The "Interior" Revenue Service: The Tax Code as a Vehicle for Third-Party Enforcement of Conservation Easements

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THE TAX CODE AS A VEHICLE FOR
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CONSERVATION EASEMENTS

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Abstract: Conservation easements are increasingly popular. They protect undeveloped land by removing the development right from the landowner’s “bundle of sticks” and giving it to the party holding the easement. These easements confer a public benefit by protecting undeveloped land, dedicating it to use as a park, or preserving its ecosystem services. The Internal Revenue Code (the Tax Code) recognizes the public benefit, offering tax incentives for their donation to qualified organizations. However, the public does not have a vehicle to enforce the easements’ terms. Standing to enforce an easement is generally limited to the parties to the easement and, in some instances, the state attorneys general. This Note proposes a vehicle for collateral enforcement through the Tax Code. It proposes a citizen suit against the Commissioner of Internal Revenue for approving income tax deductions for conservation easements as a way to ensure an easement is beneficial to the public.

Introduction

Conservation easements have become very popular land preservation tools, particularly among the land trust community.1 As of 2005, there were over 1667 private land trusts operating in the United States collectively holding conservation easements that preserve over 6.2 million acres.2 The use of conservation easements has grown over the past


fifteen years, with steady increases in the annual rate of conservation.\(^3\) Between 1995 and 1998, land trusts encumbered an average of 165,000 acres annually through conservation easements.\(^4\) The average rose to 600,000 acres annually for 1999 and 2000.\(^5\) In 2001, 2002, and 2003, land trusts and similar organizations received or bought easements encumbering an average of 825,000 acres per year.\(^6\) Between 2000 and 2005, land trusts preserved 3.7 million acres, representing a 148% increase in the total acreage encumbered over the five-year period.\(^7\)

Beginning with a revenue ruling in 1964, the Internal Revenue Service (IRS) recognized charitable deductions for conservation contributions.\(^8\) The plain language of the Tax Reform Act of 1969 seemed to prohibit any deduction for contributions of partial interest;\(^9\) however, Congress intended “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.”\(^10\) Congress clarified the requirements for a deduction through a series of amendments between 1976 and 1980.\(^11\) For gifts made between 2006 and 2009, an easement donor may deduct the value of the easement up to fifty percent of her adjusted gross income for the current taxable year and for each of the next fifteen years or until the deductions exhaust the easement’s value.\(^12\) Congress allowed these enhanced incentives to lapse.\(^13\) Currently, the donation of

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\(^4\) Id.

\(^5\) Id.

\(^6\) Id.

\(^7\) See 2005 Land Trust Report, *supra* note 2, at 8 fig.2. Easements significantly outnumber other conservation tools. *Id.* In 2005, land trusts owned only 1.7 million acres, but they held conservation easements encumbering 6.2 million acres. *Id.*


\(^12\) 26 U.S.C. § 170(b)(1)(E) (2006); *see infra* Part II.B.

\(^13\) See § 170(b)(1)(E)(vi) (noting that the provision terminated on January 1, 2010). Congress is likely to extend the incentives, retroactive to January 1, 2010. See Maryland Environmental Trust, Tax Benefits of Donating a Conservation Easement, http://www.dnr.state.md.us/met/taxbenefits.html (last visited May 13, 2010). In fact, legislation is pending
a conservation easement qualifies for an income tax deduction up to thirty percent of the value of a donor’s adjusted gross income.\textsuperscript{14} The donor can carry forward the value of the easement donation for each of the next five years or until the deductions exhaust the value of the easement.\textsuperscript{15}

Given the public investment in foregone revenue and the environmental benefit at stake in land conservation, many commentators have made arguments supporting third-party standing to enforce conservation easements.\textsuperscript{16} This Note takes an alternative approach that focuses on the income tax deductions available under § 170(h) of the United States Internal Revenue Code.\textsuperscript{17} This Note argues that an aggrieved third party can enforce a conservation easement collaterally by suing the Commissioner of Internal Revenue (Commissioner) under 5 U.S.C. §§ 702 and 704 for unlawfully approving an income tax deduction under 26 U.S.C. § 170(h).\textsuperscript{18} The plaintiff would bring suit for an order requiring the Commissioner to find a deficiency in the taxpayer’s income tax return.\textsuperscript{19} Tax incentives for conservation contributions are major factors for many property owners;\textsuperscript{20} challenging the owners’ income tax deductions can provide a way to ensure that conservation easements further legitimate conservation purposes that provide substantial public benefits.\textsuperscript{21}

\section*{I. Conservation Easements and Third Party Standing}

\subsection*{A. Conservation Easements}

A conservation easement is an interest in real property that imposes “limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recrea-
tional, or open-space use, protecting natural resources, maintaining or enhancing air or water quality.”

It is a “recorded deed restriction under which [the owner] give[s] up some or all of the development rights associated with [her] property.” The land owner reserves the right to occupy and use her land; however, she and her successors in interest cannot engage in activities that are destructive or otherwise inconsistent with preserving the land’s conservation values.

The parties to the easement should view its terms as permanent and unchangeable; however, amendments are inevitable. Amendments are likely to impact property value; therefore, they also have tax consequences for the donor, including the possibility of penalties under § 6662 of the tax code. Generally, the easement holder should not permit an amendment that increases the net value of the property.

Conservation easements are usually negative servitudes held in gross. Traditionally, courts were reluctant to enforce such easements because of concerns over the accuracy of recordation systems and re-

26 26 U.S.C. § 6662 (2006); see, e.g., Strasburg v. Comm’r, 79 T.C.M. (CCH) 1697, 1704–05 (2000); Byers & Ponte, supra note 25, at 188.
27 Byers & Ponte, supra note 25, at 188.
28 Kenton W. Hambrick, Charitable Donations of Conservation Easements: Valuation, Enforcement and Public Benefit, 59 Taxes 347, 348 (1981). In gross means the easement is personal to the holder and not dependent on the holder’s possession of a neighboring, appurtenant parcel. See Cheever, supra note 24, at 1081; Nancy A. McLaughlin, Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation, 41 U.C. Davis L. Rev. 1897, 1900 n.3 (2008). Some transactions include the donation of a small piece of land neighboring the burdened land so the donated easement is appurtenant. McLaughlin, supra, at 1901–02.
straints on free alienability of the land. Animating both concerns was the fear that servitudes may restrict marketability of title, preventing the sale of land that would dedicate the parcel to its most economically efficient or profitable use. Trends in federal law encouraged urban and suburban expansion. Consequently, rural areas surrounding major urban centers transitioned from rural, agricultural uses to suburban developments. As American society began to reject full development, state and local governments experimented with conservation servitudes to supplement zoning ordinances and preserve open spaces.

Realizing the need for increased conservation, all fifty states and the District of Columbia have enacted enabling statutes that “remove[] the potential common law impediments” to conservation easements. Rhode Island, wanting to protect its unique history and landscape without great expense to itself, “grant[ed] a special legal status to conservation restrictions” in order to ensure their “legal effect and enforceability.” The enabling statute for the District of Columbia provides that a conservation easement is valid even though it “is not of a character that has been recognized traditionally at common law.” Georgia’s enabling statute, which is also modeled on the Uniform Conservation Easement Act (UCEA), contains similar language incubating conservation easements from any common law infirmities.

33 Korngold, supra note 30, at 455–56.
34 See Seznec, supra note 32, at 480–81.
35 McLaughlin, supra note 28, at 1900 & n.5 (listing all of the state enabling statutes).
B. Enforcing Conservation Easements

As with any lawsuit filed in federal court, a plaintiff enforcing an easement must have standing.39 Standing is a doctrine of justiciability rooted in the Case or Controversy Clause in Article III of the United States Constitution.40 Standing requires the plaintiff to show that she has suffered a legally cognizable injury that was both caused by the defendant’s conduct and can be redressed by judicial decree.41

1. Parties to the Easement

On the model created by the UCEA, there are four parties who have standing to bring a lawsuit concerning the terms or existence of a conservation easement.42 The first two are the owner of the burdened parcel and the easement holder.43 Should the owner engage in activity that undermines the land’s conservation values, the easement holder may file suit to enjoin or otherwise restrain the owner’s inconsistent use.44 An organization holding conservation easements is required by Treasury Regulations to show a willingness to enforce its easements, and best practices counsel organizations to have enforcement plans in place.45

Easement holders may be reluctant to initiate formal legal action for fear that the resulting controversy may alienate the private landowners and the communities with whom they work.46 Anticipating a lack of will or resources, some easements include a clause conferring a right of enforcement on a third party.47 The UCEA provides that a third-party enforcement right may only be granted to a governmental body or

40 U.S. Const. art. III, § 2; Warth, 422 U.S. at 498.
43 Id. § 3(a)(1)–(2). The owner can sue to enforce a change to the terms and conditions, extinguish the easement, or, should the easement impose positive obligations on the holder, to compel their performance. Id. § 3, cmt. The other two parties are the third parties as stated in the easement and any “person authorized by other law.” Id. § 3(a)(3)–(4).
44 Hambrick, supra note 28, at 354.
45 Treas. Reg. § 1.170A-14(c) (2009); Byers & Ponte, supra note 25, at 159–60.
47 See Byers & Ponte, supra note 25, at 172 (noting that the easement instrument should clearly spell out the third party’s rights in relation to the easement holder).
charitable organization that qualifies to hold the easement in the first instance; it may not be given to individuals.\textsuperscript{48} Including a provision providing for third-party enforcement may require express authorization in the state enabling statute. However, the practice is common and there are cases where the court allowed third-party enforcement absent express authorization in the state’s enabling statute.\textsuperscript{49} Furthermore, state enabling statutes may also include provisions granting standing to neighbors,\textsuperscript{50} or courts may interpret them broadly to confer standing on beneficiaries or state citizens.\textsuperscript{51}

2. State Attorneys General

The absence of third-party enforcement provisions in the easement instrument does not foreclose third-party standing.\textsuperscript{52} The state attorneys general may have standing under the charitable trust or public trust doctrines.\textsuperscript{53} For a trust to exist, a grantor must pass legal title in property to a trustee who has a fiduciary duty to manage the trust res for the benefit of designated persons or an ascertainable class of persons.\textsuperscript{54} Unlike a private, benevolent trust, which requires an ascertainable class of beneficiaries, a grantor with charitable intent may settle a trust for a recognized charitable purpose without designating specific beneficiaries.\textsuperscript{55} Should the trustee breach his duty, the state attorney general can

\begin{itemize}
\item \textsuperscript{50}See, e.g., 765 I.L.L. COMP. STAT. ANN. 120/4(c) (West 2001).
\item \textsuperscript{54}See Arpad, supra note 53, at 128.
\item \textsuperscript{55}Id. at 130; Susan N. Gary, \textit{Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law}, 21 U. HAW. L. REV. 593, 618 (1999); see \textit{Restatement (Third) Trusts} § 28 & cmt. a (2003) (providing incomplete enumeration of charitable purposes, including poverty relief, promoting education, advancing religion, promoting health, supporting
enforce the charitable trust on the community’s behalf.\textsuperscript{56} Absent express statutory authorization, the attorney general may argue that enforcement of an easement’s terms is clearly in the public interest and consistent with public trust principles.\textsuperscript{57} The attorney general would have to argue that the conservation easement can be “characterized as held in trust for the public’s benefit,” and the facts and circumstances, such as the grantor’s intent, support the attorney general’s argument.\textsuperscript{58} If the attorney general could convince the court that a conservation easement is held in trust for the public, the court could enforce its terms in equity.\textsuperscript{59}

State attorneys general may also base standing to enforce conservation easements on the public trust doctrine.\textsuperscript{60} The public trust doctrine provides that the state holds in trust for its citizens their inalienable rights to access and use the air, running water, sea, and sea shores.\textsuperscript{61} Joseph Sax’s seminal article\textsuperscript{62} served as a “call to arms” for environmentalists to use the public trust doctrine as a vehicle for improved environmental protection through the courts.\textsuperscript{63} Though it has been the subject of scholarly discussion, the public trust doctrine may not be a good candidate for third-party standing to enforce conservation easements.\textsuperscript{64} The concern for free “public access underlying the public trust doctrine is [a] different” goal than “preserving natural ecological functions,” which may require denying free public access and use of natural resources.\textsuperscript{65} Furthermore, the land subject to the easement would have to be classified as land held in public trust.\textsuperscript{66} Under New Hampshire governmental purposes, or promoting other purposes that are beneficial to the community); see also Unif. Trust Code § 405(a), 7C U.L.A. 485 (2006) (providing a list that mirrors the Restatement).

\textsuperscript{56} Restatement (Third) Trusts § 28 cmt. c (2003).
\textsuperscript{57} Jay, supra note 49, at 778.
\textsuperscript{58} Id.
\textsuperscript{60} Jay, supra note 49, at 778.
\textsuperscript{63} Smith & Sweeney, supra note 61, at 308.
\textsuperscript{64} Jay, supra note 49, 779–81.
\textsuperscript{66} Jay, supra note 49, at 780–81.
state law, “conservation easements purchased through [a land protection grant] are declared to be held in public trust by the state.”67 The Illinois Supreme Court has also expressed a willingness to confer standing broadly on the basis of the public trust doctrine.68 Jessica Jay argues that these situations are rare, and when land subject to a conservation easement is held in public trust, attorney general standing would flow from the land’s status as held in public trust instead of the conservation easement’s public benefit.69

3. Neighbors and Private Citizens

Two state enabling statutes provide standing for neighbors or other private citizens. Illinois has a generous provision for neighbor standing in its enabling statute, giving standing to any neighbor owning land within 500 feet of an easement-burdened parcel.70 In Tennessee, any citizen of the state, acting as a beneficiary, can enforce the terms of an easement transferred prior to July 1, 2005.71

Furthermore, if the neighbor has a special interest in the enforcement of a conservation easement that is arguably held in trust, she may have standing to sue to enforce its terms.72 Depending on state law, the neighbor or public citizen may have standing under charitable trust theory if the trust provides that the individual benefits under its terms in a way that is distinct from the general public.73 Because of the steps of interpretation required to construe the easement as property held in public trust, standing under this theory is hard to envision.74 The public trust doctrine may also confer standing on private citizens by showing that they “are constituents or taxpayers of a public trust that includes the easement-encumbered property.”75

Carol Necole Brown argues that “private parties should have a common law property interest in conservation easements sufficient to

67 Id. at 781; see N.H. REV. STAT. ANN. § 486-A:13 (2001).
68 See Paepcke v. Pub. Bldg. Comm’n, 263 N.E.2d 11, 18 (Ill. 1970) (holding that to tell taxpayers that they have to rely solely on state action would deny their rights under the public trust doctrine for all time).
69 Jay, supra note 49, at 781.
70 765 ILL. COMP. STAT. ANN. 120/4(c) (West 2001).
71 TENN. CODE ANN. § 66-9-307(b) (Supp. 2007).
73 Id. cmt. c.
75 Id. at 786.
confer standing to seek injunctive relief.” Brown’s argument draws on scholarship that seeks to reconstitute the proverbial bundle of sticks by making the metaphor more representative of the social and communal dimensions of property. Brown’s theory generates a new stick—a common law interest in all conservation easements—that is held by private citizens. By having a legally recognized interest in the easement, private citizens would have standing to enforce its terms. Brown argues that a common law property interest in conservation easements is an efficient mechanism for enforcement that respects both the conservation easement’s status as a private transaction as well as its public benefit. The common law interest in the conservation easement is also democratic in so far as it disperses decision-making about privately owned land that is protected for public benefit beyond the parties to the easement.

Another basis for citizen enforcement for conservation easements emerges from citizen-suit theory, which is common in environmental law. Sean P. Ociepka argues that citizen-suit provisions may provide a model for third-party enforcement. Congress anticipated that federal agencies might lack the resources or political will to enforce the laws. Anticipating weak enforcement, Congress included in many of the major environmental statutes citizen-suit provisions that permit citizens to bring lawsuits to enforce the provisions of the act. Citizen suits “would motivate governmental agencies to act on their nondiscretionary duties” under environmental statutes. In light of the public benefit at

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78 Brown, supra note 76, at 107–08.

79 *Id.* at 108–09.

80 See *id.* at 127.

81 See *id.* at 112, 132.


84 Ociepka, supra note 52, 245–48.


86 PLATER ET AL., supra note 83, at 407 & n.38.

87 Burrows, supra note 85, at 110.
stake, citizen enforcement of conservation easements would serve a similar purpose; should the easement holder fail to enforce the easement, a public citizen could do so.  


The Treasury “Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes . . . imposed” by the Code or any other internal revenue law. Each taxpayer is required to submit a return to allow the determination and assessment of the taxpayer’s liability. “If the Secretary determines that there is a deficiency” in the taxpayer’s reported liability with respect to income taxes, he must issue to the taxpayer a notice of deficiency before assessing the taxes. The taxpayer may file a petition for review with the Tax Court to challenge the deficiency finding; the failure to timely file a petition results in the assessment of the deficiency. If the taxpayer fails to pay her taxes after notice and demand, “the amount shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to that person.”

A. The Shape of the Incentive: Allowed Deductions and Their Value

Income tax deductions are taken against the taxpayer’s contribution base, defined as the taxpayer’s “adjusted gross income” calculated “without regard to any net operating loss carryback.” Gross income includes “income from whatever source derived.” “The applicable percentage of the contribution base varies depending on the type of donee organization and property contributed.” Prior to 2010, conser-

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90 Id. §§ 6201(a)(1), 6203.
91 Id. § 6212(a); see Laing v. United States, 423 U.S. 161, 173 n.18 (1976) (defining deficiency as “the amount of tax imposed less any amount that may have been reported by the taxpayer on his return”).
92 26 U.S.C. § 6213(a), (c).
93 Stephen C. Loadholt Trust v. Comm’r, 80 T.C.M. (CCH) 675, 677 (2000). Section 6323 generally requires the Commissioner to file a notice of federal tax lien with the appropriate state office or the local federal district court. 26 U.S.C § 6323(f).
95 Id. § 61(a).
96 Staff of Joint Comm. on Taxation, 109th Cong., Technical Explanation of H.R. 4, The “Pension Protection Act of 2006,” as Passed by the House on July 28,
vation easements receive special treatment. Unlike other capital assets, a taxpayer may deduct the value of a contributed conservation easement up to fifty percent of her contribution base.\textsuperscript{97} She can carry over the remaining balance for annual deductions over the next fifteen years or until she exhausts the easement’s value.\textsuperscript{98} Qualified conservation contributions are not taken into account in determining the amount of other allowable charitable contributions.\textsuperscript{99} After the lapse of these special provisions, conservation easements are subject to the general provisions provided in § 170(b).\textsuperscript{100} The donor may deduct thirty percent of the value of the contribution from the taxable income in the year that it is donated and for each of the next five years or until the value of the gift is exhausted by the donations.\textsuperscript{101}

The value of a real property interest contribution is the fair market value of the property at the time of contribution.\textsuperscript{102} For qualified conservation contributions, it is the fair market value of the perpetual restriction at the time of the donation.\textsuperscript{103} To determine its value, the easement may be compared with similar transactions for similar parcels.\textsuperscript{104} If no such market exists, valuation may be determined based on the difference between the fair market value of the parcel without the easement and its fair market value after it is burdened by the easement.\textsuperscript{105} If a taxpayer uses this “before and after” method, she needs to include in the valuation the likelihood that the property would be developed absent the easement as well as the potential impact that zon-
ing, conservation, or historic preservation laws may have on the value of the burdened parcel.\textsuperscript{106}

For both the fair market value and before and after valuation methods, the Code prohibits the donor from taking a deduction where the donor anticipates financial or economic benefits that exceed the benefits for the general public.\textsuperscript{107} The Code also prohibits the donor from taking a deduction where the property value is only marginally impacted or is actually increased by the easement.\textsuperscript{108} However, a deduction will not be denied if the donor receives some incidental benefit as a result of the conservation restrictions.\textsuperscript{109}

\textbf{B. The Incentives at Work: The Intersection of Financial and Conservation Values}

The allure of the income tax incentives provided in § 170(h) to potential conservation easement donors depends on the financial status of the landowner.\textsuperscript{110} Two categories of donors are particularly common in the scholarship: the land-rich, cash-rich landowner and the land-rich, cash-poor landowner.\textsuperscript{111} Land-rich, cash-rich landowners draw large incomes that also come with steep income tax liabilities.\textsuperscript{112} They are “the most appropriate targets of the federal tax incentives” because charitable income tax deductions are most attractive to high-income earners with large tax liabilities.\textsuperscript{113}

Land-rich, cash poor landowners possess property that has valuable development potential.\textsuperscript{114} However, if they donate an easement, they

\textsuperscript{106} Treas. Reg. § 1.170A-14(h) (3)(ii). The IRS adopted this form of valuation because “there is usually no substantial record of market place sales to use as a meaningful or valid comparison.” Rev. Rul. 73-339, 1973-2 C.B. 68.

\textsuperscript{107} Treas. Reg. § 1.170A-14(h) (3)(i).

\textsuperscript{108} Id. § 1.170A-14(h) (3)(ii).

\textsuperscript{109} Id. § 1.170A-14(e)(1).

\textsuperscript{110} See McLaughlin, \textit{supra} note 9, at 47–48.


\textsuperscript{112} See Jay, \textit{supra} note 111, at 456. In most cases, the tax incentives are not lucrative enough to recover the transaction costs and lost value associated with the donation. See McLaughlin, \textit{supra} note 9, at 49–50.

\textsuperscript{113} McLaughlin, \textit{supra} note 9, at 100.

\textsuperscript{114} Jay, \textit{supra} note 111, at 455–56. For this category of owner, which is often comprised of farmers or ranchers, the estate tax deductions are usually more of an incentive; by decreasing the property value, the owner can afford the state property taxes and her heirs will not need to sell the property in order to pay the estate taxes. Id.; see also Tapick, \textit{supra} note 59, at 263 & n.12. But see Daniel H. Cole, \textit{Pollution & Property: Comparing
lose the development value without the opportunity to recoup it through income tax savings because their income tax liabilities are relatively small.\textsuperscript{115} The loss is particularly acute for property owners that rely on their properties’ development value as a buffer against financial uncertainty, use it as collateral, or anticipate that the proceeds from a future sale may provide retirement income.\textsuperscript{116} Congress amended the Code in 2006 to increase the incentives for low-income donors.\textsuperscript{117} Even with the added twenty-percent deduction and the fifteen-year, carry-forward term, low-income individuals will not be able to recover a significant portion of the lost development value.\textsuperscript{118} For land-rich, cash-poor owners with property near urban areas, sale and development may be the only viable option to realize their properties’ full economic value.\textsuperscript{119}

This suggests that the tax deductions—absent other motives—do not create an incentive that is attractive enough to induce land conservation.\textsuperscript{120} It is true that many donors report that their primary concern is preserving the land in a natural condition.\textsuperscript{121} However, for many land-rich, cash-poor landowners, easements nonetheless allow them to protect their livelihood.\textsuperscript{122} Valuable property has high property tax burdens that many cash-poor property owners simply cannot afford.\textsuperscript{123}

\textsuperscript{115} McLaughlin, supra note 9, at 29.
\textsuperscript{116} Id. at 27–28.
\textsuperscript{117} Federal Pension Protection Act of 2006, Pub. L. No. 109-280, § 1206(a)(1), 120 Stat. 780, 1068 (codified in 26 U.S.C. § 170(b)(1)(E) (2006)). Congress enhanced the tax benefits for conservation easements by increasing the deductible percentage from thirty percent to fifty percent of the contribution base and extended the period to carry the deductions forward from five years to fifteen years. Id. Ranchers and farmers who satisfy § 2032A(e)(5)’s requirements and make more than fifty percent of their gross income from farming activities may deduct one hundred percent of their contribution base. 26 U.S.C. §§ 170(b)(1)(E) (iv)—(v), 2032A(e)(5) (2006). Congress did not extend these provisions when they terminated on December 31, 2009. See id. § 170(b)(1)(E)(vi); supra note 13.
\textsuperscript{118} See McLaughlin, supra note 9, at 101.
\textsuperscript{120} McLaughlin, supra note 9, at 48–49.
\textsuperscript{121} See Cole, supra note 114, at 62.
\textsuperscript{122} Stephanie L. Sandre, Conservation Easements: Minimizing Taxes and Maximizing Land, 4 Drake J. Agric. L. 357, 360 (1999).
\textsuperscript{123} Patricia E. Salkin & Amy Lavine, Land Use Law and Active Living: Opportunities for States to Assume a Leadership Role in Promoting and Incentivizing Local Options, 5 Rutgers J. L. & Pub. Pol’y 317, 357 (2008).
Furthermore, estate taxes may be prohibitively high, forcing the owner’s heirs to sell the property to pay the tax bill.\(^{124}\) A conservation easement, by depressing the property’s value, relieves tax burdens, allowing the owner and her family to continue using the land in a way consistent with its conservation values.\(^{125}\) Some donors also find emotional satisfaction in protecting the land; they love it so much they want it to remain undeveloped.\(^{126}\)

However, the popularity of conservation as a tax planning tool suggests the tax incentives play a role in donations.\(^{127}\) The tax deductions remove some of the disincentives or hurdles to conservation.\(^{128}\) For landowners who may be predisposed to conservation, the recovery of preservation costs through income tax deductions may provide the necessary incentive for them to protect their land.\(^{129}\) Conservation also incurs maintenance costs for tasks such as expelling trespassers or adverse possessors that can be offset through income tax deductions.\(^{130}\)

The incentives lure some landowners to donate easements.\(^{131}\) Affluent landowners who do not have plans to develop their land “are likely to aggressively” take advantage of the income tax benefits.\(^{132}\) While they may be the prime target for the easements, the incentives may attract donors and donations that fall outside of the scope of Congress’s intentions.\(^{133}\) Some landowners seek to take advantage of conservation easement deductions by developing and subdividing the land, but build fewer houses than allowed under local zoning laws.\(^{134}\) Developers may also want to conserve “unusable acres” that are left over after

\(^{124}\) Jay, supra note 111, at 456.

\(^{125}\) Id.


\(^{128}\) Cole, supra note 114, at 63.

\(^{129}\) Id.

\(^{130}\) Id. at 62.

\(^{131}\) Tapick, supra note 59, at 262; Coombes, supra note 127.

\(^{132}\) See McLaughlin, supra note 9, at 100.


the property has already been subdivided and developed.\textsuperscript{135} Golf course developers and owners have also sought to reap the tax advantages by burdening fairways or the open spaces separating the individual holes on a golf course.\textsuperscript{136}

C. Using the Incentive: Current Requirements for Income Tax Deduction for Qualified Conservation Contributions

“Generally, to be deductible as a charitable contribution under § 170 [of the Code], a transfer to a charitable organization must be a gift of money or property without receipt or expectation of receipt of adequate consideration or payment commensurate with the value of the gift.”\textsuperscript{137} While 26 U.S.C. § 170(f)(3)(A) requires that the donation be the owner’s full interest in the property unless it is donated in trust,\textsuperscript{138} there is an exception for conservation contributions.\textsuperscript{139} A donor can qualify for an income tax deduction if her donation is a qualified real property interest donated to a qualified organization exclusively for conservation purposes.\textsuperscript{140}

1. Qualified Real Property Interest

Under Treasury Regulation § 1.170A-14(b)(2), a perpetual conservation restriction “is a restriction granted in perpetuity on the use which may be made of real property . . . that under state law has attributes similar to an easement.”\textsuperscript{141} The perpetuity requirement ensures that the easement “will prevent uses of the retained interest [that are] inconsistent with the conservation purposes of the donation.”\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{135} See, e.g., Joe Stephens & David B. Ottaway, \textit{Developers Find Payoff in Preservation—Donors Reap Tax Incentive by Giving to Land Trust, but Critics Fear Abuse of System}, \textit{Wash. Post}, Dec. 21, 2003, at A1 (discussing a 450-acre development in Chester County, Pennsylvania that included a residual conservation easement encumbering an undevelopable flood plain).
\item \textsuperscript{136} Id.
\item \textsuperscript{139} \textit{Id.} § 170(f)(3)(B)(iii).
\item \textsuperscript{140} \textit{Id.} § 170(h)(1)(A)–(C).
\item \textsuperscript{141} \textit{Id.} § 1.170A-14(b)(2) (2009).
\item \textsuperscript{142} \textit{Id.} § 1.170A-14(g)(1). The requirement expresses the conviction that the land needs to remain undeveloped for long periods of time if its conservation benefits are going to accrue to the public. See Mary Ann King & Sally K. Fairfax, \textit{Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates}, 46 \textit{Nat. Resources J.} 65, 104 (2006).
\end{itemize}
property law generally governs for tax purposes. A conservation easement granted pursuant to a state enabling statute is presumed to satisfy the qualified real property interest requirement.

2. Qualified Organization

The four categories of qualified organizations are federal or state government entities, tax-exempt non-profit organizations, or some subsidiary of either of them over which they exercise control. A qualified organization must “have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions.” The commitment in principle does not need to be matched by the commitment of funds set aside to enforce any of the organization’s easements.

By restricting the parties that can receive conservation easements, the tax code ensures some measure of public accountability via “self-governing restraints.” Government agencies are accountable to the public through the democratic process. The checking power of democracy creates an incentive for government agencies “to accept only those easements that provide public benefit.” Recognizing that this check is imperfect, Congress included a requirement that the preservation be pursuant to a clearly delineated governmental conservation policy. Congress also limited the qualifying organizations to charities on the theory that charities are accountable to the public for their support in the form of donations or volunteer services. Compared to private foundations that are not dependent on private donations, chari-

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144 Treas. Reg. § 1.170A-14(b)(2). State marketable title acts do not disqualify conservation easements that are subject to re-recordation requirements. See id. § 1.170A-14(g)(3); Welsh, supra note 143, at 229 (describing re-recordation requirements).
146 Treas. Reg. § 1.170A-14(c).
147 Id.
148 Hambrick, supra note 28, at 354; King & Fairfax, supra note 142, at 92.
149 McLaughlin, supra note 10, at 60–61.
150 Id. at 61.
152 McLaughlin, supra note 9, at 61–62. In theory, a charity’s interest in maintaining a positive reputation and good relationship with its community operates as an indirect check on its activities. See King & Fairfax, supra note 142, at 92.
ties are more likely to both enforce the terms of their easements and to provide benefits to the general public.153

3. Conservation Purpose

The term “conservation purpose” means: (1) “[t]he preservation of land areas for outdoor recreation” and education; (2) the protection of natural wildlife habitat, fish, plants, or ecosystems; (3) the preservation of open space, including farmland and forests; or (4) “the preservation of a historically important land area or certified historic structure.”154 A contribution needs to satisfy only one of the four conservation purposes to qualify for a deduction.155

a. Recreation or Education

Donations of a qualified real property interest that preserve land areas for outdoor recreation and education of the general public meet Treasury regulations’ requirements.156 To qualify, the recreational or educational use by the general public must be substantial and regular.157 Because most easement donors do not want to grant access to their land for recreational activities, donors usually justify their donations under one or more of the other three categories.158

b. Significant Habitat or Ecosystem

The donation of a qualified real property interest qualifies for a deduction when it protects a “significant relatively natural habitat” for fish, wildlife, plant community, or similar ecosystem.159 The Tax Court adopted a plain meaning definition of habitat as “‘[t]he area or environment where an organism or ecological community normally lives or

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153 McLaughlin, supra note 9 at 61–62. Congress assumes that charities have to be responsive to their communities and the general public if they are to survive. Id.
157 Id. § 1.170A-14(d)(2)(ii).
159 Treas. Reg. § 1.170A-14(d)(3)(i). Significant habitats or ecosystems include, but are not limited to habitats for rare or endangered species, “natural areas that represent high quality examples of a terrestrial community or aquatic community,” or natural areas bordering national, local, or state parks that contribute to the parks’ ecological viability. Id. § 1.170A-14(d)(3)(ii). In addition to parks, this provision includes “nature preserve, wildlife refuge, wilderness area, and other similar conservation area.” Id.
occurs’ or ‘[t]he place where a person or thing is most likely to be found.’”160 The U.S. Court of Appeals for the Sixth Circuit followed the Tax Court in adopting the dictionary definition of habitat.161 The courts have also held that the size of the parcel is not a critical factor.162 What matters is the assurance that the rights and uses retained by the property owner do not undermine the conservation purpose.163 Furthermore, the Code does not require public access where the conservation easement protects environmental systems or natural habitat.164 While human interaction and alteration of the environment that allow “fish, wildlife, or plants [to] continue to exist . . . in a relatively natural state” do not foreclose taking the deduction, ecosystem fragility and the conservation of wildlife habitat may require the complete ban on public access.165

c. Preservation of Open Space

Open space easements, allowed under § 170(h)(4)(A) are both the most common and the most problematic type of conservation easement.166 The preservation of open space, which includes farmland and forest land, qualifies for tax deductions when the preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated federal, state, or local governmental conservation policy.167 It also must yield a significant public benefit.168

i. Scenic Enjoyment

A contribution to preserve open space for the scenic enjoyment of the public qualifies where “development of the property would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama” enjoyed from a neighboring park or wilderness area.169 The determination of whether a contribution of a conservation easement qualifies under the scenic enjoyment conserva-


161 Glass v. Comm’r, 471 F.3d 698, 708 (6th Cir. 2006).

162 Glass, 471 F.3d at 711.

163 See id.


165 Id. § 1.170A-14(d)(3)(i), (iii).


168 Id.

tion purpose is based on a subjective test that considers “all pertinent facts and circumstances germane to the contribution.” The test weighs factors such as variations in “topography, geology, biology, and cultural and economic conditions.” The taxpayer has to demonstrate the scenic characteristics of the donation, and show that there is a significant public benefit independent of the subjective, scenic quality of the land.

To assist the taxpayer in demonstrating the scenic quality of the donation, Treasury Regulation § 1.170A-14 provides a list of eight factors. The requirements are largely contextual, examining the relationship and compatibility of the burdened parcel and neighboring parcels, the proximity of urban areas, and the degree to which the land use “maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area.” Openness is a particularly important factor for urban or densely populated areas where the open space can provide relief from urban closeness. Other factors are aesthetic, weighing the degree of contrast and variety provided by the visual scene.

ii. Governmental Conservation Policy

Conservation easement donations are deductible as preserving open space where they further a clearly delineated governmental policy embodied in a “specific, identified conservation project.” In these instances, the donation extends the protection to types of property public officials have already deemed worthy of preservation or conservation. The acceptance of the easement by the governmental body tends to establish the requirement of a clearly delineated governmental policy. However, the regulations suggest that a rigorous review process—such as site-specific resolutions by boards of supervisors or plan-

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170 Id.
171 Id.
174 Id. § 1.170A-14(d)(4)(ii)(1), (4), (6).
175 Id. § 1.170A-14(d)(4)(ii)(3)–(4).
176 Id. § 1.170A-14(d)(4)(ii)(2), (5). The remaining factors examine whether the donated easement is consistent with government landscape inventories. Id. § 1.170A-14(d)(4)(ii)(7)–(8).
177 Id. § 1.170A-14(d)(4)(iii).
178 Id.
ning commissioners—is necessary where the donation is accepted by a land trust or similar organization on behalf of the government.\footnote{179 Treas. Reg. § 1.170A-14(d)(4)(iii)(B).}

iii. Significant Public Benefit

All contributions made to preserve “open space must yield a significant public benefit.”\footnote{180 Id. § 1.170A-14(d)(4)(iv).} The determination of public benefit is contextual; factors germane for one contribution may be irrelevant for another contribution.\footnote{181 Id.} The IRS provides guidance by listing factors it deems relevant in evaluating the significance of the public benefit conferred by the contribution.\footnote{182 Id. § 1.170A-14(d)(4)(iv)(A)(1)–(11).} The list of factors includes the “uniqueness of the property,” the intensity of land development and population density in the vicinity, the contribution’s consistency with government and private conservation activities in the area, and the degree to which development would degrade the area’s scenic quality.\footnote{183 Id.}

d. Exclusively for Conservation Purposes

Section 170(h)(5)(A) reiterates the perpetuity requirement.\footnote{184 26 U.S.C. § 170(h)(5)(A) (2006).} A deduction will not be denied simply because some incidental benefit accrues to the donor as a result of her donation.\footnote{185 Treas. Reg. § 1.170A-14(e)(1).} The requirement that the donation be exclusively for conservation purposes does not prohibit all activities on the land; uses that will not interfere with the conservation purposes advanced by the easement are allowed.\footnote{186 See id. § 1.170A-14(e)(2). Common examples are selective timber harvesting and non-industrial farming. See id.} A use that contravenes one conservation purpose is permitted, provided the use furthers a different conservation purpose.\footnote{187 Treas. Reg. § 1.170A-14(e)(3). For instance, an archeological investigation, using sound archeological practices, does not prevent a deduction even though it may interrupt or impair a scenic view. See id.}
III. 26 U.S.C. § 170(h) AS ENVIRONMENTAL LAW

A. The Transmission of Environmental Values into the Tax Code

The Code is generally concerned with the federal government’s assessment and collection of tax revenue.\(^{188}\) It is widely accepted that Congress may use its taxing power to further national objectives that are not related to the assessment and collection of revenue.\(^{189}\) The tax system may be utilized for nonrevenue ends when the goal is of overriding importance to society and the tax code offers the most effective means for achieving the objective.\(^{190}\)

Congress uses the Code as a vehicle for environmental protection.\(^{191}\) The tax incentives for conservation easements are simply one among many tax incentives geared towards environmental protection.\(^{192}\) For instance, farmers who conserve water without damaging wetlands are entitled to deduct the associated costs from their income taxes.\(^{193}\) Brownfield redevelopment is also encouraged through tax incentives that seek to recruit private-sector partners to assist with clean-up costs and economic revitalization.\(^{194}\) Congress also uses tax incentives to encourage energy efficiency and reductions in greenhouse gas emissions.\(^{195}\)

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\(^{188}\) See Deborah A. Dyson, Note, Bankruptcy Court Jurisdiction and the Power to Enjoin the IRS, 70 Minn. L. Rev. 1279, 1305 (1986).


\(^{190}\) \textit{Id.} at 516.


\(^{194}\) See, e.g., \textit{id}. § 1396 (granting to employers in “Empowerment Zones” a 20% tax credit for the first $15,000 of qualified wages paid to each employee who is a zone resident and performs most employment services within the zone); \textit{see also} Scott A. Tschirgi, Aiming the Tax Code at Distressed Areas: An Examination and Analysis of Current Enterprise Zone Proposals, 43 Fla. L. Rev. 991, 1006–12 (1991). Brownfields, usually located in inner-city areas, are abandoned industrial sites that pose environmental risks because they contain hazardous contamination. Andrea Wortzel, Greening the Inner Cities: Can Federal Tax Incentives Solve the Brownfields Problem?, 29 Urb. Law. 309, 310 n.6 (1997).

\(^{195}\) See generally Richard A. Westin, Energy and Environmental Tax Changes in the Flood of Recent Federal Revenue Laws and What They Imply, 15 Penn St. Envtl. L. Rev. 171 (2007) (providing a detailed discussion of recent legislative action that uses the tax code to promote environmental initiatives).
The IRS recognizes the intersection of environmental law and the Code in two respects that are particularly pertinent for this Note. First, the IRS has expressly connected tax deductions for land conservation with the national policy of preserving unique aspects of the natural environment. An organization that protected ecologically sensitive land was entitled to tax-exempt status because it enhanced the accomplishments of the express national policy announced in the National Environmental Policy Act and federal conservation laws. Organizations that improved water quality and provided sanctuary to wild birds and animals also qualified for tax-exempt status.

In addition, the IRS has also held that private litigation that enforces environmental statutes promotes a charitable purpose. In making this determination, the IRS based its conclusion on the congressional policy that private litigation is a desirable and appropriate means for enforcing environmental statutes. Private action implementing public policy is frequently desirable because it can vindicate “expressions of congressional or constitutional policy.”

B. The Administrative Procedure Act in the Context of the Internal Revenue Code and Environmental Law

1. Environmental Accountability: Standing and Judicial Review of Agency Action Under the Administrative Procedures Act

Federal environmental laws are enforced in one of three ways: by federal agencies designated by Congress to do so, the citizen-suit provisions commonly found in environmental protection statutes, and citizens or private organizations that use the Administrative Procedure Act (APA) to bring suit and force agencies to abide by their legal obligations and rules. The second and third forms are particularly common as citizens and non-profit environmental organizations have assumed quasi-executive roles in enforcing environmental laws and regulations.
regulations. By routinely including citizen-suit provisions in environmental statutes, Congress envisions increased public participation in the environmental arena. Congress also grants more breadth for citizen suits in the environmental context than in other areas of the law. Finally, the APA provides that the aggrieved party can bring her action in a court specified by statute or in a court of competent jurisdiction. The APA is frequently used for bringing suits to enforce environmental laws and regulations.

The APA allows any person suffering legal wrong or adversely affected or aggrieved by agency action to seek judicial review of the agency action. Agency means “each authority of the Government of the United States, whether or not it is within or subject to review by another agency.” Agency action “includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” Congress adopted the term agency action to “assure the complete coverage of every form of agency power, proceeding, action, or inaction.” Consequently, the term encompasses the findings, conclusions, or reasons for the action or inaction.

The APA presumes the availability of judicial review; however, a plaintiff bringing suit under the APA must satisfy the constitutional and

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204 See id.
205 See Ociepka, supra note 52, at 246.
206 Bennett v. Spear, 520 U.S. 154, 164–65 (1997) (noting that in the context of commercial matters, Congress authorizes suits only by parties injured in their business or property interests).
209 5 U.S.C. § 702. Person “includes an individual, partnership, corporation, association, or public or private organization other than an agency.” Id. § 551(2).
210 Id. § 551(1). Section 551(1) exempts certain parties, including Congress, the courts, the governments of the U.S. territories and the District of Columbia, court martial proceedings or military commissions, and military authority exercised in a theater of war or occupied territory. Id. § 551(1)(A)–(G). In addition, the President is not an agency for the purposes of the APA. Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).
213 See id.
The court has articulated three elements for standing. First, the plaintiff must show that she suffered injury in fact that is “concrete and particularized.” The injury does not have to be significant; harm to “recreational or even the mere esthetic interests . . . will suffice.” The second requirement for standing is the existence of a causal connection between the injury and the conduct complained of undertaken by the defendant. In the regulatory and administrative context, the contribution to the harm does not need to be significant; a small incremental step is subject to judicial review. The final requirement is that judicial decision in favor of the plaintiff will redress the injury. The plaintiff must personally profit from a favorable outcome in the case, otherwise the court would overstep its assigned role in our constitutional system. Redressability may include the extent to which an adverse judgment in court deters the plaintiff from continuing the unlawful conduct.

A plaintiff that satisfies Article III standing still has to demonstrate that it is prudent for the court to resolve her dispute. For cases brought pursuant to the APA, the Court has articulated a zone of interest test to determine if the party satisfies prudential concerns. To satisfy the test, “the plaintiff must establish that the injury [s]he complains of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for” her complaint. The critical question addressed by the test “is whether Congress ‘intended for [a particular] class [of plaintiffs] to be relied upon

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217 Id. at 560.
219 Lujan, 504 U.S. at 560. The conduct complained of cannot be that of some third party who is not a party to the case. Id. Rather, it must be “fairly traceable” to the defendant’s allegedly unlawful conduct. Id.
221 Lujan, 504 U.S. at 561.
223 Friends of the Earth, Inc., 528 U.S. at 185–86.
to challenge agency disregard of the law.’”227 When challenging agency action, the particular provision upon which the plaintiff relies in making her claim determines whether she falls within the zone of interest.228 The plaintiff’s complaint does not have to fall within the overall purpose of the statute, but merely the specific interest or interests Congress sought to protect through the specific statutory provision the plaintiff relies on in bringing suit.229

When judicial review is sought solely on the grounds provided by § 702, the agency action must be final agency action for which there is no other adequate judicial remedy.230 The finality requirement is “concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts” the injury for which the plaintiff is seeking a remedy.231 To be final agency action, the action must be the consummation of the agency’s decision-making process.232 The Court has held that mere recommendations are not final agency action.233

2. Treasury Department and Internal Revenue Service Compliance with the APA

Many scholars have described the IRS’s continued non-compliance with the rule-making requirements provided in section 553 of the APA.234 Less attention has been given to the question of whether agency action taken by the Treasury Department or IRS is subject to judicial review as provided by the APA, sections 701 through 706.

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229 See Clarke, 479 U.S. at 401.
232 Bennett, 520 U.S. at 177–78.
233 See id. at 178.
Stephen M. Goodman argues that the Treasury and the IRS are both subject to judicial review.235 “Since a revenue ruling is designed to interpret the Internal Revenue Code, it qualifies as an ‘agency action.’”236 If the IRS’s action is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, the reviewing court is authorized to rule against the agency. Moreover, the Treasury Department and the IRS do not possess qualities or responsibilities that shield them from judicial review.237 Courts regularly hear cases reviewing tax determinations by the IRS. While it is true that the Anti-Injunction Act shields the IRS from suits enjoining the collection of revenue, it does not prohibit judicial review when a positive outcome for the plaintiff results in the collection of additional revenue.238

3. The Anti-Injunction Act

Two significant obstacles remain to securing judicial review: § 7421 of the Code, sometimes called the Anti-Injunction Act, and the Declaration Judgment Act (DJA).239 Section 7421 provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”240 The DJA excludes from the federal courts’ remedies any declaratory judgments in cases or controversies “with respect to Federal taxes” that are not brought pursuant to § 7428 of the Tax Code.241

The Court reads § 7421 broadly “to preclude pre-enforcement review of tax cases” that include individual taxpayer claims “with only indirect bearing upon the flow of tax revenues . . . regardless of the merits of the issues raised.”242 In a unanimous opinion, the Enoch v. Williams Packing & Navigation Co. Court stated that the congressional purpose

236 Id.
238 See infra Part III.B.3.
239 A Problem of Remedy, supra note 234, at 1164–65.
241 28 U.S.C. § 2201(a) (2006). Section 7428(a) provides for declaratory relief in cases involving the classification or status of an organization under § 501(c)(3). 26 U.S.C. § 7428(a). While it has never addressed the question directly, the Court implies that the scope of § 7421 and the DJA are co-extensive, suggesting in Alexander v. “Americans United” Inc., that the federal tax exemption to the DJA “is at least as broad as the prohibition of the Anti-Injunction Act.” 416 U.S. 752, 759 n.10 (1974). Therefore, I will limit my discussion to the Anti-Injunction Act.
242 A Problem of Remedy, supra note 234, at 1167–68.
for § 7421 was to “permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require” taxpayer-initiated suits for refund to determine disputes regarding IRS tax assessments.243

Congress passed the Anti-Injunction Act in a context where equitable principles disfavored injunctions against tax collection, absent clear proof that available remedies were inadequate.244 Against this background, it is likely that Congress, speaking in broad terms, intended the language “to compel litigants to make use solely of the avenues of review opened by Congress.”245 Though courts recognize that the path for redress is suboptimal, courts have emphasized that Congress provided an avenue for judicial review through litigation that seeks a refund after the payment of the assessed taxes.246

The Court has placed two important limits on § 7421’s scope. Section 7421 does not prevent suits by parties for whom Congress has not provided an avenue for judicial review.247 “Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.”248 The Court has also limited § 7421’s scope to actions that frustrate the collection of revenues.249 The Anti-Injunction Act does not apply to cases where the plaintiff is seeking an injunction that would require the IRS to assess and collect taxes from a third party.250 The Abortion Rights Mobilization Court acknowledged that third party suits may be a strain on IRS resources, but found that the theme in the cases is that § 7421 “only extends to those actions it expressly refers to” that would restrain the collection of tax revenues.251

IV. Increased Public Accountability for the Enforcement of Conservation Easements via the Tax Code

This Note proposes a collateral method of enforcement that does not seek to enforce the terms of a conservation easement, but focuses on whether they entitle the easement donor to the income tax deduc-

243 370 U.S. 1, 7 (1962).
245 Id.
248 Id. at 378.
251 Id. at 489.
tions provided by § 170 of the Code. An aggrieved party would file the envisioned cause of action against the IRS Commissioner for improperly allowing the deduction for an easement that fails to satisfy § 170(h)’s requirements. The suit would allege that the Commissioner improperly authorized the deduction for the easement instead of finding a deficiency in the taxpayer’s return. The relief sought by the lawsuit would be an order requiring the Commissioner to initiate deficiency proceedings against the easement donor.

A. Chosing a Course (or Cause) of Action: Assessing Alternative Arguments for Third Party Standing to Enforce Conservation Easements

While direct suits may be preferable in some situations, the reach of a suit against the Commissioner is distinct from the traditional modes of enforcement. Enforcement proceedings that seek to compel the owner to comply with the easement terms assume that the easements are beneficial; however, not all conservation easements actually provide a public benefit. If the goal is conserving land, suing to enforce the terms of an easement that provides little to no public benefit would not protect conservation values. The envisioned lawsuit presumes that the terms of the easement, by failing to satisfy § 170(h)’s requirements, do not provide to the general public the benefit that justifies the foregone tax revenue.

The proposed cause of action presumes that the plaintiff will be engaged in the community. Like the organization discussed in Revenue Ruling 76-204, the plaintiff will need to have a cooperative relationship with the other local conservationists and government officials.

252 See supra Parts I.B, II.
253 See supra Part II.
256 See supra Part I.B.
257 See Brown, supra note 76, at 87 & n.3, 91 (expressing presumption that conservation easements promote the public good).
258 See Miller Testimony, supra note 133, at 38–39.
259 The participation of the land trust community in the treasury regulations comment proceedings suggests that the Code’s requirements ensure some degree of environmental protection and benefit. See McLaughlin, supra note 9, at 15.
261 Rev. Rul. 76-204, 1976-1 C.B. 152. (discussing an organization’s collaboration with local officials).
to keep abreast of what is happening in the community. A plaintiff may encounter difficulty in securing specific information even though the terms of the easement are supposed to be recorded in the situs state’s recordation system. State recording practices vary from state to state and are notoriously unreliable. The plaintiff will likely have to use discovery to ascertain the value of the easement and the deduction taken on the taxpayer’s tax return.

**B. Getting into Court: Pleadings and Establishing Standing**

1. The Commissioner’s Unlawful Conduct

Seeking judicial review pursuant to APA §§ 702 and 704, the complaint would allege that the Commissioner failed to execute his duties under §§ 6201, 6212, and 6213 of the Code. Under § 6201 of the Internal Revenue Code, the Commissioner is required to “make the inquiries, determinations, and assessments of all taxes . . . imposed by” the Code. In the case of a donation of a conservation easement that does not satisfy § 170(h)’s requirements, the Commissioner has the duty to initiate deficiency proceedings against the taxpayer. In *Bennett v. Spear*, the Commissioner’s failure to do so allowed the taxpayer to take actions inconsistent with the donation’s supposed conservation purposes that undermined the plaintiff’s interest in the preservation of the burdened parcel. The suit would seek an order compelling the Commissioner to file a notice of deficiency that initiates deficiency proceedings against the taxpayer.

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262 Id.
263 See UNIF. CONSERVATION EASEMENT ACT § 2(b) & cmt., 12 U.L.A. 179 (2008) (requiring recordation of the easements in order for the parties to have rights under the easement).
264 See Lippmann, supra note 23, at 304 n.48.
268 Id. § 6201(a).
269 Id. §§ 6211–6212; see supra note 91 and accompanying text.
2. Standing

While standing ensures the constitutional and prudential exercise of the court’s judicial function instead of the merits of the plaintiff’s claim, it can nevertheless serve as a proxy for the determination of the merits. This is particularly true for cases brought under the APA. If the court wants to get to the merits of the case, it will find that the plaintiff has standing; if it does not, it will find that the plaintiff lacks standing. While establishing standing will be difficult for a plaintiff challenging the Commissioner’s approval of income tax deductions for a conservation easement, it is not impossible.

a. Injury in Fact

Even though the Supreme Court has narrowed standing in environmental actions, it is still available for environmental suits where the plaintiffs are personally harmed by a defendant’s conduct. The complaint must show a legally cognizable harm suffered by the plaintiff or the plaintiff’s members if the plaintiff is an organization. While the general public benefit associated with conservation easements is likely too broad a foundation to support standing absent concrete injury, a plaintiff that has a recreational or an aesthetic interest in the burdened parcel can show a concrete, personal injury sufficient to confer standing. For instance, if the plaintiff drives along a highway with a scenic

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276 See infra Part IV.B.2.a–c.


279 Earth Island Inst., 129 S. Ct. at 1149.

280 Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (1982) (noting that a generalized grievance is insufficient and that the court will not adjudicate abstract questions of wide public significance); Sierra Club v. Morton, 405 U.S. 727, 735, 739 (1972) (denying standing because the injury was not specific to the Sierra Club members and therefore too diffuse). But see Sierra Club, 405 U.S. at 737 (noting that once plaintiff demonstrates standing, he may “argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.”).

281 Earth Island Inst., 129 S. Ct. at 1149; Laidlaw, 528 U.S. at 181–83.
viewshed of which the burdened parcel is a part, any development that compromises the aesthetic quality of the view is sufficient to confer standing.\textsuperscript{282} The plaintiff would have to submit affidavits showing the nature of the concrete, specific injury that resulted from the Commissioner’s failure to properly police conservation contributions.\textsuperscript{283}

b. \textit{Causation}

Causation in the standing inquiry is analogous to proximate causation in tort law.\textsuperscript{284} The plaintiff must show a “fairly traceable causal connection between the claimed injury and the challenged conduct.”\textsuperscript{285} The tax incentives and subsequent failure of the IRS to properly police the deductions must contribute to the plaintiff’s injury.\textsuperscript{286} The court is inconsistent in its holdings on how direct the connection must be in order to confer standing on the plaintiffs.\textsuperscript{287} \textit{United State v. SCRAP} is viewed by many as the zenith in environmental standing where the causal chain between the defendant’s actions and the plaintiffs’ injuries was particularly attenuated.\textsuperscript{288} However, after \textit{Warth} and \textit{Eastern Kentucky} “[o]nly an optimist will assume . . . that injuries as indirect in nature as those recognized by the court in \textit{SCRAP}” will be sufficient to confer standing on the plaintiff.\textsuperscript{289}

Admittedly, the plaintiff in the envisioned suit should anticipate difficulty in satisfying the causation requirement.\textsuperscript{290} Causation is particularly difficult to establish when the injury involves the actions of a third party that are not before the court.\textsuperscript{291} However, it may not be impossible, provided the plaintiff’s pleadings develop a factual scenario that shows a bona fide question of fact that the Commissioner’s failure

\textsuperscript{282} \textit{Laidlaw}, 528 U.S. at 181–83.
\textsuperscript{283} \textit{Id.} at 183–84 (supporting standing where affidavits shows concrete injury to aesthetic and recreational interests).
\textsuperscript{287} Grant, \textit{supra} note 273, at 1411.
\textsuperscript{289} Nichol, \textit{supra} note 286, at 197.
\textsuperscript{290} See \textit{id.} (arguing that Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976) was the “death knell” for cases alleging indirect injury through tax determinations).
\textsuperscript{291} Grant, \textit{supra} note 270, at 1411.
to initiate deficiency proceedings lead to the plaintiff’s injury. Additionally the plaintiff should allege that weak enforcement leads to the donation of easements with terms that do not adequately promote the conservation values underlying the tax deductions.

The plaintiff does not have to demonstrate that she will win on the merits in order to establish standing. It is a threshold determination, and she simply has to make an initial showing that she suffered injury as a consequence of the Commissioner’s failure to enforce § 170(h)’s requirements. Returning to the example of the highway viewshed, the plaintiff would have to show that the development along the highway happened because the Commissioner failed to make a deficiency determination, and that the development would not have happened if the Commissioner had initiated deficiency proceedings against the taxpayer who donated the easement.

c. Redressability

The relief sought would be an order compelling the Commissioner to serve on the taxpayer a notice of deficiency and subsequent tax assessment. Like causation, redressability may prove difficult for the envisioned suit. The plaintiff will have to show that the deficiency proceeding will actually restore or otherwise provide relief for the injury suffered due to the inadequacy of the challenged conservation easement. The envisioned remedy would do little to provide relief where the easement burdens a parcel with little or no conservation value even though such easements exist.

However, the court order could lead to amended easement terms. Absent an easement holder that will easily relinquish the easement, the owner of the burdened parcel usually cannot make the uni-

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292 See Nichol, supra note 286, at 197 (discussing Simon, 426 U.S. at 45 & n.25).
295 See Warth, 422 U.S. at 517–18; supra notes 215–23 and accompanying text.
296 If the taxpayer challenges the deficiency by filing a petition with the Tax Court, the Commissioner must await the outcome of the Tax Court’s decision before assessing the taxes. 26 U.S.C. § 6213(a).
297 See E. Ky. Welfare Rights Org., 426 U.S. at 42–43 (arguing that redressability required the hospital to be dependent on favorable tax treatment).
299 See Miller Testimony, supra note 133, at 38–39.
300 See Byers & Ponte, supra note 25, at 186–87 (discussing the process for amending easement terms).
lateral decision to undo the restriction on her land. After the initiation of deficiency proceedings, the taxpayer may petition the Tax Court to allow amendments to the easement terms in order to bring them into compliance with the Code, thereby recouping a portion of the property’s lost development value. The court order can also lead to the cessation of development activities on the burdened parcel. If development is underway the easement may be modified to relocate or scale-back the development to reduce its impact.

The suit may also deter other taxpayers from taking deductions for conservation contributions that fail to satisfy § 170(h)’s requirements. The court has held that deterrence from ongoing or future unlawful conduct that injures the plaintiff is an adequate remedy. Studies have shown that taxpayers who suspect or anticipate that the IRS will detect any violations—or that their violations will be reported to the IRS by third parties—are more likely to comply with the Code; suits seeking deficiency proceedings may have the same effect in ensuring tax compliance. The envisioned suit can act to bring to the IRS’s attention conservation easements that fail to satisfy 170(h)’s requirements, increasing the probability of detection of those easements that fail to satisfy § 170(h)’s requirements as well as increased compliance with the same.

d. The Anti-Injunction Act

Plaintiffs bringing suit to challenge the deductions can anticipate the argument that the relief sought is prohibited by the Anti-Injunction Act. As demonstrated above, such an argument misconstrues the

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301 See id. at 190–97 (discussing easement termination and release).
302 See 26 U.S.C. §§ 170(b), 6212, 6213 (2006); Strasburg v. Comm’r, 79 T.C.M. (CCH) 1697, 1704–05 (2000). Amending the easement terms may lead to tax penalties for the donor and donee, depending on the change in the value of the easement. See Byers & Ponte, supra note 25, at 188–89.
303 See Byers & Ponte, supra note 25, at 158–59.
304 See id.
307 See Leviner, supra note 305, at 400–01.
308 See id.
309 26 U.S.C. § 7421 (2006); see supra notes 239–51 and accompanying text.
Act’s scope and applicability.\textsuperscript{310} First of all, there is no other judicial remedy available to the plaintiffs to challenge the donor’s tax liabilities.\textsuperscript{311} The petition to the Tax Court for a refund, which is the route provided by Congress, is unavailable for challenging the Commissioner’s failure to serve a deficiency notice.\textsuperscript{312} Furthermore, the envisioned suit does involve pre-collection judicial interference that would impinge or otherwise frustrate the orderly collection of revenue, § 7421’s primary concern.\textsuperscript{313} Rather, it increases the flow of revenue into the Treasury and therefore falls outside the scope of § 7421.\textsuperscript{314}

\section*{C. Prudential Concerns}

Because the suit is brought pursuant to the APA, the plaintiff will have to show that the action challenged was final agency action.\textsuperscript{315} There is little doubt that the assessment officer’s recordation of the taxpayer’s liabilities constitutes final agency action because the IRS has reached a “definitive position” regarding the particular taxpayer’s return.\textsuperscript{316} Furthermore, the plaintiff does not have the option of pursuing other procedural or judicial remedies; therefore, the assessment officer’s processing of the taxpayer’s return is action that is subject to judicial review under the APA.\textsuperscript{317}

She will also have to show that she is within the zone of interest protected by the statute.\textsuperscript{318} The zone of interest test will frequently involve a citizen-suit provision;\textsuperscript{319} however, it has emerged as a “prudential standing requirement[] of general application.”\textsuperscript{320} The zone of interest test is a “guide for deciding whether” Congress intended that “a particular plaintiff should be heard to complain of a particular agency decision.”\textsuperscript{321} To satisfy the test, which is not particularly difficult, the plaintiff will have to show that her interests are more than “marginally

\textsuperscript{311} See Zelenak, supra note 249, at 614–15.
\textsuperscript{312} 26 U.S.C. § 6213(a); Abortion Rights Mobilization, 544 F. Supp. at 489–90.
\textsuperscript{314} Zelenak, supra note 249, at 613.
\textsuperscript{317} See 26 U.S.C. §§ 6203, 6213; Darby, 509 U.S. at 144, 146.
\textsuperscript{319} See, e.g., Bennett v. Spear, 520 U.S. 154, 164 (1997) (discussing that the Endangered Species Act’s citizen-suit provision broadened the zone of interest).
\textsuperscript{320} Id. at 163.
related” to and consistent with § 170(h)’s purpose.322 Because the zone of interest test is not identical with injury-in-fact, the plaintiff could appeal to the significant public benefit provided by conservation easements.323 Drawing on the language in Bennett v. Spear, the plaintiff could argue that she falls within the zone of interest protected by conservation easements because she is a member of the general public, to whom the easements’ benefits run.324 She does not have to appeal to the legislative purpose behind the various tax reform measures, but can rely specifically on the purpose behind the legislation authorizing deductions for conservation contributions.325 The legislative history,326 the conservation purposes test under the Code,327 and the regulations328 indicate that the tax incentives provide a measure of environmental protection against development and the loss of open spaces.329 Congress intended tax incentives to attract and facilitate the donation of easements with significant benefits that accrue to the general public.330 Just as citizen-suit provisions anticipate a lack of political will and resources to enforce environmental laws,331 a suit against the Commissioner can provide additional policing of conservation easements to ensure that the deductions are justified by the benefit to the public and the environment.332

Conclusion

Conservation easements have grown in popularity as a consequence of the generous tax deductions available to easement donors. Since the 1980s, the number of land trust and similar organizations has grown in response to an increased awareness of the value of open space, particularly on the urban fringe. Conservation easements have been an effective tool, preserving millions of acres; however, they have

322 See id.
323 See Bennett, 520 U.S. at 165 (describing the environment as “a matter in which it is common to think all persons have an interest”).
325 Clarke, 479 U.S. at 401.
331 See Burrows, supra note 85, at 109–10.
also been a tool for tax shelters and other tax abuses. The IRS does not have the resources to audit every taxpayer who takes a deduction for a conservation easement. A suit that challenges the deduction may provide a collateral method for enforcing conservation easements, ensuring that the easements for which deductions are taken actually yield a substantial public benefit.