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## BC Ranch II v. Commissioner: A Flexible Approach to Perpetual Conservation Easements

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**BC RANCH II v. COMMISSIONER: A FLEXIBLE APPROACH TO  
PERPETUAL CONSERVATION EASEMENTS**

VICTORIA WOLFE\*

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INTRODUCTION

Shortly before the end of 2017, Republican lawmakers in the U.S. Congress passed the most significant change to the tax system in over thirty years.<sup>1</sup> Although rewriting much of the Internal Revenue Code (the “Code”),<sup>2</sup> House and Senate

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\* J.D. Candidate, 2019, Indiana University Maurer School of Law. M.A., 2012, George Washington University. B.A., 2010, Case Western Reserve University. A special thanks to my partner, Jacob Marks, and my family for their enduring support and to Hannah Miller and the members of the *Indiana Law Journal* for their thorough editing.

1. See *Congress Approves Republican Tax Plan Setting Up Delivery to Trump’s Desk*, N.Y. TIMES (Dec. 19, 2017), <https://nyti.ms/2oO6asL> [<https://perma.cc/VQC6-BHNE>]; Damian Paletta & Jeff Stein, *Sweeping Tax Overhaul Clears Congress*, WASH. POST (Dec. 20, 2017), [http://wapo.st/2z5wdLG?tid=ss\\_mail&utm\\_term=.c0cb415166cd](http://wapo.st/2z5wdLG?tid=ss_mail&utm_term=.c0cb415166cd) [<https://perma.cc/J8NX-4BU8>]. Prior to this legislation, the most substantial change in tax law was President Ronald Reagan’s 1986 Tax Reform Act (the “1986 Act”). Tax Reform Act of 1986, H.R. 3838, 99th Cong. (1985). The 1986 Act “was the first across-the-board tax reduction for everyone since the Kennedy tax cuts.” Stuart E. Eizenstat, *Back to the Future: Reagan, Trump and Bipartisan Tax Reform*, BROOKINGS (Sept. 27, 2017), <https://www.brookings.edu/blog/fixgov/2017/09/27/back-to-the-future-reagan-trump-and-bipartisan-tax-reform> [<https://perma.cc/MJU5-W4AH>]. Some commentators believe that the comparison of the recent tax law to the 1986 Act is misplaced because there are key differences between the two, including that the main piece of the 2017 law is the cut to the corporate tax rate and it is less egalitarian and costlier than the 1986 Act. *How the Republican Tax Bill Compares with Previous Reforms*, ECONOMIST (Dec. 9, 2017), <https://www.economist.com/news/united-states/21732096-todays-bill-does-not-much-resemble-1986-tax-overhaul-how-republican-tax-bill> [<https://perma.cc/7WH8-ZNPS>]. Thus, a “better comparison” is to Reagan’s tax overhaul in 1981, which “contained big across-the-board income-tax cuts, and investment incentives for businesses.” *Id.*

2. To elaborate, some of the most significant changes to the tax code affect taxpayers at the individual level and include increasing the standard deduction (\$12,000 for single

Republicans retained a provision authorizing a charitable deduction for the donation of a conservation easement<sup>3</sup> for federal income tax purposes.<sup>4</sup> This tax incentive, adopted to encourage private landowners to voluntarily limit the development and use of their land for conservation purposes, has largely received bipartisan support since its enactment in 1980.<sup>5</sup> Conservation easements have subsequently experienced dramatic growth and today encumber an estimated forty million acres in the United States.<sup>6</sup>

However, in recent decades, conservation easements have not been without controversy, as news outlets have reported on abusive tax breaks claimed through such easement deductions.<sup>7</sup> In the wake of this coverage, the Senate Finance

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taxpayers and \$24,000 for married taxpayers), eliminating the personal exemption, capping the mortgage interest deduction to \$750,000, and limiting state and local taxes to a \$10,000 deduction, among others. Lorie Konish, *10 Tax Changes You Need to Know for 2018*, CNBC (Feb. 19, 2018, 9:30 AM), <https://www.cnbc.com/2018/02/16/10-tax-changes-you-need-to-know-for-2018.html> [<https://perma.cc/Q9D9-7JQQ>]. Corporate-level taxpayers now face a significantly lower tax rate of 21% along with the repeal of the corporate alternative minimum tax, while pass-through entities can take advantage of the new § 199A deduction of 20% of the entity's qualified business income. Bill Bischoff, *Top 10 Tax Changes for Business Owners*, MARKETWATCH (Dec. 29, 2017, 10:43 AM), <https://www.marketwatch.com/story/top-10-tax-changes-for-business-owners-2017-12-29> [<https://perma.cc/25ZR-ATUL>]; I.R.C. § 199A (Supp. V 2018).

3. The Nature Conservancy defines a conservation easement as “a restriction placed on a piece of [real] property” to preserve the property's ecological values. NATURE CONSERVANCY, CONSERVATION EASEMENTS: CONSERVING LAND, WATER AND A WAY OF LIFE 1 (2003), <https://web.archive.org/web/20160327073929/https://www.nature.org/about-us/private-lands-conservation/conservation-easements/conservation-easements.pdf> [<https://perma.cc/US7V-Q3TV>]. This is accomplished through a “voluntary, legally binding agreement that limits certain types of uses or prevents development from taking place now and in the future.” *Id.* To illustrate, the conservation purpose of an easement, for example, could include preserving watersheds, migration routes, open space, or agricultural lands. *Id.* at 2, 4.

4. See Tax Cuts and Jobs Act of 2017, H.R. 1, 115th Cong. (2017); see also Lori Faeth, *What's All This About Tax Reform?*, LAND TR. ALLIANCE (Sept. 29, 2017), <http://www.landtrustalliance.org/blog/whats-all-about-tax-reform> [<https://perma.cc/B85L-E548>] (“[S]o far there is no sign that the enhanced deduction for conservation easement donations is at risk.”).

5. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 4–5 (2004) [hereinafter McLaughlin, *Increasing Tax Incentives*]; see also *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 551 (5th Cir. 2017) (“Congress has provided a tax deduction for the charitable contribution of a conservation easement, which has enjoyed decades of bipartisan support.”).

6. Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 33 *UTAH L. REV.* 687, 691–92 (2013) [hereinafter McLaughlin, *21st Century*]. See generally *National Conservation Easement Database*, <http://www.conservationeasement.us> [<https://perma.cc/XU3K-8WCE>].

7. See, e.g., Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST (Dec. 21, 2003), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601176.html> [<https://perma.cc/3WRZ-9EG3>]; Joe Stephens, *IRS Starts Team on Easement Abuses*, WASH. POST (June 9, 2005), <http://www.washingtonpost.com>

Committee and the Joint Committee on Taxation both released reports in 2005 proposing several reforms to easement donations.<sup>8</sup> Additionally, following this congressional action, the Internal Revenue Service (IRS) began to aggressively audit and litigate conservation easement deductions where valuation<sup>9</sup> was at issue.<sup>10</sup> Recently, the IRS also successfully challenged claimed deductions for failure to satisfy the perpetuity requirements.<sup>11</sup> Despite scrutiny by the IRS, conservation

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.com/wp-dyn/content/article/2005/06/08/AR2005060802308.html [https://perma.cc/S7ZE-G698]; Joe Stephens, *Panel Advises Ending Tax Breaks for Easements*, WASH. POST (Jan. 28, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A42697-2005Jan27.html> [https://perma.cc/5JAU-ZFAK]; see also *Conservation Easements*, IRS, <https://www.irs.gov/charities-non-profits/conservation-easements> [https://perma.cc/2NK2-Q7GR] (last updated Apr. 3, 2018) (providing background on abusive tax deductions for conservation easements). Although beyond the scope of this Note, much of the recent debate has focused on the use of the easement deduction by owners of golf courses. See, e.g., Dan Wilchins & Prashant Gopal, *One Tax Loophole Untouched So Far: The Trump Golf-Course Break*, BLOOMBERG POL. (Nov. 9, 2017, 10:50 AM), <https://www.bloomberg.com/news/articles/2017-11-09/one-tax-loophole-untouched-so-far-the-trump-golf-course-break> [https://perma.cc/DNJ9-KVJZ].

8. See STAFF OF S. COMM. ON FIN., 109TH CONG., REP. OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY 10–11 (Comm. Print 2005), <https://www.finance.senate.gov/imo/media/doc/Prt109-27.pdf> [https://perma.cc/P38Y-QHGQ]; STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 281–287 (Comm. Print 2005), <http://www.jct.gov/s-2-05.pdf> [https://perma.cc/LZ7H-D83S]; see also Nancy A. McLaughlin, *Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA. TAX REV. 1, 3–4 (2017) [hereinafter McLaughlin, *Essential Perpetuity Requirements*].

9. The Treasury regulations provide that the value of the deduction is the fair market value of the conservation easement at the time of the donation. Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 2018). However, fair market value can be difficult to determine because each easement of land is presumably unique. See Roger Colinvau, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 33 UTAH L. REV. 755, 765 (2013). Thus, the regulations provide two methods to define this value: first, based on comparable sales, and second, on value before and after restriction. Treas. Reg. § 1.170A-14(h)(3)(i)–(ii). One commentator has suggested that valuation is an acute problem for the IRS, as elucidated through recent litigation, because of: “(1) the complexity, imprecision, and unreliability of appraisals; (2) the cost and risk of loss from gross valuation misstatements; and (3) the failure of a market value approach to reflect true conservation value.” Nicholas Carson, Note, *Easier Easements: A New Path for Conservation Easement Deduction Valuation*, 109 NW. U. L. REV. 739, 753 (2015).

10. Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L. PROP. & SOC’Y 107, 127 (2015); see also Scott D. McClure, Steven E. Hollingworth & Nicole D. Brown, *Courts to IRS: Ease Up on Conservation Easement Valuations*, TAX NOTES, Aug. 10, 2009, at 551 (“Increasingly, the IRS has taken the position that conservation easements have little or no value.”).

11. See David van den Berg, *IRS Scrutinizing Conservation Easements*, TAX NOTES, Oct. 1, 2012, at 19, 20; see also Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29, 45 n.89 (2011) (“Historically, the IRS has been much more likely to audit donors based on their estimate of the easement valuation than on any other measure of substantive compliance with § 170(h). It should be noted, however, that audits based on other requirements have appeared to increase

easements remain popular with charitable organizations (e.g., land trusts)<sup>12</sup> seeking protection of land and with congressional lawmakers who repeatedly renewed a provision providing enhanced incentives to conservation easement donors.<sup>13</sup>

The diverging viewpoints of the IRS on one side and land trusts and congressional leaders on the other highlight the tension between conservation easement enforcement, policymaking, and lobbying. Some critics of the IRS's viewpoint argue that the IRS's enforcement of the perpetuity requirements amounts to a technical "foot fault" (analogizing to the game of tennis),<sup>14</sup> where a single error can result in the disallowance of the full easement deduction, thereby discouraging such

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in recent years."); Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 234 (2013) ("[T]he IRS has been increasingly vigilant in enforcing these [perpetuity] requirements."). The current perpetuity requirements, in the Code and in the Treasury regulations, require perpetual (i.e., forever) encumbrance. See *infra* notes 38–40 and accompanying text.

12. According to the Land Trust Alliance (LTA), "[a] land trust is a nonprofit organization that, as all or part of its mission, actively works to conserve land by: [a]cquiring land or conservation easements (or assisting with their acquisition), and/or [s]tewarding/managing land or conservation easements." *What You Can Do: Questions?*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/what-you-can-do/conserv-your-land/questions> [https://perma.cc/9F9G-NC8P]. The LTA is a national conservation organization representing over 1000 land trusts in the United States. *About Us*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/about-us> [https://perma.cc/GE5M-UT2V].

13. Anson H. Asbury, *Understanding the Conservation Easement Tax Deduction*, FED. LAW., Mar. 2016, at 26, 27–28, <http://asburylawfirm.com/new/wp-content/uploads/2013/04/Easement-Asbury.pdf> [https://perma.cc/WA3F-CNSU]. The Pension Protection Act of 2006 (the "Pension Protection Act") was enacted to curb abuses but also increased tax benefits offered to conservation easement donors by making percentage limitations on charitable deductions more favorable. These temporary incentives, which were repeatedly extended by Congress, were made permanent in 2015. Nancy A. McLaughlin, *Trying Times: Important Lessons to Be Learned from Federal Tax Cases Involving Conservation Easement Donations* 4 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2808234](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808234) [https://perma.cc/RE4U-KN26]. Now part of the Code under § 170(b)(1)(E), the Pension Protection Act generally limited conservation easement deductions to fifty percent of the donor's contribution base but increased the limitation to one-hundred percent for certain farmers and ranchers. Pension Protection Act, Pub. L. No. 109–280, § 1206(a), 120 Stat. 780, 1068 (codified as amended at I.R.C. § 170 (2012)). The Act also allowed a carryover period of up to fifteen years for excess contributions. *Id.*

14. In tennis, a foot fault (the equivalent of a penalty) occurs, for example, when the server while serving "[c]hange[s] position by walking or running" or "[t]ouch[es] the baseline or the court with either foot." 2018 ITF RULES OF TENNIS, INTERNATIONAL TENNIS FEDERATION 8 (2017), <http://www.itftennis.com/media/277603/277603.pdf> [https://perma.cc/U5P9-NUV7] (providing four instances in Rule 18 where a server can be found to have committed a foot fault); see also Greg Bishop, *A Fine Line on Foot Faults*, N.Y. TIMES (Aug. 28, 2011), <https://www.nytimes.com/2011/08/29/sports/tennis/foot-faults-and-the-rage-they-can-cause.html> [https://perma.cc/XL84-3MH2] ("The issue, though, is not with the rule, or the wording of the rule, but rather with the enforcement of it, with how often foot faults are called and when or whether they should be.").

donations.<sup>15</sup> Others argue that strict compliance with the requirement is necessary to “ensur[e] that tax-deductible easements will actually protect the properties they encumber in perpetuity as Congress intended — that easement protections will be durable.”<sup>16</sup>

Moreover, IRS enforcement of the perpetuity requirements can potentially be used to prevent taxpayer gaming of property valuation in conservation easements.<sup>17</sup> Although it would be inappropriate to enforce perpetuity in a formalistic manner to disallow easements, the IRS is increasingly faced with an expanding number of cases involving overvaluation, among other issues.<sup>18</sup> However, the question remains as to whether the IRS may be using a hypertechnical reading of the perpetuity requirements in lieu of more stringent challenges to easement valuation.<sup>19</sup> Such a policy would be at odds with congressional intent evinced in the multiple passages of conservation easement provisions that maintain the status quo ante and even provide enhanced tax benefits to easement donors.<sup>20</sup>

Several court cases have addressed the perpetuity requirements for conservation easements (and façade easements) and have grappled with the definition of perpetuity.<sup>21</sup> While many courts have employed a technical reading of the requirements,<sup>22</sup> consistent with the IRS’s interpretation, the Fifth Circuit Court of Appeals in *BC Ranch II, L.P. v. Commissioner* (“*BC Ranch II*”) determined that the

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15. See, e.g., Anson H. Asbury, *Anyone for Tennis? Technical Foot Faults and the Conservation Easement Deduction*, 32 TAX MGMT. REAL EST. J. 195, 195–96 (2016).

16. McLaughlin, *Essential Perpetuity Requirements*, *supra* note 8, at 8.

17. See *infra* notes 129–130 and accompanying text.

18. Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 228 (2016) [hereinafter McLaughlin, *Valuation Conundrum*] (“Over the past ten years, the courts have issued more than seventy-five opinions in this context, which is an astonishing amount of case law for such a specific charitable deduction provision. This case law reveals a variety of abuses, including persistent overvaluation of easements.”).

19. Cf. Ronald Levitt & David Wooldridge, *An Unwelcome Gift from the IRS on Conservation Easements*, LAW360 (Jan. 9, 2017, 5:46 PM), <https://www.law360.com/articles/879088/an-unwelcome-gift-from-the-irs-on-conservation-easements> [https://perma.cc/D22E-YXLM]. In this article, the authors suggest that “[t]he real threat of abuse in conservation easement deductions lies in overvaluation of the easement,” arguing, in the context of “listed transactions,” (i.e., tax avoidance transactions) that the IRS should “address[] overvaluation by changing its own internal audit procedures to obtain more accurate results in a more efficient manner.” *Id.* For further discussion on this point, see *infra* Section III.B.

20. See *supra* note 13. In 1997, Congress enacted I.R.C. § 2031(c), which added an estate tax incentive for donating conservation easements. See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 508, 111 Stat. 787, 857 (1997); McLaughlin, *21st Century*, *supra* note 6, at 703. Pursuant to this incentive scheme, taxpayers contributing conservation easements are given the option to reduce the value of their estate for estate tax purposes by the value of the easement or exclude up to forty percent of the value of the land under the easement from estate taxes, if § 2031(c) is applicable. See Taxpayer Relief Act of 1997 § 508.

21. See, e.g., *Belk v. Comm’r*, 774 F.3d 221, 227 (4th Cir. 2014) (conservation easement); *Kaufman v. Shulman*, 687 F.3d 21, 28 (1st Cir. 2012) (façade easement); *Comm’r v. Simmons*, 646 F.3d 6, 10–11 (D.C. Cir. 2011) (façade easement).

22. See, e.g., *Atkinson v. Comm’r*, 110 T.C.M. (CCH) 550 (T.C. 2015); *Balsam Mountain Invs., LLC v. Comm’r*, 109 T.C.M. (CCH) 1214 (T.C. 2015).

perpetuity of an easement does not require such inflexibility, particularly in the case of a modification provision.<sup>23</sup> In this case, the Fifth Circuit vacated the Tax Court's holding that provisions in the conservation easements allowing for boundary changes violated the perpetuity requirements, and thus, the Fifth Circuit held that the charitable contribution deductions were allowable.<sup>24</sup>

Depending on the approach used in enforcement, there is the potential to encourage or discourage charitable donations of conservation easements. In Part I, this Note explores the federal charitable income tax deduction for conservation easements and the legislative purpose in enacting the perpetuity requirements. Part II examines the Fifth Circuit's decision in *BC Ranch II* and the flexible approach to perpetuity adopted by the court. Finally, Part III considers the implications of the *BC Ranch II* decision, specifically authority to monitor conservation easements, valuation gaming of easements in the context of perpetuity, and congressional intent in allowing the conservation easement deduction. Part IV addresses the main arguments against adopting a flexible approach to the easement deduction. Overall, this Note argues that a flexible interpretation of perpetuity by the IRS and the courts strikes the proper balance between respecting congressional intent and encouraging conservation efforts.

#### I. THE CONFUSION SURROUNDING THE CONSERVATION EASEMENT DEDUCTION AND ITS PERPETUITY REQUIREMENT

Congress first enacted express statutory authority, albeit temporary authority, for a charitable deduction for conservation easement donations in the Tax Reform Act of 1976<sup>25</sup> (the "1976 Act").<sup>26</sup> In the 1976 Act, conservation easements were not required to be perpetual, but they had to last for at least thirty years and be donated exclusively for conservation purposes.<sup>27</sup> The Tax Reduction and Simplification Act of 1977<sup>28</sup> later extended the easement deduction provision from the 1976 Act but limited the deduction to perpetual easements.<sup>29</sup> Then, as part of the Tax Treatment Extension Act of 1980,<sup>30</sup> Congress made the deduction a permanent provision of the Code with the enactment of section 170(h).<sup>31</sup>

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23. See *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547, 553–54 (5th Cir. 2017).

24. *Id.* at 553–54, 556.

25. Pub. L. No. 94-455, 90 Stat. 1520.

26. McLaughlin, *Increasing Tax Incentives*, *supra* note 5, at 12. Although this was the first statutory recognition of conservation easements, Congress had addressed the deductibility of certain easements in the Conference Report for the Tax Reform Act of 1969. H.R. REP. NO. 91-782, at 294 (1969) (Conf. Rep.) ("The conferees on the part of both Houses intend that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity.").

27. McLaughlin, *Increasing Tax Incentives*, *supra* note 5, at 11.

28. Pub. L. No. 95-30, 91 Stat. 126 (codified as amended in scattered sections of 26 U.S.C.).

29. McLaughlin, *Increasing Tax Incentives*, *supra* note 5, at 11.

30. Pub. L. No. 96-541, 94 Stat. 3204 (codified as amended in scattered sections of 26 U.S.C.).

31. Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part I: The Standards*, 45 REAL

However, there were concerns that, without a restriction on perpetuity, taxpayers would take a current tax deduction on an easement and then terminate the easement when it became “inconvenient or the deduction invaluable.”<sup>32</sup> Therefore, in an effort to minimize potential abuse, Congress imposed significant restrictions on the deduction.<sup>33</sup> Pursuant to section 170(h), a federal charitable tax deduction by a landowner for a conservation easement is allowed provided that the easement is (1) “granted in perpetuity” on the use of real property,<sup>34</sup> (2) to a “qualified organization” as the easement holder<sup>35</sup> (e.g., a government entity or charity),<sup>36</sup> and (3) “exclusively for conservation purposes.”<sup>37</sup> As a point of clarity, there are two perpetuity requirements: first, on the use of real property,<sup>38</sup> and second, on the conservation purpose.<sup>39</sup> In 1986, the Department of Treasury (the “Treasury”) promulgated final regulations (the “regulations”) interpreting the perpetuity requirements and other provisions of section 170(h).<sup>40</sup>

The fact that Congress permanently extended the charitable deduction provisions for conservation easements indicates the importance of easements in the eyes of the legislature. In doing so, the legislature emphasized that “the preservation of our country’s natural resources and cultural heritage is important” and that “conservation

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PROP. TR. & EST. L.J. 473, 478 (2010).

32. Asbury, *supra* note 13, at 28. To illustrate, an easement could become “inconvenient” if, for example, an energy company began exploring for natural gas near the easement property, making the land unsuitable for agriculture. See David Baron, *In Land Conservation, ‘Forever’ May Not Last*, NPR (Mar. 11, 2008, 4:15 PM), <https://www.npr.org/templates/story/story.php?storyId=88038482> [<https://perma.cc/F267-FA9F>].

33. See *supra* text accompanying note 31. These restrictions are also likely derived from the notion that deductions for conservation easements (i.e., partial interests in land) are an exception to the general rule that a taxpayer may not claim a deduction for a charitable contribution of property consisting of less than the taxpayer’s *entire* interest in the property. See I.R.C. § 170(f)(3) (2012); Colinvaux, *supra* note 9, at 758 (describing that Congress “adopted a number of special rules intended to address potential (and anticipated) problems” stemming from the fact that conservation easements are an exception to the rule).

34. I.R.C. § 170(h)(1)(A), (2)(C) (2012); see also Treas. Reg. § 1.170A-14(b)(2) (as amended in 2018) (defining a perpetual conservation restriction).

35. I.R.C. § 170(h)(1)(B).

36. See I.R.C. § 170(h)(3). An example of an organization that holds conservation easements is The Nature Conservancy, a nonprofit with a mission “to conserve the lands and waters on which all life depends.” *Our Mission, Vision, and Values*, NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/our-mission-vision-and-values> [<https://perma.cc/X5NY-NPRZ>].

37. I.R.C. § 170(h)(1)(C). There are four conservation purposes for which deductible conservation easements can be donated: the preservation of land areas for the public, the protection of a natural habitat, the preservation of open space (subject to some restrictions), and the preservation of a historically important land area or historic structure. See I.R.C. § 170(h)(4)(A)(i)–(iv).

38. I.R.C. § 170(h)(2)(C) (“[A] restriction (granted in perpetuity) on the use which may be made of the real property.”).

39. I.R.C. § 170(h)(5)(A) (“[A] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.”).

40. See Treas. Reg. § 1.170A-14 (as amended in 2018).



easements now play an important role in preservation efforts.”<sup>41</sup> Karin Gross of the IRS Office of Chief Counsel has also stated that Congress created the provision to incentivize taxpayers to make a substantive investment in land conservation.<sup>42</sup> Congress, for example, stressed that the deduction should be limited to conservation easements that permanently protect “unique or otherwise significant land areas or structures.”<sup>43</sup> The perpetuity requirements support this overall purpose by ensuring that conservation easements will “protect the conservation values of the properties they encumber in perpetuity or forever”<sup>44</sup> and “the public investment in conservation will not be lost.”<sup>45</sup>

However, there are still some concerns with the deduction. The Treasury, for instance, has acknowledged some issues with the provision. More specifically, the Treasury recognized that changed circumstances could potentially “frustrate the purpose of a perpetual conservation easement.”<sup>46</sup> For example, in situations of force majeure, such as a catastrophic earthquake, the regulations specify that: “[i]f a subsequent unexpected change in the conditions surrounding the property” that is subject to the easement “make[s] impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity.”<sup>47</sup>

However, this conservation purpose will only be considered perpetual “if the restrictions are extinguished by judicial proceeding” and the proceeds from the sale of the property are used by the easement holder “in a manner consistent with the conservation purposes.”<sup>48</sup>

In general, there is still much confusion about the deduction provision and the perpetuity requirements. Professor Nancy McLaughlin of the University of Utah S.J.

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41. S. REP. NO. 96-1007, at 9 (1980), <https://www.finance.senate.gov/imo/media/doc/Rpt96-1007.pdf> [<https://perma.cc/3MVG-NM6C>]; see also Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 120 (2010) (describing the history and development of conservation easements as part of the Code). In fact, the adoption of this provision is consistent with long-time congressional commitment to cultural and historic preservation. See, e.g., 16 U.S.C. §§ 431–33 (enacting the Antiquities Act of 1906); 16 U.S.C. § 1 (establishing the National Park Service in 1916); 16 U.S.C. § 470 (enacting the National Historic Preservation Act in 1966).

42. Anne Galloway, *IRS Attorney Clarifies ‘In Perpetuity’ Rules for Conservation Easements*, VTDIGGER (Nov. 30, 2014), <https://vtdigger.org/2014/11/30/irs-attorney-clarifies-perpetuity-rules-conservation-easements> [<https://perma.cc/A5YZ-UZFJ>].

43. S. REP. NO. 96-1007, at 9. Therefore, the deduction is intended to apply narrowly to these lands and structures, rather than to “ordinary lands or structures.” McLaughlin, *21st Century*, *supra* note 6, at 693.

44. McLaughlin, *Essential Perpetuity Requirements*, *supra* note 8, at 28.

45. *Id.* at 7, 43.

46. Cheever & McLaughlin, *supra* note 10, at 124.

47. Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 2018).

48. *Id.*; see also Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199, 220 (2011) (describing that the regulations recognize “that changed circumstances could trigger a court proceeding to dissolve a conservation easement”). Interestingly, this “extinguishment” provision resembles the charitable-trust law doctrine of *cy pres*. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 444 n.74 (2005).

Quinney College of Law, whose research focuses on conservation easements, addressed this current state of confusion, stating “[w]ith more than three decades of experience, continued investment of billions of dollars of public funds, and an estimated 40 million acres encumbered, it is somewhat surprising that we still do not know (and are quite vigorously debating in some circles) what it actually means to protect land ‘in perpetuity’ or ‘forever’ with a conservation easement.”<sup>49</sup> The Fifth Circuit Court of Appeals in its recent decision in *BC Ranch II* also weighed in on the semantic debate over perpetuity.<sup>50</sup> The court seemingly interpreted an exception to the perpetuity requirements for changes to the border of a conservation easement (which this Note will refer to as a “modification” or “substitution” provision in the following Part)—an exception that on the face of the Code and the regulations does not explicitly exist.<sup>51</sup> Part II will address the details of the case.

## II. *BC RANCH II* V. *COMMISSIONER*—AN OVERVIEW

This Part describes the relevant facts of the *BC Ranch II* decision and its procedural history. It also focuses on the key points of the majority’s opinion and concludes with the reasons for the dissent’s disagreement with the majority.

In *BC Ranch II*, two limited partnerships, Bosque Canyon Ranch I (“BCR I”) and Bosque Canyon Ranch II (“BCR II”), owned a 3729-acre tract of land called Bosque Canyon Ranch (the “ranch”) in Bosque County, Texas.<sup>52</sup> In 2003, the ranch developers began working with the North American Land Trust (NALT)<sup>53</sup> to establish tax-deductible conservation easements that would cover the majority of the land within the ranch and protect the nesting areas and habitat of the golden-cheeked warbler, an endangered species of bird that only nests in the hill country of central Texas.<sup>54</sup> Between 2005 and 2008, BCR I and BCR II began offering limited partners five-acre homestead parcels,<sup>55</sup> but in 2005 and 2007, both partnerships (i.e., BCR I

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49. McLaughlin, *21st Century*, *supra* note 6, at 717 (“The most fundamental of questions remain controversial and unresolved. Under what circumstances can perpetual conservation easements be modified or terminated? Who should have the authority to make such decisions and what standards should apply?”).

50. *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547 (5th Cir. 2017).

51. *See id.* at 554.

52. *Id.* at 549; *Bosque Canyon Ranch, L.P. v. Comm’r*, 110 T.C.M. (CCH) 48 (T.C. 2015), *vacated and remanded sub nom. BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547 (5th Cir. 2017).

53. NALT is a 501(c)(3), nonprofit organization. *North American Land Trust*, GUIDESTAR, <https://www.guidestar.org/profile/23-2698266> [<https://perma.cc/MB3U-FZTU>]. It was formed with the “primary purpose of preserving and managing open space with ecological, agricultural or historical significance” and to “balance[] conservation and land development.” *About*, NORTH AM. LAND TR., <http://northamericanlandtrust.org/about> [<https://perma.cc/6CY9-2WRM>]. The organization has protected more than 120,000 acres through conservation easements in the United States. NORTH AM. LAND TR., <https://northamericanlandtrust.org> [<https://perma.cc/32M2-BK6C>].

54. *BC Ranch II*, 867 F.3d at 549.

55. From the remaining land on the ranch, there were forty-seven homestead parcels marketed to the limited partners, totaling 235 acres (or five acres each). *Id.* at 554.

and BCR II) donated conservation easements of the remaining land to NALT<sup>56</sup> with the purpose of protecting and preserving the warblers' habitat.<sup>57</sup> However, the easements reserved certain rights to the ranch developers, including a "modification" that allowed the developers, only with NALT's consent, to adjust the boundaries of the easements to allow for the five-acre homesteads.<sup>58</sup>

In 2005 and 2007, BCR I and BCR II, respectively, filed federal tax returns, claiming charitable contribution deductions for the amount of \$15.9 million total for the conservation easements donated to NALT.<sup>59</sup> The IRS disallowed the deductions, and the partnerships filed petitions for readjustment before the Tax Court.<sup>60</sup> The Tax Court, agreeing with the IRS Commissioner, held that the boundary modification provision violated the perpetuity requirement of § 170(h)(2)(C).<sup>61</sup> Because the "modification" provision meant that boundaries could potentially be changed to include property not within the original easement, the court found that the easement was not granted in perpetuity.<sup>62</sup> In its decision, the Tax Court cited the court's holding in *Belk v. Commissioner*<sup>63</sup> "for the proposition that an easement is not qualified real property if the boundaries of the property subject to the easement may be modified."<sup>64</sup> Therefore, the partnerships were not entitled to charitable tax deductions.<sup>65</sup> The partnerships then appealed the Tax Court's decision to the Fifth Circuit.<sup>66</sup>

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56. According to the Conservation Easement Plan of the ranch, the conservation area covered under the easement in 2005 totaled 1750.1 acres and in 2007 totaled 1731.63 acres. *Id.*

57. *Id.* at 550. In addition to preserving the habitat of the golden-cheeked warblers (and other birds and game), the easements sought to protect watershed, scenic vistas, and mature forest. *Id.*

58. *Id.* Additional rights provided included to "raise livestock; hunt; fish; trap; cut down trees; and construct buildings, recreational facilities, skeet shooting stations, deer hunting stands, wildlife viewing towers, fences, ponds, roads, trails, and wells." *Bosque Canyon Ranch, L.P. v. Comm'r*, 110 T.C.M. (CCH) 48, at 5 (T.C. 2015).

59. *BC Ranch II*, 867 F.3d at 550.

60. *Id.* at 550–51.

61. *Id.* at 552. The Code provision on which the Tax Court stated that the easement at issue failed is the perpetual restriction on the use of real property. I.R.C. § 170(h)(2)(C).

62. *BC Ranch II*, 867 F.3d at 552.

63. 140 T.C. 1 (2013), *aff'd*, 774 F.3d 221 (4th Cir. 2014). In *Belk*, the taxpayers donated a conservation easement over a 184-acre golf course and claimed a \$10.5 million deduction. *Id.* at 3. The conservation easement agreement executed by the parties included a provision which allowed the taxpayers to substitute the property subject to the easement with "an area of land owned by Owner which is contiguous to the Conservation Area for an equal or lesser area of land comprising a portion of the Conservation Area." *Id.* The Fourth Circuit held that, while the conservation purpose of the easement was perpetual, the use restriction on the real property was not because the taxpayers could remove land from the defined parcel and replace it with other land. *Belk v. Comm'r*, 774 F.3d 221, 227 (4th Cir. 2014).

64. *BC Ranch II*, 867 F.3d at 552; *see also Belk*, 774 F.3d at 227 (articulating that the Treasury regulations "confirm that a conservation easement must govern a defined and static parcel" and "that holding otherwise would deprive donees of the ability to ensure protection of conservation interests").

65. *Bosque Canyon Ranch v. Comm'r*, 110 T.C.M. (CCH) 48 (T.C. 2015).

66. *BC Ranch II*, 867 F.3d at 551. For the appeal, NALT submitted an amicus brief in

The Fifth Circuit overturned the Tax Court's ruling that the provisions in the conservation easements allowing boundary changes violated the perpetuity requirement, thereby permitting the easement grantors to take the claimed charitable deductions.<sup>67</sup> In justifying its position, the majority highlighted that for any boundary modification to occur, NALT would have to agree to the modification established by the partnerships and the homestead parcel owner.<sup>68</sup> Additionally, the majority observed that any such modification would be permitted only if three criteria were met: (1) NALT determines that the modification does not "result in any material adverse effect on any of the Conservation Purposes," (2) the homestead parcels do not increase in size, and (3) the modification is correctly documented and recorded.<sup>69</sup>

The Commissioner argued that the case at hand was indistinguishable from the Fourth Circuit's decision in *Belk*,<sup>70</sup> relied upon by the Tax Court, because "property initially subject to restrictions can be released from those restrictions," even though the easement in *BC Ranch II* permitted only interior boundaries to be modified, as opposed to exterior boundaries in *Belk*.<sup>71</sup> However, the majority found "the Tax Court's reliance on *Belk* [to be] misplaced," observing that in *BC Ranch II* "neither the exterior boundaries nor the total acreage of the instant easements will ever change: Only the lot lines of one or more [sic] the five-acre homesite parcels are potentially subject to change and then only (1) within the easements and (2) with NALT's consent."<sup>72</sup> Whereas, the easement in *Belk* "could be moved, lock, stock, and barrel" to an entirely different area of land.<sup>73</sup> Therefore, the majority concluded that "the homesite adjustment provision does not prevent the grants of the

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support of *BC Ranch II* stating that "[d]isallowing deductions for gifts of conservation easements that incorporate the sort of purposeful, limited and controlled guidelines as contained in the provisions of the Bosque Canyon conservation easements - that allow for movement of homestead parcel boundaries - would deprive landowners and conservation organizations of a valuable tool in managing perpetuity wisely." Brief for North American Land Trust as Amici Curiae Supporting Petitioners-Appellants at 17, *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547 (5th Cir. 2017) (No. 16-60068).

67. *BC Ranch II*, 867 F.3d at 554. The Fifth Circuit's decision also involved whether the limited partnerships' documentation for conservation easements satisfied the baseline documentation requirement for the claimed charitable contribution (the court found that it did) and whether the limited partners' contributions to limited partnerships were receipts from "disguised sales" (the court found that they were not). *Id.* at 556, 558. However, for the purposes of this Note, the focus will be on the portion of the decision related to the "in perpetuity" requirement. *See id.* at 551-54.

68. *Id.* at 552.

69. *Id.*

70. *Belk v. Comm'r*, 774 F.3d 221, 227 (4th Cir. 2014).

71. Answering Brief for Appellee at 29, *BC Ranch II, L.P. v. Comm'r*, 867 F.3d 547 (5th Cir. 2017) (No. 16-60068).

72. *BC Ranch II*, 867 F.3d at 552.

73. *Id.* at 553. The majority noted that the easements in *BC Ranch II* were more analogous to the façade easements in *Commissioner v. Simmons*, 646 F.3d 6 (D.C. Cir. 2011), and *Kaufman v. Shulman*, 687 F.3d 21 (1st Cir. 2012), where the Fifth Circuit's sister circuits found that permitting repairs and changes to the building façades did not violate the perpetuity restrictions on the easements but, rather, promoted the underlying conservation purposes. *BC Ranch II*, 867 F.3d at 552.

conservation easements . . . from satisfying the perpetuity requirement of § 170(h)(2)(C).<sup>74</sup>

Notably, in its discussion, the majority included language advocating for a flexible approach to perpetual conservation easements: “The need for flexibility to address changing or unforeseen conditions on or under property subject to a conservation easement clearly benefits all parties, and ultimately the flora and fauna that are their true beneficiaries.”<sup>75</sup> The majority also appeared to be persuaded that “the perpetuity of the easements is further ensured by NALT’s virtually unrestricted discretion to withhold consent to any modifications.”<sup>76</sup> In line with this flexible interpretation, the majority further observed that “the usual strict construction of intentionally adopted tax loopholes is not applicable to grants of conservation easements made pursuant to § 170(h),” but rather are analyzed under the “ordinary standard of statutory construction.”<sup>77</sup>

The dissent took issue with two points in the majority opinion: first, that the conservation easements donated by the partnerships were not granted in perpetuity, thus the charitable deductions should be disallowed; and second, that the majority employed a “lax standard” in its use of an ordinary standard of statutory construction, which is at odds with Supreme Court precedent requiring that tax deductions be strictly construed.<sup>78</sup> The dissent stated that the easements fail because the property contributed to NALT was not subject to perpetuity because *any* future modification cannot be considered de minimis. These modifications could have a substantial effect given that nonprotected land can be substituted for land originally protected in the easement.<sup>79</sup> Therefore, the dissent argued that the majority, in distinguishing *Belk* and refusing to apply the rule from that case, created a circuit split.<sup>80</sup>

It is worth noting that the response period for the Commissioner to petition for a rehearing en banc by the Fifth Circuit expired in October 2017.<sup>81</sup> However, as the case was remanded to the Tax Court for that court to consider the other grounds asserted by the Commissioner, including overvaluation of the easements (which was not originally addressed by the Tax Court),<sup>82</sup> further developments may await.

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74. *Id.* at 554.

75. *Id.* at 553.

76. *Id.*

77. *Id.* at 554. As support for the majority’s application of the ordinary standard of statutory construction to the conservation easement deduction, the majority relied on the fact that, among others, the easement deduction provision (i.e., § 170(h)) was adopted “by an overwhelming majority of Congress.” *Id.* at 553.

78. *Id.* at 560 (Dennis, J., dissenting in part and concurring in part). The dissent cited to *INDOPCO, Inc. v. Commissioner* for “the well-established rule that tax deductions are a matter of legislative grace,” and therefore are strictly construed. *Id.* (citing *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992) (“[D]eductions are strictly construed and allowed only ‘as there is a clear provision therefor.’”)).

79. *Id.* at 562.

80. *Id.* at 560.

81. *See BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547 (5th Cir. 2017) (No. 16-60068) (indicating that the petition for rehearing en banc was not filed before the October 25, 2017, deadline).

82. *BC Ranch II*, 867 F.3d at 556, 556 n.30.

## III. THE FIFTH CIRCUIT'S FLEXIBLE APPROACH SHOULD BE ADOPTED

In a way, the distinctions drawn by the majority and the dissent in *BC Ranch II* mirror the typical tax deduction framework between balancing the interests of the government and the taxpayer.<sup>83</sup> However, this balancing act fails to take into account the interests of another stakeholder: the conservationists (e.g., the land trust holding the conservation easement). The majority alluded to the viewpoints of conservation proponents in its policy argument, recommending flexibility in the conservation easement analysis to benefit all parties, including “the flora and fauna.”<sup>84</sup>

There are differing opinions regarding whether the decision in *BC Ranch II* created a circuit split, and if there is a circuit split, there are also different views regarding how this split affects the various stakeholders.<sup>85</sup> Assuming, for argument's sake, that the majority did create a circuit split with the Fourth Circuit,<sup>86</sup> the issue for the stakeholders then is to what extent will modifications of land under a conservation easement still fulfill the requirements of perpetuity. Depending on whether a technical or flexible approach is implemented, there is the potential for differing consequences. Under the Fourth Circuit's technical reading in *Belk*, a modification provision in a conservation easement would likely put the taxpayer's charitable deduction at risk of disallowance (a potential win for the IRS).<sup>87</sup> Conversely, under the Fifth Circuit's more flexible approach in *BC Ranch II*, a factual determination would be necessary to determine whether the modification is sufficiently restricted so as to allow the deduction (a potential loss for the IRS).<sup>88</sup> Note that, in *BC Ranch II*, the majority was persuaded by the fact that any modifications to the easements could not occur without the consent of the easement holder (i.e., NALT).<sup>89</sup> In both instances described, the interests of the easement holder are affected. The adoption of the technical approach will likely lead to less taxpayer enthusiasm for participating in the easement process for fear of unforeseeable consequences (or ultimate disallowance of the deduction).<sup>90</sup> On the contrary, the adoption of the flexible approach will likely lead to greater enthusiasm on the part of the taxpayer to engage in conservation easement donations.<sup>91</sup>

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83. See Carson, *supra* note 9, at 742; see also *Interstate Transit Lines v. Comm'r*, 319 U.S. 590, 593 (1943) (noting “the now familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer”).

84. *BC Ranch II*, 867 F.3d at 553.

85. See *infra* note 87 and accompanying text.

86. See *BC Ranch II*, 867 F.3d at 560 (Dennis, J., dissenting in part and concurring in part) (“The majority opinion . . . creates a split with the Fourth Circuit by refusing the [sic] apply the rule established in *Belk v. Commissioner*.” (citation omitted)).

87. Ed Zollars, *Split Fifth Circuit Panel Finds a Limited Ability to Substitute Land Was Not Fatal to Conservation Easement Deduction*, CURRENT FED. TAX DEV. (Aug. 19, 2017), <https://www.currentfederaltaxdevelopments.com/blog/2017/8/19/split-fifth-circuit-panel-finds-a-limited-ability-to-substitute-land-was-not-fatal-to-conservation-easement-deduction> [<https://perma.cc/9GQE-N3J5>].

88. *Id.*

89. See *BC Ranch II*, 867 F.3d at 553.

90. See *infra* Section III.C.

91. *Id.*

Even if there is a “split” over the degree of modification allowed in an easement, this Note maintains that any distinctions drawn between *Belk* and *BC Ranch II* (i.e., between exterior versus interior boundary modifications) are minute.<sup>92</sup> Because any potential differences between the two circuits are negligible, as a matter of complete clarity and consistency, this Note recommends that other courts (as well as the IRS) adopt the Fifth Circuit’s flexible approach; this approach offers a more sound and pragmatic interpretation of the Code that allows conservation easement donors and easement holders to adapt to changing circumstances. This Note further contends that hairsplitting over minor modification details in the context of perpetuity detracts from more serious issues in conservation easements, particularly that of overvaluation (which was likely present in *BC Ranch II*).<sup>93</sup> The Fifth Circuit’s flexible approach is also desirable for reasons discussed by the majority in its opinion, including longstanding bipartisan, congressional support for conservation easements<sup>94</sup> and issues with hypertechnicality on the part of the Tax Court and the IRS.<sup>95</sup>

As noted by Professor McLaughlin, “the circuit courts have indicated impatience with the IRS’s attempts to use litigation to confirm the agency’s interpretation of Internal Revenue Code and regulatory requirements without having provided taxpayers with fair warning regarding that interpretation.”<sup>96</sup> As demonstrated, there remains much confusion concerning the conservation easement deduction (and this confusion was arguably augmented after the potential circuit split due to the *BC Ranch II* decision). To eliminate any confusion or uncertainty, this Note urges the IRS and the courts to adopt a single approach: the Fifth Circuit’s flexible approach.

The remainder of this Part explains the reasons for adopting this recommendation, in addition to those described above, such as issues with easement holder autonomy, hypertechnicality and valuation gaming, as well as congressional intent.

#### A. *The IRS Is Not the Best-Suited Party to Oversee Easement Holders*

In *BC Ranch II*, the majority found the boundary modifications to accommodate certain homestead parcels to be allowable and not in contravention of the perpetuity

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92. See *infra* Section III.B.

93. See *infra* Section III.B.

94. See *BC Ranch II*, 867 F.3d at 551 (“Congress has provided a tax deduction for the charitable contribution of a conservation easement, which has enjoyed decades of bipartisan support.”).

95. See *id.* at 556 (“The Tax Court’s hyper-technical requirements for baseline documentation, if allowed to stand, would create uncertainty by imposing ambiguous and subjective standards for such documentation and are contrary to the very purpose of the statute. If left in place, that holding would undoubtedly discourage and hinder future conservation easements.”).

96. McLaughlin, *21st Century*, *supra* note 6, at 714; see also *Kaufman v. Shulman*, 687 F.3d 21, 27 (1st Cir. 2012) (“[T]he IRS’s reading of its regulation would appear to doom practically all donations of easements, which is surely contrary to the purpose of Congress. We normally defer to an agency’s reasonable reading of its own regulations . . . but cannot find reasonable an impromptu reading that is not compelled and would defeat the purpose of the statute . . .” (citation omitted)).

requirement.<sup>97</sup> However, neither voluntary modification nor substitution are expressly provided for in the Code or the Treasury regulations, and the IRS's policies and practices are consistent with the view of the Code and the regulations.<sup>98</sup> According to the regulations, only in instances of extinguishment, where sustaining the easement is now impracticable or impossible, may an easement be modified.<sup>99</sup>

Although the IRS is following the express provisions in the statute (as well as in the regulations) in litigating the perpetuity of conservation easements, this Note asks how far the IRS's authority goes (or perhaps it is better to ask how reasonable is such presumptive authority) to disallow a charitable deduction for failure to satisfy the perpetuity requirements. Particularly, this Note questions IRS authority in instances such as those present in *BC Ranch II*, where potential modifications have been agreed upon (through mutual assent) by the easement donor and the holder in the original deed of easement.<sup>100</sup> The Fifth Circuit appears to find reasonable (and this Note agrees) that when modifications are agreed upon in the deed of easement and do not appear to substantially affect the perpetuity of the land and the conservation purpose,<sup>101</sup> then there is little reason for the IRS to disallow them on perpetuity grounds.<sup>102</sup>

However, some believe the Fifth Circuit, in its holding, may be giving too much weight to private agreements between parties (e.g., between the landowner and the

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97. *BC Ranch II*, 867 F.3d at 554.

98. See IRS, CONSERVATION EASEMENT AUDIT TECHNIQUES GUIDE 12 (Jan. 24, 2018), [https://www.irs.gov/pub/irs-utl/conservation\\_easement.pdf](https://www.irs.gov/pub/irs-utl/conservation_easement.pdf) [<https://perma.cc/BK9Y-RQYK>] (“[Protected in perpetuity] means that the deed of conservation easement must indicate that the restriction remains on the property forever and is binding on current and future owners of the property. If a deed of conservation easement does not meet the perpetuity requirements, the easement is not deductible.”); I.R.S. Info. Ltr. 2012-0017, at 2 (Mar. 5, 2012), <https://www.irs.gov/pub/irs-wd/12-0017.pdf> [<https://perma.cc/A6NT-Z99N>] (“[E]xcept in the very limited situations of a swap that meets the extinguishment requirements of section 1.170A-14(g)(6) of the Regulations, the contribution of an easement made subject to a swap is not deductible under section 170(h) of the Code.”); see also IRS, 2017 INSTRUCTIONS FOR SCHEDULE D (FORM 990) 2 (2017), <https://www.irs.gov/pub/irs-pdf/i990sd.pdf> [<https://perma.cc/8RBA-LE95>] (“[A]n easement is modified when its terms are amended or altered in any manner. For example, if the deed of easement is amended to increase the amount of land subject to the easement or to add, alter, or remove restrictions regarding the use of the property subject to the easement, the easement is modified.” (emphasis omitted)).

99. See *supra* notes 47–48 and accompanying text.

100. See *BC Ranch II*, 867 F.3d at 552 (“The easements specified a few ‘reserved rights’ that NALT and the BCR Partnerships agreed ‘could be conducted . . . without having an adverse effect on the protected Conservation Purposes.’”).

101. See *id.* at 554 (“We are satisfied that any potential future tweaking of the boundaries of one or a few homesite locations cannot conceivably detract from the conservation purposes for which these easements were granted, especially in light of the requirement for NALT’s prior approval of any such change.”).

102. See Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 96 (2009) (commenting that easement “holders that desire th[e] extraordinary level of discretion [to modify or terminate conservation easements] should negotiate for it up-front and in good faith at the time they acquire conservation easements and memorialize that grant of discretion in the easement deeds,” while acknowledging that this may affect deductibility of the easement for the donor).



land trust) at the expense of the Code, the Treasury regulations, and IRS policy.<sup>103</sup> For instance, Professor McLaughlin argues that conservation easements are not “private arrangements,” but “are created for” and “subsidized by the public through . . . tax incentive and easement purchase programs.”<sup>104</sup> In response to this viewpoint, others argue that such “private arrangements” are just the mechanism needed to ensure the longevity of conservation efforts through easements to benefit the public as well as to provide flexibility to the donor and the easement holder to manage changed circumstances.<sup>105</sup> This Note claims that where the conservation purpose is not jeopardized, even though minor modification in the easement has occurred, perpetuity (both on the use of real property and on the conservation purpose) should be considered satisfied.<sup>106</sup>

Related to the foregoing discussion on the appropriate degree of discretion allowed to the parties as to the terms of the easement (including modification), what level of deference should be accorded to the easement holder in modifying and monitoring the easement in the future? In a deferential maneuver, the majority in *BC Ranch II* found that perpetuity of the easement was further protected because the easements at issue could only be amended with the consent of the easement holder.<sup>107</sup> Is the Fifth Circuit giving preference to the easement holder vis-à-vis the IRS? It is reasonable to assume that the easement holder is in the best position to oversee and enforce the easement in perpetuity as an organization that is required to “have a

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103. See McLaughlin, *21st Century*, *supra* note 6, at 719 (arguing that giving “nonprofit holders the freedom to sell, trade, swap, release, or otherwise dispose of perpetual conservation easements as they might see fit from time to time . . . would be contrary to . . . federal tax law perpetuity requirements”).

104. *Id.*

105. See Jane Ellen Hamilton, *Understanding the Debate About Conservation Easement Amendments*, SAVING LAND, Winter 2014, at 14, 19, <https://www.landtrustalliance.org/news/understanding-debate-about-conservation-easement-amendments> [<https://perma.cc/B6BU-A6NF>] (“Proponents of treating conservation easements as private agreements that may be amended at the parties’ discretion believe that this approach better fulfills the needs of the public benefitted by the conservation easement over time, gives land trusts appropriate and needed flexibility to address change, and reduces cost, time and the risk of politicizing amendment decisions.”).

106. The Staff of the Senate Committee on Finance, in a 2005 report in regard to the committee’s investigation of The Nature Conservancy, explained that “[m]odifications to an easement held by a conservation organization may diminish or negate the intended conservation benefits, and violate the present law requirements that a conservation restriction remain in perpetuity.” STAFF OF S. COMM. ON FINANCE, 109TH CONG., REP. ON THE NATURE CONSERVANCY: EXECUTIVE SUMMARY 9 (2005), <https://www.finance.senate.gov/imo/media/doc/tnccontents.pdf> [<https://perma.cc/N373-YCCV>]. While important to note, the committee staff’s concerns are not relevant in the case of *BC Ranch II* as the majority concluded that any boundary modification would not detract from the conservation purposes of the easement. See *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 554 (5th Cir. 2017).

107. See *BC Ranch II*, 867 F.3d at 553 (“The benefit to NALT is especially significant in this case in which the perpetuity of the easements is further ensured by NALT’s virtually unrestricted discretion to withhold consent to any modifications.”).

commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.”<sup>108</sup>

However, this brings up the issue of which agency or organization is best-suited to ensure that the easement holder is properly carrying out its duties, including protecting the easement in perpetuity. Common sense might indicate that this job is best left to the IRS. However, “the authority of the IRS to require that holders enforce conservation easements consistent with their terms and stated purposes over the long term is uncertain.”<sup>109</sup> In fact, the attorney general of the state in which the easement holder organization is formed is supposed to be the primary enforcer of the easement holder’s duties, not the IRS.<sup>110</sup> However, in reality, the issue of how to police easement holders is further magnified by the fact that charitable organizations that work in conservation easements are largely self-regulated (i.e., they are expected to police themselves).<sup>111</sup> As a result, in the event that an easement holder fails to enforce the easement, the IRS and the states’ attorneys general are nonetheless essentially left powerless, without basic “enforcement tools.”<sup>112</sup>

Nonetheless, as the Land Trust Alliance (LTA) has acknowledged, the IRS has a “direct interest in the operation of all nonprofits and in amendments to easements for

108. Treas. Reg. § 1.170A-14(c)(1) (as amended in 2018). An “eligible donee” (i.e., qualified easement holder) per the regulations is an organization that is “organized or operated primarily or substantially for one of the conservation purposes” in the Code (e.g., the protection of wildlife habitat) but also includes government entities and 501(c)(3) charitable organizations. *Id.* For example, the majority in *BC Ranch II* noted that NALT surveys the conservation area and “has repeatedly found it to be in good condition and in compliance with the terms of the easements.” 867 F.3d at 550.

109. McLaughlin & Weeks, *supra* note 102, at 80. For instance, the Senate Finance Committee Report discussing § 170(h) of the Tax Treatment Extension Act of 1980 describes the role of easement holders in enforcement:

By requiring that the conservation purpose be protected in perpetuity, the committee intends that the perpetual restrictions must be enforceable *by the donee organization* (and successors in interest) against all other parties in interest (including successors in interest). . . . The requirement that the conservation purpose be protected in perpetuity also is intended to limit deductible contributions to those transfers which require that the donee (or successor in interest) hold the conservation easement . . . exclusively for conservation purposes (i.e., that [the easement] not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction . . . exclusively for conservation purposes).

S. REP. NO. 96-1007, at 14 (1980) (emphasis added), <https://www.finance.senate.gov/imo/media/doc/Rpt96-1007.pdf> [<https://perma.cc/A5DX-5VAT>]; *see also id.* at 80 n.308.

110. Colinvaux, *supra* note 9, at 764.

111. *See, e.g.,* McLaughlin, *21st Century*, *supra* note 6, at 705–06 (noting that the Land Trust Accreditation Commission, a supporting organization of the LTA, is a self-regulatory body); *see also* STAFF. OF S. COMM. ON FINANCE, 109TH CONG., REP. ON THE NATURE CONSERVANCY: EXECUTIVE SUMMARY 9 (2005), <https://www.finance.senate.gov/imo/media/doc/tnccontents.pdf> [<https://perma.cc/TB46-SPMQ>] (investigating the organization’s management and real estate sales, including valuation of land donations).

112. Colinvaux, *supra* note 9, at 764, 766 (noting that the IRS lacks the ability to regulate qualified easement holders, and reforms involve providing the IRS with greater enforcement tools in this regard).

which landowners took tax deductions.”<sup>113</sup> For instance, the IRS examines charitable organizations’ “efforts to monitor and enforce conservation easements,” as tax “[e]xempt organizations are required to file a Form 990<sup>114</sup> annually with the [agency].”<sup>115</sup> It is understandable and certainly prudent for the IRS to have the primary role in determining deductibility of the conservation easement. However, this Note agrees with the Fifth Circuit’s suggestion that it is less desirable and understandable for the IRS to police land trusts for potential modifications to the easement—modifications that may never happen. This Note argues that the IRS is not in the best position to monitor and enforce the easement duties when the donor and the easement holder have come to a mutually beneficial agreement—as long as parts of the easement are not replaced “lock, stock, and barrel,” as was the case in the easement in *Belk*.<sup>116</sup>

### B. Valuation Gaming in the Context of Perpetuity

In *BC Ranch II*, in addition to the Commissioner’s arguments regarding the perpetuity requirement,<sup>117</sup> the Commissioner also asserted that the conservation easements at issue were grossly overvalued for the purposes of the charitable deduction (the combined deductions were \$15.9 million for the value of the easements).<sup>118</sup> The Commissioner’s expert reported that one easement was 1600% higher than its real value, and the other easement was 1300% higher than its real value.<sup>119</sup> However, the Fifth Circuit declined to address the question of valuation since it had not been examined by the Tax Court and then remanded the case (while vacating other portions, including those involving perpetuity) to the Tax Court to determine, among other grounds, whether the easements were overvalued.<sup>120</sup> The lack of discussion over potential overvaluation of the easements by the Tax Court and the fact that the IRS did not press this issue further is curious.

In December 2016, at the end of the Obama administration, the IRS issued a notice<sup>121</sup> alerting taxpayers that the IRS will now consider syndicated conservation

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113. LAND TR. ALLIANCE, AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES LAND TRUST ALLIANCE 4 (Sylvia Bates & Mary Burke eds., 2d ed. 2017) (ebook), <http://s3.amazonaws.com/landtrustalliance.org/AmendingConservationEasements-2nd-Edition.pdf> [<https://perma.cc/RP9Y-BC52>]; see also *supra* note 98.

114. I.R.S. Form 990, Return of Organization Exempt from Income Tax (2017), <https://www.irs.gov/pub/irs-pdf/f990.pdf> [<https://perma.cc/A8KM-88XZ>].

115. Robert W. Wood, *Conservation Easements, the IRS & Charity*, MONT. LAW., April 2008, at 9, 11, [http://www.woodllp.com/Publications/Articles/pdf/conservation\\_easements\\_the\\_IRS.pdf](http://www.woodllp.com/Publications/Articles/pdf/conservation_easements_the_IRS.pdf) [<https://perma.cc/6PCH-TYC4>].

116. *BC Ranch II, L.P. v. Comm’r*, 867 F.3d 547, 553 (5th Cir. 2017).

117. Answering Brief for Appellee, *supra* note 71, at 72.

118. See *BC Ranch II*, 867 F.3d at 550.

119. Answering Brief for Appellee, *supra* note 71, at 72. (“The Commissioner’s expert determined that the actual value of the 2005 easement was \$525,057, yet BCR I reported a value of \$8.4 million — 1,600% higher than the actual value . . . . The Commissioner’s expert determined a value of \$571,221 for the 2007 easement, yet BCR II’s reported value was \$7.5 million — 1,300% higher than the actual value.”).

120. *BC Ranch II*, 867 F.3d at 560.

121. I.R.S. Notice 2017-10, 2017-4 I.R.B. 544, <https://www.irs.gov/pub/irs-drop/n-17>

easements to be tax avoidance transactions (i.e., listed transactions) and that the agency will now require disclosure of such transactions.<sup>122</sup> The notice describes that in “a syndicated conservation easement transaction, a promoter offers prospective investors in a partnership or other pass-through entity . . . the possibility of a charitable contribution deduction for donation of a conservation easement.”<sup>123</sup> By its own account in the notice, the IRS is primarily concerned with overvaluation in the context of syndicated easements.<sup>124</sup> A preliminary investigation by the IRS of syndicated partnerships has shown that for each dollar invested in such schemes, an average of nine dollars was taken as a tax deduction.<sup>125</sup> Adam Looney, an economist at the Brookings Institution, has estimated that the revenue loss from syndications in 2016 was between \$1.3 billion and \$2.4 billion, up from \$1 billion to \$1.9 billion in 2015, and that the surging was due to abusive tax gaming through syndicated transactions.<sup>126</sup>

It is likely that the IRS targeted the conservation easements in *BC Ranch II*, at least in part, because the underlying transaction appears to have involved a syndicated partnership similar to that described in the IRS notice. In fact, Stephen Small, who initially helped to draft the 1986 Treasury regulations, commented that the structure of the transaction in *BC Ranch II* was a version of a syndicated transaction that he had observed, where “developers were devising complicated

-10.pdf [<https://perma.cc/ULS9-6LTQ>]; see also Peter J. Reilly, *New IRS Scandal – Syndication of Conservation Easement Deductions*, FORBES (Jul. 24, 2017, 11:25 AM), <https://www.forbes.com/sites/peterjreilly/2017/07/24/new-irs-scandal-syndication-of-conservation-easement-deductions/#43f0f3df6b33> [<https://perma.cc/XQ7V-EYDJ>] (commenting that past conservation easement abuses do not “hold[] a candle to syndicated easements”). The Partnership for Conservation has come out against the notice providing five primary concerns with it. *Our Position on IRS Notice 2017-10*, PARTNERSHIP FOR CONSERVATION, <https://partnershipforconservation.org/position-paper-irs-notice-2017-10-recommended-solutions> [<https://perma.cc/3YYU-S8XR>]. Whereas, the LTA has shown support for the notice. Lori Faeth, *It’s Time to Stand Up for IRS Notice 2017-10*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/blog/it%E2%80%99s-time-stand-irs-notice-2017-10> [<https://perma.cc/EPV4-A9A7>].

122. I.R.S. Notice 2017-10, 2017-4 I.R.B. 544, at 4–5, <https://www.irs.gov/pub/irs-drop/n-17-10.pdf> [<https://perma.cc/AR7N-FNVL> Edit].

123. *Id.* at 2.

124. *Id.* at 3 (“The IRS intends to challenge the purported tax benefits from this transaction based on the overvaluation of the conservation easement.”).

125. Peter Elkind, *The Billion-Dollar Loophole*, FORTUNE (Dec. 20, 2017), <http://fortune.com/2017/12/20/conservation-easement-tax-deduction-loophole> [<https://perma.cc/7PFN-GGEL>]; Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement> [<https://perma.cc/M2BP-26ZJ>]; see also Letter from John A. Koskinen, Comm’r, IRS, to Senator Ron Wyden 1 (July 13, 2017), <http://s3.amazonaws.com/landtrustalliance.org/7.13%20Wyden%20Response.pdf> [<https://perma.cc/93FJ-ZGZY>] (“The average contribution deduction from this preliminary analysis was 9 times the amount of the investment in the transaction (computed by excluding a few outlier disclosures that would otherwise have skewed the result higher).”).

126. Looney, *supra* note 125.

transactions in which an investor bought into the project and received a deduction for a conservation easement plus the ownership of a house lot.”<sup>127</sup>

As briefly mentioned in the Introduction of this Note, an important question raised here is whether the IRS is litigating the perpetuity requirements in a minor, formulistic manner (e.g., litigating potential minor modifications to an easement) to evade the murky waters of valuation games<sup>128</sup> played by the taxpayer. It certainly appears this way, at least in the case of *BC Ranch II*. Disallowance of a charitable deduction on the basis of failing to meet the perpetuity requirements is a “silver bullet”<sup>129</sup> for the IRS. For that reason, it seems likely that, in some instances, the IRS attempts to solve complicated overvaluation issues under the guise of attacking noncompliance with the perpetuity requirements. If this is, in fact, what the IRS is attempting, then it is unacceptable, as the agency is failing to attack true instances of abuse in conservation easements.<sup>130</sup> If overvaluation is a chief concern of the IRS (as recognized in the notice), then it should litigate such abuse, rather than expend valuable time and resources litigating perpetuity, which for all intents and purposes is a mere technical hurdle to overcome.<sup>131</sup> In other words, perpetuity should not supplant the requirement that taxpayers provide a proper valuation of the land they donate for conservation purposes.<sup>132</sup>

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127. Stephen J. Small, *A Modest Legislative Proposal to Shut Down Specific Tax Shelters*, TAX NOTES, May 23, 2016, at 1085, 1089 (emphasis omitted), <http://www.stevesmall.com/wordpress/wp-content/uploads/Small-05-23-2016.pdf> [<https://perma.cc/6F66-Q7V2>].

128. *See Exempt Organizations: Enforcement Problems, Accomplishments, and Future Direction: Hearing Before the S. Comm. on Finance*, 109th Cong. 10 (2005) (written statement of Mark W. Everson, Comm’r of IRS), <https://www.finance.senate.gov/imo/media/doc/metest040505.pdf> [<https://perma.cc/YP9W-X4JN>] (“Overvaluations are difficult to identify, substantiate and litigate. Further, donors and the recipient charities do not have adverse interests that would help establish a correct valuation.”).

129. The term “silver bullet” was aptly used by Professor McLaughlin to describe the IRS’s attempt to disallow conservation easement deductions on failure to properly substantiate the easement. McLaughlin, *21st Century*, *supra* note 6, at 711–12. However, the term applies equally to perpetuity because if perpetuity is not satisfied, then the entire deduction is disallowed.

130. In 2014, taxpayers deducted \$3.2 billion in charitable contributions for conservation easements, resulting in a reduction of \$1.3 billion in tax liability. Looney, *supra* note 125. Such deductions tripled between 2013 and 2014. *Id.*

131. Many tax practitioners also agree that overvaluation is the primary area of abuse in the conservation easement program. *See, e.g.,* Levitt & Wooldridge, *supra* note 19 (“The real threat of abuse in conservation easement deductions lies in overvaluation of the easement.”); Letter from Randy Bampfield, Legal Comm. Co-Chair, P’ship for Conservation, to Scott K. Dinwiddie et al., IRS Office of Chief Counsel, at 3 (Nov. 8, 2016), <http://src.bna.com/kfu> [<https://perma.cc/SB6H-295H>] (commenting that the IRS should explore options that “will increase transparency and get to the root of abusive transactions” and that “[s]uch options should focus on over-valuation, which . . . is the greatest possible area of abuse under Section 170(h)”).

132. The IRS has further noted that the agency “ha[s] seen taxpayers, often encouraged by promoters and armed with questionable appraisals, take inappropriately large deductions for easements.” *Conservation Easements*, IRS, <https://www.irs.gov/charities-non-profits/conservation-easements> [<https://perma.cc/P6F5-KTV4>] (last updated Apr. 3, 2018); *see also* McLaughlin, *Valuation Conundrum*, *supra* note 18, at 267 (“The case law . . . suggests

By focusing on perpetuity, the IRS is explicitly acting against congressional intent<sup>133</sup> to allow charitable deductions for easements (and curb abuse), while potentially discouraging donors from contributing bona fide easements for conservation.<sup>134</sup> Perhaps the *BC Ranch II* decision demonstrates that the Tax Court decided to disallow the deductions on weaker grounds and should have been more concerned with valuation, in addition to the fact that the IRS should have focused on litigating the valuation issue rather than the perpetuity requirement, if that was the area of true concern with the partnerships' deductions.

This Note advocates for a flexible approach, as applied by the Fifth Circuit in *BC Ranch II*, enabling the IRS and the courts to use their limited time and resources in a more efficient manner by preventing litigation over minor technicalities in perpetuity and focusing more on abusive valuation practices.

### *C. The Flexible Approach Furthers Congressional Intent*

Although seemingly at odds with the express language of the Code (and the Treasury regulations), the IRS and the courts should utilize a flexible approach to perpetuity because such an approach is consistent with Congress's wishes to allow charitable tax deductions for easements that further conservation efforts—a matter to which the legislature has had a longstanding commitment.<sup>135</sup> To illustrate, tax attorney Anson Asbury, for example, has advocated that a less rigid standard should be employed by the IRS and the courts because it closely aligns with congressional intent to incentivize taxpayers to donate land for conservation purposes.<sup>136</sup> Asbury has posited that perpetuity restrictions on the donor's property were offered “as an objectively measured proxy for the donor's intent,” arguing that this is supported by the brief legislative history of the provisions.<sup>137</sup> Therefore, the congressional intent of the requirements “has been lost in courtroom battles on technical readings of regulations that established that theoretical objective standard.”<sup>138</sup> Similarly, Joseph Ecyer, an editor for Bloomberg Tax, when discussing the *BC Ranch II* decision specifically, questioned whether the Fourth Circuit was correct in reading the

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that overvaluation has been a persistent problem in the conservation easement donation context. In addition, the prevalence of overstatements in the recent cases, and the fact that the taxpayers asserted values for their easements that were, on average, ten times the court-determined correct values, suggest that the problem of overstatements has worsened over time.”).

133. See *infra* Section III.C.

134. See Letter from Senator Christopher S. Murray and Senator Richard Blumenthal to John Koskinen, Comm'r, IRS 1 (Feb. 23, 2016), <https://www.sirote.com/media/28949/22316-irs-conservation-easement.pdf> [<https://perma.cc/74K9-TGBD>] (“[W]e are deeply troubled by a trend recounted by a number of constituents who have chosen to conserve their properties, especially given Congress's strong and unambiguous support of the charitable deduction. These constituents describe audits focused on their donation of a conservation easement as antagonistic, aggressively adversarial, lengthy, and expensive—even when the final result is a ‘no change’ letter from the Service.”).

135. See *supra* note 41 and accompanying text.

136. Asbury, *supra* note 13, at 28.

137. *Id.*

138. *Id.*

perpetuity requirement for the purposes of § 170(h)(2)(C) as narrowly as the *Belk* court did.<sup>139</sup> Ecuyer suggested that it appears the IRS is relying on technicalities to disallow these deductions, which is contrary to Congress's intent to encourage conservation easement contributions.<sup>140</sup>

Encouraging taxpayer donations through flexible interpretation is also an important consideration for land trusts.<sup>141</sup> For instance, Leslie Ratley-Beach, Conservation Defense Director for the Land Trust Alliance, has articulated that the IRS is thwarting Congress's intent to encourage conservation easements when it denies otherwise legitimate deductions on procedural compliance grounds.<sup>142</sup> Drew Troyer, Chairman of the Compatible Lands Foundation, further argues that private landowners have an important role in advancing conservation efforts through easements because these landowners effectively subsidize the cost of the land that the government would otherwise have to purchase and manage with federal (or state) funds.<sup>143</sup>

In contrast to the above perspectives, Professor McLaughlin suggests that the perpetuity requirements should be enforced strictly to curb abuse and facilitate compliance.<sup>144</sup> McLaughlin argues that, when enhancing incentives for taxpayers to donate conservation easements, Congress largely ignored the abuses present in the case law.<sup>145</sup> Thus, given the increasingly public investment in tax-deductible easements, one suggestion for reform is for the Treasury Department to provide guidance that would reduce transaction costs for parties involved in the conservation easement process, as well as reduce audits and litigation overall.<sup>146</sup> However, this viewpoint fails to recognize that the perpetuity requirements should not be used to limit abuse as an end run around attacking overvaluation.<sup>147</sup> Congress has remained steadfast in its support of the deduction for over three decades by not amending the law<sup>148</sup> and by adding tax incentives to foster easement donations.<sup>149</sup> Therefore, strict enforcement of perpetuity, rather than flexibility, would contradict congressional movement towards increasing the scope of the conservation easement program.

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139. Joseph J. Ecuyer, *To Be Contiguous, or Not to Be Contiguous – The Fifth Circuit's Folly*, BLOOMBERG: ESTATE TAX BLOG (Oct. 11, 2017), <https://www.bna.com/contiguous-not-contiguous-b73014470728> [<https://perma.cc/9K55-EMFB>].

140. *Id.*

141. *See, e.g.*, Van den Berg, *supra* note 11, at 21.

142. *Id.*

143. Drew Troyer, *New IRS Guidelines Deter Private Land Conservation, Thwart Congressional Intent*, POLITICO (Oct. 3, 2017, 10:03 AM), <http://www.politico.com/sponsor-content/2017/10/03/new-irs-guidelines-deter-private-land-conservation-thwart-congressional-intent> [<https://perma.cc/QC9C-DGD9>] (“Whether the land being conserved is owned by an individual, a family partnership or an investment partnership, all private landowners play an important role advancing needed conservation projects.”).

144. McLaughlin, *Essential Perpetuity Requirements*, *supra* note 8, at 8.

145. *Id.* at 6.

146. *Id.* at 6, 9.

147. *See supra* Section III.A.2.

148. *See* Tax Cuts and Jobs Act of 2017, H.R. 1, 115th Cong. (2017).

149. *See supra* notes 13 and 19 (describing tax incentives for conservation easements approved in the Pension Protection Act of 1996 and Taxpayer Relief Act of 1997).

## IV. ADDRESSING THE ARGUMENTS AGAINST THE FLEXIBLE APPROACH

There are downsides to the flexible approach (as opposed to a technical reading), particularly for the government. First, private conservation easements decrease federal revenues because of the considerable tax deductions allowed.<sup>150</sup> Professor Roger Colinvaux estimates that \$3.6 billion in total revenue was lost over the six-year period between 2003 and 2008, without including corporate donations of conservation easements.<sup>151</sup> Furthermore, Adam Looney has found that, according to preliminary IRS reports, total deductions by taxpayers for conservation easements tripled in 2014, rising from \$971 million in 2012 to \$1.1 billion in 2013 to \$3.2 billion in 2014.<sup>152</sup> If courts were to follow the Fifth Circuit's approach in *BC Ranch II*, it could be expected that more deductions (often six-figure deductions)<sup>153</sup> would pass muster because they would not be disallowed for the purposes of the perpetuity requirements, thereby further decreasing government revenue.

However, an argument based on revenue loss can only go so far. Congress is presumably aware of the revenue gains that could be provided from reforming (or dropping) the charitable deduction for conservation easements. Further support for Congress's commitment to allowing such deductions is found in the latest tax overhaul that maintains the deduction provisions as the legislature created them decades ago (including the tax benefits for such donations added in the timespan from when the law was enacted).<sup>154</sup>

Furthermore, while some might argue that a flexible approach leaves the door open for abusive practices by the taxpayer, the potential for abuse in the context of perpetuity is likely overblown because the root issue in taxpayer abuse is overvaluation of easements.<sup>155</sup> Valuation gaming by the taxpayer should be the IRS's focus, not insignificant modifications, for instance, that do not encroach on the perpetuity of the easement. This is not to say that all modifications to the conservation easement should be allowed wholesale. But some flexibility is

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150. McLaughlin, *21st Century*, *supra* note 6, at 716.

151. Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 9 n.26, 9–10 (2012).

152. ADAM LOONEY, BROOKINGS INST., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 3 (2017), [https://www.brookings.edu/wp-content/uploads/2017/05/looney\\_conservationeasements.pdf](https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf) [<https://perma.cc/YPV9-UEPG>].

153. McLaughlin, *21st Century*, *supra* note 6, at 715–16.

154. *See* Tax Cuts and Jobs Act of 2017, H.R. 1, 115th Cong. (2017); *see also* Letter from Senator Christopher S. Murray and Senator Richard Blumenthal to John Koskinen, Comm'r, IRS 1 (Feb. 23, 2016), <https://www.sirote.com/media/28949/22316-irs-conservation-easement.pdf> [<https://perma.cc/396W-EQ3U>] (recognizing the high value of conservation easement donations to the IRS, but stating that “[t]he record is clear: Congress values the conservation of land protection by private landowners through the charitable contribution of conservation easements”).

155. *See* Adam Looney, *Abuse of Tax Deductions for Charitable Donations of Conservation Lands Are on the Rise*, BROOKINGS (June 1, 2017), <https://www.brookings.edu/research/abuse-of-tax-deductions-for-charitable-donations-of-conservation-lands-are-on-the-rise> [<https://perma.cc/JNU9-M433>] (“[S]ome donors are abusing the provision by applying grossly inflated appraisals to the value of the easement to increase their charitable deduction.”); *supra* notes 131–132.



necessarily justified when two parties have agreed to allow the possibility for modification in the original deed of easement, as in *BC Ranch II*.

#### CONCLUSION

In response to uncertainty regarding the “in perpetuity” requirement for conservation easements, two approaches have emerged that courts have employed to resolve this uncertainty: one flexible, the other technical. Both of these options present different benefits and challenges in practice. However, as the conservation easement program’s primary goal is to preserve land and habitats from development, flexible, perpetual conservation easements, such as the one in *BC Ranch II*, provide the most appropriate mechanism for achieving this goal.

This Note urges the IRS and the courts to adopt a flexible approach when evaluating the perpetuity requirements for conservation easements because this approach respects Congress’s intent in enacting the Code provisions to allow such easement deductions, thereby promoting conservation values. Furthermore, less stringent focus on minor details related to perpetuity (such as potential modifications agreed upon by the easement donor and holder) will allow the IRS and the courts to address overvaluation of conservation easements, a chief issue in charitable deductions for such easements.