1.170A-14(e)(2).

291. *Id.*; see also McLaughlin, *supra* note 22, at 42–43 (summarizing IRS guidance in this area).

NRCS-approved conservation practices of a comprehensive nutrient management plan to balance productive and conservation benefits.

### 3. *Aligning the IRC with Other Funding Streams*

An additional challenge of the current structure of the tax incentive is the potential inconsistency between the requirements of other statutory federal programs and the tax incentives associated with the charitable deduction. Federal agencies could take greater care and effort to ensure that their programs align, or Congress could legislatively determine this balance. The IRS began to more aggressively audit conservation easement donations in the mid-2000s as abuses were prominently featured in the media.<sup>292</sup> Out of this climate came limited legislative reforms as Congress placed additional requirements on easement donations through the 2006 Pension Protection Act.<sup>293</sup> The net result of some of this activity is that a body of case law developed relating to conservation easements and qualifying donations.<sup>294</sup> Beyond qualifying a donation and appraisal issues, the IRS has focused on different easement provisions that could impact an easement's perpetuity (swaps, amendment, and termination provisions) as well as strict compliance with the substantiation requirements of the Tax Code (for example, requiring a contemporaneous written acknowledgement of the donation).<sup>295</sup>

The guidance from and positions taken by the IRS, however, have not always aligned with the requirements of other federal programs, and this can present challenges to easement holders looking to combine funding sources to accomplish larger projects.<sup>296</sup> For one example, there are several possible conflicts between the § 170(h) and Treasury Regulation requirements and the requirements of NRCS's ACEP-ALE program.<sup>297</sup> Under ACEP-ALE, NRCS

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292. See, e.g., Owley & Rissman, *supra* note 38, at 77 (discussing the layers of scrutiny applied to conservation easements during the 2000s).

293. McLaughlin, *supra* note 65, at 18–19 (profiling the impacts of the Pension Protection Act and IRS audit activities).

294. See, e.g., Nancy A. McLaughlin & Steven Small, 2016 TRYING TIMES: IMPORTANT LESSONS FROM FEDERAL TAX CEASES INVOLVING CONSERVATION EASEMENT DONATIONS 1–13 (2016) (providing summary overview of the developments in this area).

295. McLaughlin, *supra* note 68, at 9–14.

296. Combining federal and state monies to facilitate conservation easement transactions can present challenges outside of the charitable deductions. To do this successfully requires being able to align the various programmatic requirements that are a condition of accepting funds. If one of the programs requires an agency to hold the easement and other requires a third-party holder, it may be difficult to bridge this gap and get approval to modify or depart from agency practice and regulatory and statutory requirements. See, e.g., F. Mark Schiavone, *West Virginia Farmland Protection Program*, MARTINSBURG J., 2015–16, at 5–7, <http://berkeley.wvfp.org/wp-content/uploads/sites/3/2017/03/Full-Year-Series.pdf>.

297. Agricultural Act of 2014 § 1265B(b); 7 C.F.R. § 1468. ACEP-ALE is cited as an example as it directly seeks to protect farmland but there are a multitude of other federal funding sources that also seek to protect farmland, such as the Department of the Defense (DOD). DOD, through its Readiness and Environmental Protection Integration is a prominent funding source. This program seeks to protect open space adjacent to its installations to better ensure long-term compatibility in proximity to DOD operations and to mitigate harms to environmentally sensitive species through land and resource protection. For more

provides cost-share assistance to qualified partners through either cooperative or grant agreements.<sup>298</sup> This funding is usually 50 percent of the property's value, which requires the partner to secure the gap as match.<sup>299</sup> A portion of this value can be provided by the landowner as a donation, which if the landowner is seeking to claim as a charitable deduction, will also have to meet the requirements under § 170(h).<sup>300</sup> The ability to match NRCS funding with 170(h) helps to expand the reach of both tools.<sup>301</sup> Beginning with the 2014 Farm Bill, however, NRCS has the statutory authority to modify, extinguish, subordinate, or even terminate conservation easements,<sup>302</sup> which the agency refers to as its easement administrative action policy.<sup>303</sup> Under this authority, cabined somewhat through rulemaking, NRCS can terminate easements without going through a judicial process.<sup>304</sup> This authority, however, conflicts with the IRC's perpetuity requirements and corresponding regulations that require tax-incentivized easements to be extinguished only in a judicial proceeding, upon a finding of impossibility or impracticality, and with a payment of a designated share of proceeds to the holder to be used for similar conservation purposes.<sup>305</sup> Adjusting or at least working to align the Treasury Regulations with NRCS's role in safeguarding these easements and perhaps providing greater flexibility for these easements would help to better align the program authorities and avoid potential conflict.

This ACEP-ALE example is only one illustration of the often competing program requirements between other federal funding streams and the requirements of § 170(h).<sup>306</sup> Greater consideration and integration of these funding streams, at least at the federal level, would provide greater clarity to land

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information about this program, see AM. FARMLAND TR., WORKING TO PRESERVE FARM, FOREST AND RANCH LANDS: A GUIDE FOR MILITARY INSTALLATIONS (2011), [http://www.repi.mil/Portals/44/Documents/Primers/Primer\\_FarmForestRanchLands.pdf](http://www.repi.mil/Portals/44/Documents/Primers/Primer_FarmForestRanchLands.pdf).

298. Agricultural Act of 2014 § 1265A; 7 C.F.R. § 1468; CONSERVATION PROGRAMS MANUAL 528.43.

299. CONSERVATION PROGRAMS MANUAL 528.43.

300. *Id.* at 528.43(A)(3).

301. Vermont Land Trust, *Randolph Farm Transitioning to Young Farmer*, PANORAMA 16–17 (2017) (profiling the protection of a farm in Randolph, Vermont through the NRCS program).

302. Agricultural Act of 2014 § 1265B(b)(2).

303. CONSERVATION PROGRAMS MANUAL 528.170.

304. 7 C.F.R. § 1468.6; CONSERVATION PROGRAMS MANUAL 528.146.

305. 26 C.F.R. § 1.170A-14(g)(6) (2009).

306. Another example of this disconnect is appraisal standards. IRS and land management agencies, including NRCS, have different timing and appraisal requirements, which can lead to program confusion and lead to two appraisals being completed if both funding streams are utilized. See *West Virginia Farmland Preservation Program, FAQs*, <http://wvfp.org/about/frequently-asked-questions/#.Wmd3Dq6nFhE> (last visited July 15, 2018) (explaining the need for two appraisals and the timing considerations).

trusts and state agencies working to protect agricultural lands, and to facilitate additional layering for large landscape level projects.<sup>307</sup>

*A. Establishing Farmland Preservation as an Express Conservation Value*

Last, farmland preservation could be added as an express conservation value under 170(h), which would clarify the often meaningful distinction between farmland protection and open space more broadly.<sup>308</sup> The challenge would be how to define which agricultural forms qualify for the donation in a manner that appropriately balances productive and conservation considerations within working landscape protection efforts.<sup>309</sup> It would also require congressional action, which may not be politically possible. Two possible approaches are explored below.

*1. Protection of All Farmland*

The IRC could simply state that all farmland is eligible for the charitable donation. The policy rationale for this approach would be that as farmland is scarce and becoming more so, it is imperative to protect what can still be protected.<sup>310</sup> Thus, if a landowner is interested in protecting his or her land and an easement holder is interested in protecting the resource, the property owner should generally be able to take advantage of the charitable deduction as there will be some societal benefit associated with this initiative. Under the current law, the protection of “ordinary” farmland would not provide a significant public benefit unless a donor is able to demonstrate why the specific parcel or tract being conveyed did, in fact, meet this test (and also advanced an enumerated policy objective). Legislation would then be required to support this more expansive approach.<sup>311</sup>

There may be other arguments in favor of this expansion. It has the virtue of clarity and simplicity and even further defers to nongovernmental organizations and state and local agencies to make determinations about which properties should be protected in their area (even more expressly than relying on generalized policy statements or ad hoc declarations of support for specific

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307. See, e.g., Agricultural Conservation Easement Program (ACEP) Farm Bill Policy Recommendations (2017) (on file with author) (profiling land trust suggestions for the next farm bill regarding desired program improvements).

308. Richardson, *supra* note 9, at 170 (noting this gap). Beyond creating an express conservation value, it might make sense to create a new deduction provision (outside of § 170(h)) that applies to donations protecting agricultural land, rather than trying to use the existing conservation easement structure. This would make it more clear how it differs from other donative forms and avoid public confusion as far as what benefit is being provided to the public.

309. BYERS & PONTE, *supra* note 18, at 198–206 (discussing this need for balance).

310. See, e.g., Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Nonagricultural Uses*, 28 ENVTL L. 113, 113–15 (1998) (exploring the importance of farmland to rural identity and economies).

311. SMALL, *supra* note 16, at § 6-4.03.

transactions). Additionally, agricultural lands are not static or a closed system and have to be responsive to changing conditions, including those driven by market forces.<sup>312</sup> Allowing productive lands to be protected and to remain available to future nondeveloped uses at least affords the ability for future agricultural use, since if these lands are developed, it is fairly unlikely, although admittedly not impossible, that the lands will ever return to a predevelopment level of remotely comparable intensity<sup>313</sup> Also, in many instances, expanding the IRC may not be unduly costly or overly inclusive, as lands that face little or no development pressure should result in relatively modest appraisals because the landowner is likely not giving up much economic value by restricting its future development capacity.<sup>314</sup> This value proposition admittedly would change if the property is truly threatened, but in such a case, it seems likely that the property would be even more valuable from a public benefit perspective and likely to already qualify as open space under the existing tax-incentive structure.<sup>315</sup> It is not clear to what extent the structure of the current tax incentive has hamstrung or limited efforts to protect working lands in rural areas without developmental pressures, but an IRC expansion to include all farmland may open up other lands to being protected.<sup>316</sup> While a challenge to expanding § 170(h) would be how to actually define farmland, this definition could be tailored through the regulatory process and rely on how this term been defined in other agricultural policy contexts.<sup>317</sup>

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312. See Hamilton, *supra* note 161, at 192. For a specific example, consider the ever-evolving state of Vermont's agricultural sector. Over the nineteenth and early twentieth centuries, market conditions continually forced farmers to evolve to stay on the land, as the sector—particularly through the merino wool boom and bust during the middle of the nineteenth century. Competition from more market-based western farms, shifting economic policy, and technological advances all had substantial impacts on this sector's production and, in turn, the appearance of the agricultural landscape. Vermont's contemporary agricultural economy has also transitioned to support a mix of smaller, sustainable farms, focused on a value-added agriculture that appeals to a large segment of its customer base both in-state and throughout its larger foodshed. See, e.g., HARRISON *supra* note 83, at 199–211 (discussing the emergence of Vermont's contemporary agricultural landscape as a complicated product of competing social and cultural factors).

313. See *Protect Farm and Ranch Land*, *Farmland Info. Centr.*, AM. FARMLAND TR., <http://www.farmlandinfo.org/planning-agriculture/protect-farm-and-ranch-land> (last visited July 15, 2018) (explaining that the point of many farmland preservation efforts is to keep these lands available for agriculture).

314. See, e.g., Ashley D. Miller et al., *Factors Impacting Agricultural Landowners' Willingness to Enter into Conservation Easements: A Case Study*, 24 SOC. & NAT'L RES. 65, 65–74 (2010).

315. See Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PENN. L. REV. 873, 875–77 (2000).

316. See, e.g., I.R.S. P.L.R. 8638012 (June 18, 1986) (finding a project to have a significant benefit when found in an area with substantial development pressure). The lack of threat or development pressure does shape policy or eligibility in some instances. For the USDA's ACEP-ALE program, "land that faces development pressure from nonagricultural use" is a land eligibility requirement. See CONSERVATION PROGRAMS MANUAL 528.33(A)(6).

317. Again, the farmland protected under such an approach could mirror or resemble the factors NRCS considers in making funding decisions under its ACEP program. See CONSERVATION PROGRAMS MANUAL 528.33.

This approach does almost nothing, however, to strategically target resources into those lands that most merit protection or to encourage more beneficial land management<sup>318</sup> As a result, it has even greater potential for creating or causing random acts of conservation than our current programmatic structure and could result in lands being protected in relative isolation with little potential to actually remain viable for agricultural use over the longer-term.<sup>319</sup> One of the major critiques of the land trust movement has been its failure to work in a concerted and coherent fashion—often protecting lands out of convenience rather than based upon their merits and benefits as conserved lands.<sup>320</sup> This form of expansion would probably not work to improve this situation. It also has the potential of opening up the charitable deduction more widely than originally intended and, despite practical bounds on expansion, it could have or at least be perceived as having negative fiscal impact, which further reduces the likelihood for this degree of expansion under the current funding climate.<sup>321</sup> Additionally, ensuring that the environmental and conservation benefits remain intact and avoiding dilution and other unanticipated consequences would be required.

Overall, the benefit of creating an express farmland preservation-focused conservation value would be to more clearly distinguish this donative form from other open space donations. This could be accomplished by developing regulations more tailored to working lands to appropriately define and balance the multiple functions of these resources. The challenge is developing a definition of farmland to best align the available funding with the desired farmland preservation benefits.

## 2. *Securing Additional Social and Conservation Objectives*

A second option would be to begin to consider the use of conservation easements to target broader issues of societal concern such as (1) the land's actual conservation performance, and (2) its continued use for agricultural operations.<sup>322</sup> This would move the agricultural conservation easement's

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318. Admittedly, this is also a valid criticism of the charitable deduction as well. See Colinvaux, *supra* note 70, at 5–29 (critiquing the current structure of this stand of conservation acquisitions); see also Eagle, *supra* note 257, at 69–75 (exploring the motivations for donors and the various reasons why charitable donations of conservation easements outpace other forms of charitable giving on a relative value basis).

319. See Scott McMillion, *Ranching Rebooted*, NATURE, Nov./Dec. 2013, at 34, 35 (discussing the Nature Conservancy's need to avoid random acts of conservation and have more strategic planning for conservation initiatives).

320. Colinvaux, *supra* note 70, at 47–48 (arguing for the replacement of the tax incentive with direct expenditures for targeted land acquisitions); see also Osswald, *supra* note 176, at 27–30 (looking to federal land management agencies as a model for more strategic acquisition decisions).

321. See *Farm Bill 2018: A Primer*, NAT'L SUSTAINABLE AGRIC. COAL., 8, <http://www.safsf.org/wp-content/uploads/2016/12/2018-Farm-Bill-Primer-for-SAFSF1.pdf> (last visited July 15, 2018) (profiling the impacts of the current fiscal climate on projected spending under the Farm Bill's conservation title).

322. See, e.g., Mary J. Angelo & Joanna Reilly-Brown, *Whole-System Agricultural Certification: Using Lessons Learned from LEED to Build A Resilient Agricultural System to Adapt to Climate Change*,

impacts beyond passively securing conservation benefit by securing these lands against development, which is unquestionably important, towards affirmatively attaining or achieving additional social objectives.<sup>323</sup> This would require legislative action, either within or separate from the existing § 170(h), targeted directly toward farmland preservation outside of its traditional open space context.<sup>324</sup>

This new conservation value could more clearly articulate the types of farm operations that should qualify for the deduction—similar to those factors utilized by the NRCS to determine continued farm viability and operational rigor.<sup>325</sup> Beyond even the land's eligibility, an independent farmland-focused conservation value could help to target the conservation performance of these working lands, including adding express limits on more intensive agricultural operations, such as concentrated animal feeding operations and retention of open space or buffer requirements.<sup>326</sup> This conservation value could also require conformance with best management practices for the type of farming operation to try to incentivize more conservation-focused practices moving forward, including requiring Resource Management Plans or higher environmental stewardship than would otherwise be in place.<sup>327</sup> There are material challenges associated with addressing ongoing farm practices within the context of a perpetual agricultural easement,<sup>328</sup> but using existing independently developed and evolving best management practices may allow for the standards to evolve to balance conservation and operational needs.<sup>329</sup>

Establishing an independent conservation value focused on farmland protection would also channel farmland preservation funding into lands and conservation practices with clearer beneficial impact. Depending upon the priorities of Congress and the agency, a number of goals could be advanced.

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85 U. COLO. L. REV. 689, 723 (2015) (exploring the potential pathways for promoting a more resilient and diverse food system).

323. Phelps, *supra* note 26, at 670–74 (identifying tiers of conservation benefits that can be secured through easements).

324. The challenge for this approach would obviously be funding and appropriations. The types of restrictions imposed would likely have valuation impacts (being more restrictive as to property value) and would be open to more farms. Both the amount of the individual donations and the gross number of donations would potentially increase as opposed to use of existing § 170(h).

325. See CONSERVATION PROGRAMS MANUAL 528.33

326. See Milne, *supra* note 177, at 888–89 (discussing the permissibility of pollution considered viable to farm operations under the tax code).

327. Anderson & Cosgrove, *supra* note 24, at 8 (profiling normative practices are far as requiring best management practices and some of the issues this approach would potentially present).

328. *Id.* at 8 (exploring typical land trust practices in this regard, which tier into state or federal standards to avoid conflict with their donor base). There are land trusts, however, working to increase this performance baseline. See Hamilton, *supra* note 4 (profiling land trust efforts to secure additional conservation performance, including the PCC Farmland Trust which requires certified organic practices for all enrolled lands).

329. For an example of state-specific standards, see *Required Agricultural Practices*, Vermont Agency of Agriculture, FOOD AND MARKETS, <http://agriculture.vermont.gov/rap> (last visited July 15, 2018) (providing overview of the Required Agricultural Practices currently applicable to Vermont farms).

These goals could include a requirement that these lands remain in agricultural use, provide for transitioning these lands to younger farmers (including consideration of affordability restrictions and options to purchase at agricultural value). As far as keeping these lands actively farmed, the easement could provide the holder with the option to lease the land for agricultural use to better ensure its continuing viability as working farmland, or to purchase at agricultural value.<sup>330</sup> This bucket of relatively social or operational objectives would be materially different than the other conservation prongs under § 170(h), but would actually recognize the distinction between this form of working lands and other conservation easements.<sup>331</sup>

Overall, having a more expansive conservation value for farmland preservation would allow the IRS, government agencies, and farmland advocates sufficient flexibility to use the charitable deduction to expand farmland preservation impact. Moving towards this approach would not be without challenges, however, as this would require substantial effort to implement. An expanded farmland preservation value would also have the very difficult task of balancing productive and conservation values to ensure that the tool is functional while retaining the support of the farming community and continuing to encourage donations.

#### CONCLUSION

As the IRC and implementing regulations have remained relatively static for three decades, there is a need to revisit the framework that has been at the foundation of the farmland preservation movement—at least within the prominent band of protective activity which relies on tax-incentivized conservation easements. Given the rate of use, it may seem as if there is no pressing need for this degree of adjustment. This appearance, however, ignores a potential option for improving targeting of lands for protection and the overall design of farmland protection-based conservation projects. As societal goals and relative priorities adjust, our farm policy eventually realigns. In relation to this realignment, a related reexamination of how successful our means or methods are at actually attaining our objectives can provide valuable perspective. With

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330. Johnson, *supra* note 37, at 47–48 (discussing affirmative agricultural requirements); Hamilton, *supra* note 4 (same); see also *Complex Dough*, VERMONT FARM TO PLATE, <http://www.vtfarmtoplate.com/features/complex-dough#.WzIq09JKjZt> (last visited July 15, 2018) (discussing some of the challenges associated with a farm acquisition for new/beginning farmers within the context of South Burlington-based Bread and Butter Farm’s financing model).

331. Requiring or allowing restrictions to purchase at agricultural value as part of the deduction structure would have the potential for helping to bridge the financing gap that makes it difficult for new and beginning farmers to enter the field. See, e.g., *Farmland Access Program*, VERMONT LAND TRUST, <https://www.vlt.org/affordable-farmland/> (last visited July 15, 2018) (discussing the challenges for beginning farmers seeking to gain access to land). If the farmland conservation value’s requirements were not workable for a parcel of land, the landowner could conceivably still utilize the existing open space prong. The idea of this additional value would be to fill a gap for working lands projects that currently face some issues in fitting into that category.

the tax incentives associated with agricultural conservation easements, it may very well be that continuing to utilize the open space prong is the preferred outcome with slight work around the margins to make sure it is sufficiently flexible to address agricultural properties and priorities. It may also be time, however, to further assess our relative priorities and to try to achieve an enhanced degree of stewardship in connection with these grants by creating a new conservation value specifically focused on farmland preservation within or wholly separate from IRC § 170(h). This targeted conservation value would be able to focus on the unique challenges that these projects present and would modify the regulatory structures to better tailor program requirements to reflect contemporary goals and objectives within working agricultural landscapes.

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