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A SAND COUNTY TAX SHELTER: SYNDICATED CONSERVATION EASEMENTS AND THEIR TOLL ON THE AMERICAN TAXPAYER

Jimmy Godin*

Abstract

The conservation easement is a powerful tool for conserving private land in the United States and beyond. Among the many incentives for encouraging conservation easement donations are tax deductions, which largely depend on the conservation value of the donated land. But groups of wealthy taxpayers, accountants, attorneys, and appraisers are manipulating the conservation easement tax framework and receiving large tax deductions for conservation easements that are practically worthless in a conservation sense—transactions known as 'syndicated conservation easements.' Syndicated conservation easements have generated substantial controversy, in part because they cost American taxpayers billions of tax dollars annually. While the Internal Revenue Service, the United States Department of Justice, members of Congress, and conservation groups are attempting to crack down on syndicated conservation easements, their efforts to curb the practice remain ineffective. This Note first examines the conservation easement tax framework and considers the ways in which it enables syndicated conservation easements. Next, this Note describes the measures taken against syndicated conservation easements and analyzes how such measures have fallen short. Finally, this Note contemplates more effective ways to uncover syndicated conservation easements and curb such transactions entirely. Specifically, the Internal Revenue Service must streamline its auditing efforts to focus on appraisals, while the United States Department of Justice must impose harsher penalties on those involved in syndicated conservation easements. Similarly, Congress must create a more effective system for appraisal oversight and should enact legislation that alters the existing tax framework in a way that disincentivizes wealthy taxpayers from engaging in syndicated conservation easements altogether. Lastly, individual conservation groups must work together to create a more uniform set of standards and

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practices for conservation easement donation, while state legislators should strive to create uniformity in state conservation easement tax law.

I. INTRODUCTION

Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest.

—Aldo Leopold¹

The conservation easement is a powerful tool for conserving private land,² and the practice of donating one's land to help conserve the public interest is now a critical component of the conservation movement at large—as predicted by renowned American conservationist Aldo Leopold. Recently, this practice has generated substantial controversy in part due to groups of wealthy taxpayers, realtors, appraisers, accountants, and lawyers who abuse the practice for tax purposes.³ Most notably, these groups receive substantial tax deductions for donating lands with little or no conservation value, a transaction known as the syndicated conservation easement.⁴ At first glance, these transactions may appear as valid conservation easements and thus go undetected. When analyzed more closely, syndicated conservation easements are exposed for what they really are: mere tax shelters that contribute little to land conservation in the United States.

This Note begins with a broad overview of conservation easements and the conservation easement tax framework, then moves to a synopsis of syndicated conservation easements and the efforts to combat them, and concludes by evaluating more effective ways in which stakeholders could extinguish syndicated conservation easements altogether. Specifically, this Note argues that the IRS must streamline its auditing efforts and impose harsher penalties on those involved in syndicated conservation easement schemes. Furthermore, while some members of Congress pursue legislation that would deter wealthy taxpayers from investing in syndicated conservation easements, they must also address the lack of uniformity in state conservation easement tax law, urge a legally mandated set of standards and practices, and create more effective systems for appraisal oversight.

¹ Aldo Leopold, *Conservation Economics*, in THE RIVER OF THE MOTHER OF GOD 193, 202 (Susan L. Flader & J. Baird Callicott eds., 1991).

² See, e.g., Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . and Should It Be?*, 52 UIC J. MARSHALL L. REV. 677, 677–79 (2019) (discussing the impact of the conservation easement movement).

³ See, e.g., Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter*, BROOKINGS: UP FRONT (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/Z4TY-B9A4>] (assessing the federal cost of syndicated conservation easements).

⁴ See *infra* Section II.D for an explanation of the dynamics underlying syndicated conservation easements.

II. BACKGROUND

A. Traditional Easements and Conservation Easements

In its most basic form, an easement is a nonpossessory interest in land. One of the most common examples of this type of property right is a right of way through someone else's property.⁵ In this instance, the easement holder has the right to cross the property but is not conferred any other rights such as ownership, possession, or the right to exclude others. This type of easement is an affirmative easement. Negative easements, on the other hand, "convey the right to prohibit some use of the affected parcel."⁶ An illustration of a negative easement is as follows: Landowner A and Landowner B are neighbors. Landowner A has a magnificent view of the surrounding foothills, but this view would be impeded if Landowner B constructs any tall structures on her property. Landowner A and Landowner B agree to meet and discuss an arrangement where Landowner A can continue to enjoy their view of the surrounding foothills despite Landowner B's adjacent property. After some negotiation, Landowner B agrees to grant a negative easement to Landowner A that prohibits Landowner B from building any structures over twenty feet in height on her own property. In this case, Landowner A is the negative easement holder and has no property rights to Landowner B's land, other than the guarantee that Landowner B will not build structures over twenty feet in height on her property. Consequently, Landowner B's property is the affected parcel.

A conservation easement is another type of negative easement. While there is no singular, legally operative definition of a conservation easement, it is understood as a "legal agreement[] between a landowner and another party, generally a land trust or government agency, that permanently restricts the development and/or use of land with the purpose of achieving certain conservation or preservation goals."⁷ Put simply, it restricts a specific parcel or section of land from being developed in certain ways.

Conservation easements are made more complex by the variety of outcomes they seek to achieve and the methods used to achieve them. In theory, the negative easement in the previous example is similar to a conservation easement. There was a specific preservation outcome, such as maintaining Landowner A's view of the surrounding foothills, and a distinct method to achieve that outcome, i.e. prohibiting Landowner B from building structures over twenty feet in height. Some conservation easements have distinct methods and outcomes (as in the previous example),⁸ but

⁵ Joan M. Youngman, *Taxing and Untaxing Land: Open Space and Conservation Easements*, TAX ANALYSTS: SPECIAL REP. 747, 747-48 (Sept. 11, 2006), https://www.lincolnst.edu/sites/default/files/pubfiles/1171_youngman_easements.pdf [<https://perma.cc/MG6P-SZUH>].

⁶ *Id.* at 748.

⁷ *United States v. Zak*, 426 F. Supp. 3d 1365, 1367-68 (N.D. Ga. 2019).

⁸ *See, e.g., Anna Berry, Beyond Planned Gifts: Could Your Last Gift Be Your Burial Site?*, NONPROFIT Q. (Apr. 19, 2017) (discussing Larkspur Conservation's efforts to create Tennessee's first ever "conservation burial ground").

many have broad, multi-faceted methods and outcomes, like creating “open space” to be used for “park or recreational purposes, . . . conservation of land or other natural resources, . . . historic or scenic purposes, . . . community development, . . . [or] wetlands.”⁹ The method in this example—creating “open space”—is as multitudinous as the desired outcomes of the conservation easement.

The contexts in which conservation easements are created add another component to the conservation easement equation. Some conservation easements are created to ensure that a working farm will continue to be used for agricultural purposes, even after the landowners perish and the property is either inherited or sold to a third party.¹⁰ In this instance, the farmer will work with “a qualified conservation organization or public agency”¹¹ to establish conservation easement terms, such as which land uses will be allowed and which will be prohibited.¹² While many conservation easements are donated by the landowner, “[s]ome . . . are purchased either in whole or in part, often with funds from federal, state, or local conservation easement programs.”¹³ Gallatin County in Montana, for example, has an “open space bond” which appropriates \$10 million in funding for the acquisition of land and conservation easements.¹⁴ Conservation easements can last any duration, but conservation easements lasting “in perpetuity” appear to be the most common.¹⁵

In sum, conservation easements are negative easements that restrict development and are complicated by the wide range of goals they seek to achieve and the contexts from which they arise. Ultimately, conservation easements afford landowners and easement holders abundant latitude in tailoring property agreements that align with each party’s desired conservation outcomes. But why would a landowner choose to attach a conservation easement to their property if it limits what they can do with their property?

B. Conservation Easements and the Coinciding Tax Framework

In part, the answer to the previous question lies in the tax framework surrounding conservation easements. While there are several non-monetary benefits

⁹ Virginia Open-Space Land Act, VA. CODE ANN. § 10.1-1700 (2006).

¹⁰ See *Protect Your Land*, FARMLAND INFORMATION CENTER, <https://farmlandinfo.org/protect-your-land/> [<https://perma.cc/Y8UE-NDX5>] (last visited June 1, 2021) (describing agricultural conservation easements (ACEs)).

¹¹ *Id.*

¹² See *id.* (“In general, ACEs limit subdivision, non-farm development and other uses of land that are incompatible with farming.”).

¹³ 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, 112 (2015).

¹⁴ See generally *Open Lands Board: Conservation Easements*, GALLATIN CNTY. <https://gallatincomt.virtualltownhall.net/open-lands-board/pages/conservation-easements> [<https://perma.cc/3XYN-MFNU>] (last visited June 1, 2021) (describing the county’s “open space bond” program).

¹⁵ Cheever & McLaughlin, *supra* note 13, at 113.

for donating a conservation easement, this Note focuses only on the tax incentives associated with conservation easement donations because such incentives are the primary drivers for syndicated conservation easements.¹⁶ Before examining the tax benefits of conservation easements, it is important to understand how conservation easements emerged in the United States, how they became part of the tax code, and their relevance in current land conservation efforts.

1. A History of Conservation Easements

Conservation easements emerged in the mid-twentieth century but were not recognized as *conservation* easements during this time. The practice began in the southeastern United States when the National Park Service purchased nearly 6,000 acres of easements to protect scenic vistas along the Blue Ridge and Natchez Trace Parkways.¹⁷ Around the same time, Congress enacted the Federal Highway Beautification Act, which required states to allot three percent of their federal highway funds to landscaping and scenic enhancement projects, or such funds would lapse.¹⁸ This Act ultimately incentivized states to develop their own scenic highway easement programs.¹⁹ While states continued to enact “easement enabling statutes” that “authorized the use of conservation easements to accomplish a broader range of land conservation goals,”²⁰ the Internal Revenue Service (IRS) announced that landowners who donate easements for conservation purposes may be eligible for tax deductions.²¹ This announcement ushered in a series of IRS actions²² that eventually led to the codification of conservation easements in the Internal Revenue Code (I.R.C.) in 1980.²³ Pursuant to I.R.C. § 170(h), a conservation easement donor could now receive a tax deduction generally equal to the value of the land donated.²⁴ Shortly after, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) promulgated the Uniform Conservation

¹⁶ See *infra* Section II.C.

¹⁷ See Cheever & McLaughlin, *supra* note 13, at 115 n.15 (noting how the federal government ultimately discontinued this practice because of legal and political difficulties, instead utilizing a “fee simple purchase program”).

¹⁸ Federal Highway Beautification Act, 23 U.S.C. §§ 131, 136, 319 (1965); *see also* 23 U.S.C. § 319.

¹⁹ Cheever & McLaughlin, *supra* note 13, at 115–16.

²⁰ *Id.* at 116 (“The earliest easement enabling statutes were enacted by California in 1959 and New York in 1960. By 1979, 40 states had enacted some type of conservation easement enabling statute.” (internal citations omitted)).

²¹ See Roddewig, *supra* note 2, at 679–84 (discussing the cultural and political context surrounding the emergence of conservation easements).

²² See Rev. Rul. 64-205, 1964-2 C.B. 62; Cheever & McLaughlin, *supra* note 13, at 116–17.

²³ See I.R.C. § 170(h) (containing the federal tax law for conservation easement donations).

²⁴ See *id.*

Easement Act (UCEA), which is “generally considered the dominant source for state statutory conservation easement law.”²⁵

With conservation easements becoming solidified in both the IRC and state law, the practice of donating easements as a means to receive tax benefits surged in popularity,²⁶ especially among the wealthy.²⁷ Billionaire philanthropists like Ted Turner bought numerous “trophy ranches” around mountain communities and donated conservation easements on these ranches to preserve the land’s scenic and natural character.²⁸ While the validity of these conservation easements is not disputed, this trend signified that donating conservation easements on large parcels of land—and receiving substantial tax deductions—would appeal to wealthy taxpayers.

Nonetheless, conservation easements were popular with more than only the wealthy. Indeed, conservation organizations also depended on the practice to preserve land. The number of land trusts, or charitable organizations whose mission is to acquire and steward conservation easement lands,²⁹ grew steadily and dramatically, only leveling out recently.³⁰ With the surge in popularity came the demand for an organization that could oversee the conservation easement movement. Thus, the Land Trust Alliance (LTA) was formed and remains the foremost overseeing body of land trusts to this day.³¹ The LTA is not the only major

²⁵ Cheever & McLaughlin, *supra* note 13, at 117–18; *see generally* UNIF. CONSERVATION EASEMENT ACT (amended 2007) (UNIF. L. COMM’N 1981).

²⁶ Cheever & McLaughlin, *supra* note 13, at 117–18 (discussing the significance of I.R.C. § 170(h) and the UCEA’s role in facilitating the emergence of conservation easements).

²⁷ *See* Roddewig, *supra* note 2, at 686.

²⁸ *See id.* (explaining the ‘trophy ranch’ phenomenon); S. REP. NO. 106-267, at 30 (2000) (defining a trophy ranch as: “a premium property available to only the wealthiest of buyers who can afford to enjoy the amenities of a property without necessarily deriving sufficient income from it to offset their investment or operating costs. These ranch properties appeal to an affluent segment of society who have exceptional buyer power and a desire for exclusivity and seclusion with a ranch having a high degree of ‘ambiance.’”).

²⁹ *See What Is a Land Trust?*, WECONSERVEPA, <https://conservationtools.org/guides/150-what-is-a-land-trust> [<https://perma.cc/N7LM-MRQ8>] (last visited June 1, 2021) (“A land trust is a charitable organization that acquires land or conservation easements, or that stewards land or easements, to achieve one or more conservation purposes.”).

³⁰ Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 690 graph 1 (2013). Beginning in 1980, only approximately 128,000 acres were under conservation easements; in only thirty years, that number rose to approximately 8.8 million acres. *See id.* at 691 graph 2.

³¹ *See* Roddewig, *supra* note 2, at 683–84 (discussing the LTA’s origins). *See generally About Us*, LAND TR. ALLIANCE, <https://www.landtrustalliance.org/about-us> [<https://perma.cc/3Q8B-9ZD5>] (last visited June 1, 2021) (noting LTA’s history, vision, and mission); LAND TR. ALLIANCE, 2018 ANNUAL REPORT (2018), <https://s3.amazonaws.com/landtrustalliance.org/2018AnnualReport-LandTrustAlliance.pdf> [<https://perma.cc/2UNR-F7R8>] (providing an overview of LTA’s operations).

charitable organization focusing primarily on the conservation easement as a tool for land protection. The Nature Conservancy, for instance, currently holds 3.1 million acres of conservation easements in forty-nine states,³² while the Trust for Public Land aids communities and stakeholders in acquiring conservation easements for park land and open space.³³ As of 2014, 105,000 conservation easements in the United States encompassed approximately forty million acres, an area that was roughly half the total acreage of the National Parks and approximately equal in size to the state of Washington.³⁴

On a national scale, conservation easements are instrumental in securing private property for conservation purposes, but since conservation easement donations result in tax deductions, they cost American taxpayers a substantial amount of money. In fact, tax deductions resulting from the donation of conservation easements cost the federal government between \$1.6 to \$2.9 billion annually, ranking among the largest federal environmental and land programs in the budget.³⁵

C. Conservation Easement Tax Code, Valuations, and Tax Deductions

To understand why wealthy taxpayers abuse the practice of donating conservation easements by engaging in syndicated conservation easements, it is important to first understand how tax deductions operate within the conservation easement tax framework.

1. The Tax Code

Section 170(h) allows tax deductions for any “qualified conservation contribution,”³⁶ which is a contribution of a qualified real property interest, to a qualified organization exclusively for conservation purposes.³⁷ There are several “real qualified property interests,” but the most relevant (for syndicated conservation easement purposes) and disputed type of “qualified real property interest” is a

³² See *How We Work: Private Lands Conservation*, THE NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/> [<https://perma.cc/MKA4-QFP6>] (last visited June 6, 2021).

³³ *Frequently Asked Questions*, THE TR. FOR PUB. LAND, <https://www.tpl.org/frequently-asked-questions-0#q4> [<https://perma.cc/QCS6-A3PL>] (last visited June 1, 2021).

³⁴ See Cheever & McLaughlin, *supra* note 13, at 109–10 (referencing data from the National Conservation Easement Database, United States Department of Interior, and NPS).

³⁵ See Looney, *supra* note 3 (comparing the annual cost of conservation easement tax deductions to other federal environmental and land program budgets (e.g., the Bureau of Land Management (\$1.2 billion), the Fish and Wildlife Service (\$1.6 billion), and the NPS (\$3.0 billion)).

³⁶ I.R.C. § 170(h).

³⁷ I.R.C. § 170(h)(1).

“perpetual use restriction over real property,”³⁸ as demonstrated in a previous example.³⁹ Such contributions must be made to a qualified organization. Land trusts with a 501(c)(3)⁴⁰ nonprofit status are obvious examples of qualified organizations, but there are many other nonprofit organizations that may qualify,⁴¹ as well as federal, state, or local governmental entities, or public charities.⁴² These contributions must be made “exclusively for conservation purposes,”⁴³ which is generally defined as preservation, either of land, species, open space, farmland, or historic sites.⁴⁴ Appraisers assume an important role in conservation easement donations, and the value of a conservation easement tax deduction largely depends upon their appraisals. As such, “the rules for qualified appraisers and appraisals . . . also apply to conservation easement donations.”⁴⁵

2. *The Valuation Process*

Syndicated conservation easements exist largely because taxpayers have found ways to exploit and manipulate the conservation easement valuation process. Therefore, understanding how this process works is vital in understanding how syndicated conservation easements function and go undetected or unpunished.

In practice, a landowner works out the details of a potential conservation easement with a charitable organization and, once satisfied with its overall terms, agrees to donate a parcel of the landowner’s property in the form of a conservation

³⁸ Anson H. Asbury, *Understanding the Conservation Easement Tax Deduction (or “Strawberry Fields Forever”)*, THE FED. LAW. 26, 29 (March 2016), <https://www.fedbar.org/wp-content/uploads/2016/03/Easement-pdf-2.pdf> [<https://perma.cc/QCS6-A3PL>].

³⁹ See *infra* Section II.A.

⁴⁰ I.R.C. § 501(c)(3).

⁴¹ See, e.g., DAVID MARRONE, DUCKS UNLIMITED, CONSERVATION EASEMENTS: PROTECTION IN PERPETUITY 7, https://www.ducks.org/media/Conservation/Conservation_Documents/_documents/ConservationEasementBrochure.pdf [<https://perma.cc/9KLE-Q8Z3>] (last visited June 1, 2021) (outlining Ducks Unlimited’s conservation easement program in FAQ form).

⁴² See ADAM LOONEY, THE BROOKINGS INSTITUTION, CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 13 (May 2017), https://www.brookings.edu/wp-content/uploads/2017/05/looney_conservationeasements.pdf [<https://perma.cc/4C6E-3XSA>]; see also *id.* at 8 n.3 (“To qualify as a public charity, an organization must have broad public support. Most charities qualify by receiving at least one-third of its support from contributions from the general public and/or from receipts from activities related to its tax-exempt purpose. Organizations that fail to meet that threshold—such as when one individual, family, or organization provides a large share of the contributions—are private foundations and governed by stricter rules intended to prevent against self-dealing.”).

⁴³ I.R.C. § 170(h)(1)(c).

⁴⁴ See I.R.C. § 170(h)(4).

⁴⁵ Asbury, *supra* note 38, at 29 (citing I.R.C. § 170(f)(11)(E)(i)–(ii)).

easement.⁴⁶ In many instances, the terms of a conservation easement prevent development altogether or at the very least limit the amount a landowner may develop on that donated section of their property. As a result, the landowner foregoes any potential return or benefit they could have received by developing that land. This opportunity cost is recognized in the form of a tax deduction, which generally is equal to the difference between the entire property's "development potential" (or its "most valuable economic use . . . possible under the circumstances")⁴⁷ and the value of the entire property once encumbered by the easement.⁴⁸ This method of valuation is referred to as the "before and after" method.⁴⁹ This value is subject to limitations⁵⁰ but can be significant depending on the property's development potential.⁵¹

The valuation process is the single most important step in determining the magnitude of a tax deduction, and taxpayers interested in donating a conservation easement must follow certain valuation rules and appraisal standards.⁵² While the regulations provide that the preferred method of calculating the value of a conservation easement is the "sales of comparable easement" method,⁵³ or comparing the value of the conservation easement in question with other similar conservation easements, this method is almost never used due to the complex and dynamic nature of individual conservation easements.⁵⁴ Instead, the "before and

⁴⁶ Charitable organizations often spend a substantial amount of time building relationships with potential conservation easement donors, and the process of acquiring conservation easements can span years. *See, e.g., Donating an Easement*, VT. LAND TR., <https://vlt.org/donate-easement> [<https://perma.cc/9T3T-VR5J>] (last visited June 1, 2021) ("It can take anywhere from six months to a couple of years [to donate a conservation easement]. Title issues and family agreements are often an important variable in this estimate.").

⁴⁷ Stephen J. Small, *Appraisals and Valuations - How the Gift Is Valued*, LIBRARY, LAND CONSERVATION ASSISTANCE NETWORK, <https://www.landcan.org/article/Appraisals-and-Valuations--How-the-Gift-is-Valued/201> [<https://perma.cc/6EZK-SVY2>] (last visited June 1, 2021).

⁴⁸ *Id.*

⁴⁹ *See* Nancy McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 232 (2016), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1046&context=scholarship> [<https://perma.cc/2CB4-XG8N>].

⁵⁰ *See* Barbara T. Kaplan, G. Michelle Ferreira & Jennifer A. Vincent, *Prepare for Greater IRS Scrutiny on Conservation Easements*, LAW360: EXPERT ANALYSIS (Dec. 4, 2019, 5:50 PM EST), <https://www.law360.com/articles/1224999/prepare-for-greater-irs-scrutiny-on-conservation-easements> [<https://perma.cc/GU6G-PN3K>] ("Generally, taxpayers are limited in the amount of a charitable deduction they may utilize by a ceiling of 50% of their adjusted gross income.").

⁵¹ *See* Small, *supra* note 47 (demonstrating how some donations may be valued at upwards of \$1.5 million).

⁵² *See* Reg. § 1.170A-14(h)(3); I.R.C. § 170(f)(11)(E)(i)-(ii).

⁵³ *See* Reg. § 1.170A-14(h)(3)(i).

⁵⁴ *See* McLaughlin, *supra* note 49 ("However, because conservation and façade easements are not bought and sold in true market transactions, and an easement's restrictions

after” method is used most often to determine the conservation easement’s value.⁵⁵ But before this method can be used, appraisers first must determine the value of the entire property itself.

There are three common approaches for determining property values: the sales comparison approach, the income capitalization approach, and the reproduction cost approach.⁵⁶ The reproduction cost approach, which involves estimating the current costs to reproduce or replace a property, applies mainly to historical sites and structures, and thus will not be examined further. The other two approaches are critical in conservation easement valuation and are examined in turn.

(a) The Sales Comparison Approach

The sales comparison approach compares the value of the property in question with similar properties recently sold in the open market.⁵⁷ An appraiser using this approach must identify other property sales that meet the following criteria: “(1) the properties must be similar to the subject property . . . ; (2) the sales must have been arm’s-length transactions; and (3) the sales must have occurred within a reasonable time of the valuation date.”⁵⁸ The appraiser then makes adjustments based on the differences between the compared properties and the property in question, including size, location, and topography,⁵⁹ and uses these adjustments to arrive at the property’s estimated value. This approach is generally the most reliable indicator of a property’s fair market value because courts and other scrutinizing parties can refer to similar transactions, and thus have a baseline from which to compare the appraiser’s estimated property value. Therefore, an appraisal that “claims that there are no comparable sales with which to estimate . . . [the] value of a property . . .” must be scrutinized more carefully.⁶⁰

(b) The Income Capitalization Approach

The income capitalization approach estimates the subject property’s future cash flow and discounts that value against the property’s present value.⁶¹ This approach

and the underlying property generally will be unique in some if not many respects, the sales of comparable easements method is rarely (if ever) used.”).

⁵⁵ *See id.* at 232–36.

⁵⁶ *See Hilborn v. Comm’r*, 85 T.C. 677, 689–90 (1985).

⁵⁷ *See McLaughlin, supra* note 49, at 236–38. This “sales comparison” approach should not be confused with the “sales of comparable easements” method previously described, which applies only to easement values and not the value of the property as a whole.

⁵⁸ *Id.*

⁵⁹ *See id.* (“Because no two sales and no two properties are ever identical, the appraiser must then consider aspects of the comparable transactions, such as the size of the property, its location, its topography, and other significant features, and make appropriate adjustments for each aspect to approximate the qualities of the subject property.”).

⁶⁰ *Id.*

⁶¹ *See id.*

is arguably more complicated than the “sales comparison” approach, and the appraiser is given substantial leeway in assuming a variety of factors or variables, most of which are not easily compared to existing market data.⁶² A “subdivision development” analysis is a variant of the “income capitalization” approach. The subdivision development analysis assumes that the highest and best use of undeveloped acreage is a subdivision of residential lots, and involves “estimating a final sale price for the total number of lots into which the property could be divided and then deducting all costs of development, including the developer’s anticipated profit.”⁶³ Because these approaches are highly speculative, neither is preferred when comparable sales are available,⁶⁴ but they are nevertheless utilized when valuing property involved in syndicated conservation easement schemes.

3. Tax Deductions

Pursuant to I.R.C. § 170(h), once the value of the conservation easement is determined and the easement donated, the value of that conservation easement is deducted from the donor’s taxes. These donations are viewed as gifts, in part because the donor intends “to relinquish the granted rights to the property permanently” for preservation purposes, or purposes otherwise benefiting the public welfare.⁶⁵ Essentially, if a landowner donates a conservation easement, the tax framework recognizes this donation as a gift made to the public, and that landowner is rewarded through tax benefits. When the landowner actually gifts their land for “conservation purposes”⁶⁶ and is “truly contributing . . . to the general environmental wellbeing of the area,”⁶⁷ then they have the donative intent that the conservation easement tax framework was designed to promote. When the landowner lacks donative intent, or is merely seeking a tax deduction by donating land with little or no conservation value,⁶⁸ then they abuse the conservation easement tax framework. The latter scenario underlies the syndicated conservation easement, the tax scheme that undermines the integrity of conservation easements and costs American taxpayers billions annually.⁶⁹

⁶² See *id.* at 238–39.

⁶³ *Id.* at 239–40.

⁶⁴ See *id.* at 238–41.

⁶⁵ Ashbury, *supra* note 38, at 28.

⁶⁶ I.R.C. § 170(h)(1)(C).

⁶⁷ Stephen J. Small, *Test Your Knowledge of Conservation Purposes, Library, LAND CONSERVATION ASSISTANCE NETWORK*, <https://www.landcan.org/article/Test-your-knowledge-of-Conservation-Purposes/180/> [<https://perma.cc/J3PE-XFNM>] (last visited June 1, 2021).

⁶⁸ See Looney, *supra* note 3 (“These deals often involve easements related to large real estate developments (include private residential communities, country clubs, and golf courses) or donations in high-cost areas like metropolitan suburbs and resort destinations.”).

⁶⁹ See *generally id.* (arguing that syndicated conservation easements disproportionately contribute to the rising federal cost of conservation easements).

D. Syndicated Conservation Easements

The general “syndication scheme”⁷⁰ goes as follows: (1) a syndicated conservation easement promoter (“syndicator”) forms a partnership using a limited liability company (LLC); (2) drafts a deed for the conservation easement and prepares baseline documentation; (3) hires an appraiser to provide an inflated or flawed appraisal of the property of interest;⁷¹ (4) engages a law firm to provide a tax opinion letter; (5) markets the LLC interests and sells them as securities to taxpayers in high federal income tax brackets;⁷² (6) sells each stake in the LLC and donates the land as a conservation easement; (7) prepares the LLC’s tax return and submit copies to the invested taxpayers; and (8) those taxpayers file their income tax returns, with the deductions resulting from the syndicated conservation easement.⁷³ Because the syndicator forms the LLC as a “pass-through entity,”⁷⁴ the sizable tax deduction resulting from the syndicated conservation easement is fractionalized among the invested taxpayers, who each receive a substantial return in their investment in the form of tax deductions.⁷⁵

⁷⁰ United States v. Zak, No. 1:18-cv-05774-AT, 2019 U.S. Dist. LEXIS 224114, at *4 (N.D. Ga. Dec. 10, 2019).

⁷¹ See Kaplan et al., *supra* note 50 (“[P]roperty valuations and appraisals greatly inflate the value of the easement based on unreasonable conclusions about the development potential of the real estate.”); Stephen J. Small, *Note #6: “Syndications” of Conservation Easement Deductions*, STEVE SMALL, <https://www.stevesmall.com/note-6-syndications-conservation-easement-deductions-theres-trouble-river-city/> [<https://perma.cc/9LFE-AB3E>] (last visited June 1, 2021) (“A grossly inflated appraisal . . . changes the entire analysis of the transaction.”); see also Jay Adkisson, *The IRS Leaves a Lump of Coal for Syndicated Conservation Easements In Notice 2017-10*, FORBES (Dec. 27, 2016, 10:56 PM EST), <https://www.forbes.com/sites/jayadkisson/2016/12/27/the-irs-leaves-a-lump-of-coal-for-syndicated-conservation-easements-in-notice-2017-10/#2929fede6eb3> [<https://perma.cc/WUP2-FMBD>] (describing the role of the “friendly property appraiser”).

⁷² See, e.g., Peter Elkind, *The IRS Tried to Crack Down on Rich People Using an “Abusive” Tax Deduction*, PROPUBLICA: GUTTING THE IRS (Jan. 3, 2020, 5 AM EST), <https://www.propublica.org/article/the-irs-tried-to-crack-down-on-rich-people-using-an-abusive-tax-deduction-it-hasnt-gone-so-well> [<https://perma.cc/8UV7-LQCM>] (referencing a Barron’s ad which reads: “TAX DEDUCTIONS AVAILABLE THROUGH CONSERVATION EASEMENTS . . . 100,000 INVESTED YIELDS UP TO 600,000 IN DEDUCTIONS.”).

⁷³ See Complaint, United States v. Zak, No. 1:18-cv-05774-AT, 2019 U.S. Dist. LEXIS 224114, at 18–22 (N.D. Ga. Dec. 10, 2019) for a full description of the entire syndicated conservation easement scheme.

⁷⁴ See Adkisson, *supra* note 71 (explaining how pass-through entities allow syndicators to skirt around the IRS’ tax deduction limitations).

⁷⁵ See Kaplan et al., *supra* note 50 (“Generally, the deductions claimed by investors in these transactions . . . often generate deductions of up two and a half times the invested amount.”).

1. Efforts to Combat Syndicated Conservation Easements

Although syndicated conservation easements are confined to a limited number of states,⁷⁶ they nevertheless constitute a substantial portion of the overall costs attributable to conservation easements.⁷⁷ For this reason, the IRS, nonprofits, and members of Congress are attempting to curb the practice entirely.

In 2003 and 2004, the Washington Post published a series of articles criticizing the practice of syndicated conservation easements.⁷⁸ Congress responded by “tighten[ing] the requirements pertaining to appraisers [and] appraisals”⁷⁹ while enhancing the tax benefits offered to conservation easement donors.⁸⁰ Soon after, the IRS issued its first syndicated conservation easement-related notice to taxpayers and began “aggressively auditing”⁸¹ suspect conservation easements.⁸² The LTA also responded to the emergence of syndicated conservation easements by creating a set of standards and practices for land trusts to follow.⁸³ Today, the IRS continues to scrutinize syndicated conservation easements, identifying the transaction as a “tax scam to avoid”⁸⁴ and enlisting three separate divisions (plus outside contractors) to pursue “[e]very available enforcement option,”⁸⁵ including civil penalties and criminal prosecution. Moreover, the Senate Finance Committee is urging Congress,

⁷⁶ See Looney, *supra* note 3 (“The 25 promoters of syndicated deals that [Brookings] identified in 2015 and 2016 represent just seven states. Two-thirds of the companies they manage are incorporated in Georgia, and almost all of the remaining entities reside in Alabama, Florida, and North Carolina.”).

⁷⁷ See *id.* (“The total revenue loss from syndications is likely somewhere between \$1.0 billion and \$1.9 billion in 2015, and between \$1.3 billion and \$2.4 billion in 2016.”).

⁷⁸ See Cheever & McLaughlin, *supra* note 13, at 125 n.54 and accompanying text.

⁷⁹ *Id.* at 126 (citing Pub. L. No. 109-280, 120 Stat. 780, §§ 1213, 1219 (2006)).

⁸⁰ See *id.* at 126–27 (“Illustrating Congress’s somewhat schizophrenic approach the § 170(h) deduction, however, the PPA also temporarily enhanced the tax benefits offered to conservation easement donors by making the percentage limitations on the resulting charitable deductions more favorable.”).

⁸¹ *Id.* at 127.

⁸² See generally IRS Notice 2004-41 (announcing the IRS’s investigation into syndicated conservation easements).

⁸³ See generally *Land Trust Standards and Practices*, LAND TR. ALLIANCE, [hereinafter LTA Standards and Practices] <https://www.landtrustalliance.org/topics/land-trust-standards-and-practices> [<https://perma.cc/FN4L-YCGD>] (last visited June 1, 2021) (LTA’s standards and practices reference guide).

⁸⁴ Kaplan et al., *supra* note 50 (“These transactions are also included in IRS’ 2019 dirty dozen list of scams to avoid.”).

⁸⁵ News Release, IRS, IRS Increases Enforcement Action on Syndicated Conservation Easements (Nov. 12, 2019), <https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements> [<https://perma.cc/BJJ9-4HG6>].

the IRS, and the Department of Treasury to take further actions “to preserve the integrity of the conservation-easement tax deduction.”⁸⁶

The IRS sometimes succeeds in uncovering syndicated conservation easement schemes, and those involved in the transactions typically appear in court. In late 2019, the Department of Justice sued Georgia-based syndicators, alleging that the defendants engaged in a syndicated conservation easement scheme that unlawfully exploited the tax code and defrauded investors and the government.⁸⁷ In 2020, the IRS denied tax deductions and imposed substantial penalties on the wealthy taxpayers who engaged in a syndicated conservation easement scheme. The taxpayers subsequently filed a class action lawsuit against the CPA firm who set up the transaction, alleging that the firm conspired with other firms and property appraisers to develop the syndicated conservation easement.⁸⁸ Past rulings suggest that the court recognizes the abusive nature of syndicated conservation easements and punishes syndicators accordingly,⁸⁹ though “over 80 other [syndicated conservation easement] cases remain pending in Tax Court”⁹⁰

While there are no penalties specific to syndicated conservation easement schemes, there are penalties for taxpayers who overstate the value of conservation easements and for appraisers who assist them in doing so. After the Pension

⁸⁶ COMMITTEE ON FINANCE UNITED STATES SENATE, SYNDICATED CONSERVATION EASEMENT TRANSACTIONS, S. Prt. 116-44 (Aug. 2020), <https://www.finance.senate.gov/imo/media/doc/SFC%20-%20Syndicated%20Conservation-Easement%20Transactions.pdf> [<https://perma.cc/DCC8-FD5Y>]; COMMITTEE ON FINANCE UNITED STATES SENATE, SYNDICATED CONSERVATION EASEMENT TRANSACTIONS, Exhibits 1-133, S. Prt. 116-44 (Aug. 2020), <https://www.finance.senate.gov/imo/media/doc/SFC%20-%20Syndicated%20Conservation-Easement%20Transactions%20Exhibits.pdf> [<https://perma.cc/EC3J-DESD>]; See also News Release, Senate Finance Committee, Finance Committee Releases Report on Syndicated Conservation-Easement Transactions (Aug. 25, 2020), <https://www.finance.senate.gov/chairmans-news/finance-committee-releases-report-on-syndicated-conservation-easement-transactions> [<https://perma.cc/S82W-DADT>].

⁸⁷ *United States v. Zak*, No. 1:18-cv-05774-AT, 426 F. Supp. 3d 1365 (N.D. Ga. Dec. 10, 2019).

⁸⁸ See Jay Adkisson, *Alleged Syndicated Conservation Easement Tax Shelter Promoters Face Class-Action Lawsuit*, FORBES (Mar. 28, 2020, 12:55 PM EDT), <https://www.forbes.com/sites/jayadkisson/2020/03/28/alleged-syndicated-conservation-easement-tax-shelter-promoters-face-class-action-lawsuit/#ab6efc05c564> [<https://perma.cc/F7FW-FMQR>] (citing Jury Demand, *Lechter v. Aprio, L.L.P.*, No. 1:20-mi-99999-UNA, Document 918 (Dist. Ct. N.D. Atlanta Div., Ga. filed Mar. 26, 2020), https://assetprotectionbook.com/casedocs/conservation_easements/Aprio_Class_Action_Complaint_200326.pdf [<https://perma.cc/AXN8-MY8N>]).

⁸⁹ See, e.g., *Wendell Falls Dev. v. Comm’r*, No. 3494-14, T.C. Memo 2018-193 (T.C., Nov. 20, 2018) (holding that taxpayers receive no tax deduction for easements donated for park use, when their highest and best use is park use); *Graev v. Comm’r*, 140 T.C. 377 (2013) (holding that taxpayers receive no tax deduction when donating conservation easements solely for tax benefits).

⁹⁰ Kaplan et al., *supra* note 50.

Protection Act of 2006,⁹¹ taxpayers are subject to a 20 percent penalty if the stated value of the conservation easement was 150 percent higher than the correct value (a “substantial valuation misstatement”), and a 40 percent penalty if the stated value of the conservation easement was 200 percent higher than the correct value (a “gross valuation misstatement”).⁹² Tax Courts typically are capable of computing a conservation easement’s correct value.⁹³ Appraisers, on the other hand, may receive a penalty of 125 percent, maximum, of the gross income derived from a substantial or gross valuation statement, but liability may be avoided if the appraiser can show that it was “more likely than not” that the appraisal was correct.⁹⁴ Additionally, appraisers may be “blacklisted,” meaning “the appraiser’s appraisals will have no probative effect in any administrative proceeding before the Treasury or the IRS and bar such appraiser from presenting evidence or testimony in any such proceeding.”⁹⁵

Members of Congress have tried to pass a bill that would further disincentivize wealthy taxpayers from engaging in syndicated conservation easement schemes. The Charitable Conservation Easement Program Integrity Act of 2019 (CCEPIA)⁹⁶ would add a new paragraph to IRC § 170(h)⁹⁷ that effectively limits the amount an investor can receive in conservation easement tax deductions. According to the Joint Committee on Tax, the bill may generate up to \$6.6 billion in federal revenue.⁹⁸ The current bill has failed to garner mainstream support in the Senate, though many charitable organizations with a stake in conservation easements strongly support its passage.⁹⁹

⁹¹ Pub. L. No. 109-280, 120 Stat. 780.

⁹² See *Kaufman v. Comm’r (Kaufman I)*, T.C. Memo 2014-52 at 387, *aff’d Kaufman v. Commissioner (Kaufman II)*, 784 F.3d 56 (1st Cir. 2015); see also *McLaughlin, supra* note 49, at 247 (describing taxpayer penalties for the purposes of the § 170(h) deduction).

⁹³ See *McLaughlin, supra* note 49, at 247 (discussing how tax courts found gross valuation statements on multiple occasions).

⁹⁴ I.R.C. § 6695A(b); see also *McLaughlin, supra* note 49, at 248–49 (describing appraiser penalties for the purposes of the § 170(h) deduction).

⁹⁵ *McLaughlin, supra* note 49, at 249 (citing 31 U.S.C. § 330(c) (2015)); see also *Practice Before the Department*, 31 U.S.C. § 330(b) (2015).

⁹⁶ Charitable Conservation Easement Program Integrity Act of 2019, S. 170, 116th Cong. (1st Sess. 2019).

⁹⁷ I.R.C. § 170(h).

⁹⁸ See Press Release, LTA, *Allies Call for Immediate Passage of Charitable Conservation Easement Program Integrity Act* (Dec. 11, 2019), <https://www.landtrustalliance.org/land-trust-alliance-allies-call-immediate-passage-charitable-conservation-easement-program-integrity> [<https://perma.cc/73UB-XV3N>] (referencing statements made by the nonpartisan Joint Committee on Tax).

⁹⁹ See *id.* (listing each charitable organization that supports the CCEPIA).

III. ANALYSIS

A. The IRS: A Toothless Tiger

While the IRS continues to combat syndicated conservation easements, the agency has gained little traction in curtailing the issue, likely because most of its power derives from audits and Tax Court, both of which require abundant resources and time.¹⁰⁰

Syndicated conservation easement schemes are not the only abusive tax practices that the IRS has targeted with a special task force. In 2009, the IRS employed a similar tactic to uncover abusive tax maneuvers from high-profile business magnates but ultimately stopped short after nearly a decade of auditing, eventually settling for only a small fraction of its intended penalties and back taxes.¹⁰¹ Efforts like this demonstrate the myriad challenges the IRS faces when auditing ultrawealthy taxpayers, in part because those taxpayers have abundant financial resources to afford “the best legal and accounting talent” to help guide them in their potentially abusive practices and defend them whenever the IRS takes notice.¹⁰² Indeed, these lawyers and accountants aid taxpayers in creating complex tax schemes that may take the IRS years just to “understand a transaction and deem it to be a violation.”¹⁰³ In effect, wealthy taxpayers have the ability to “steamroll tax laws,”¹⁰⁴ aiding the notion that current auditing practices are insufficient in addressing syndicated conservation easement schemes. This problem is exacerbated by the fact that Congress continues to cut IRS funding, weakening the agency’s ability to carry out full audits and investigations.¹⁰⁵

Syndicators design syndicated conservation easement schemes in a way that accounts for IRS auditing efforts and ultimately protects the invested wealthy taxpayers from facing the brunt of penalties and punishments. Because billions of dollars are at stake each year in the form of tax deductions, syndicate organizers

¹⁰⁰ See generally Elkind, *supra* note 72 (arguing that the IRS’s efforts ultimately fail to slow the growth of syndicated conservation easements).

¹⁰¹ See Jesse Eisenger & Paul Kiel, *The IRS Tried to Take on the Ultrawealthy. It Didn’t Go So Well.*, PROPUBLICA (Apr. 5, 2019 5:00 AM EDT), <https://www.propublica.org/article/ultrawealthy-taxes-irs-internal-revenue-service-global-high-wealth-audits> [<https://perma.cc/7SYS-CDD8>] (discussing how such long and contentious audits yield only small amounts of penalties and back taxes).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Robert Frank, *How Congress Made It Easier to Avoid the IRS*, CNBC (Jan. 14, 2020, 2:00 PM EST), <https://www.cnbc.com/2020/01/14/why-congress-made-it-easier-to-avoid-the-irs.html> [<https://perma.cc/Y5WM-H6US>] (providing data that show a 21% decline in IRS funding since 2010); Paul Kiel & Jesse Eisinger, *How the IRS Was Guttled*, PROPUBLICA (Dec. 11, 2018, 5:00 AM EST), <https://www.propublica.org/article/how-the-irs-was-guttled> [<https://perma.cc/KVJ5-HNMF>] (arguing that the IRS’s funding deficit favors corporations and the wealthy).

accept the risk of being audited by the IRS and build “audit reserves”¹⁰⁶ and/or “audit insurance” into their budget. Since most syndicated conservation easements appear legal on paper, anything less than a full audit of the transaction likely will not reveal an abuse of the tax system. As mentioned previously, it may take the IRS years of auditing a single transaction to determine whether a violation occurred. Even if the IRS successfully uncovers a syndicated conservation easement scheme through an audit, the “deals are structured in a way that insulate[s] the wealthy individual investors,”¹⁰⁷ meaning that the lawyers and sponsors are left to deal with much of the legal battle in tax court, rather than the wealthy taxpayers who ultimately reap the benefits from the abusive tax practice.

For these reasons, the IRS’s current efforts against syndicated conservation easements are insufficient, especially considering the financial power syndicators wield¹⁰⁸ and the amount that the wealthy taxpayers stand to gain in the form of tax benefits.¹⁰⁹ Since syndicated conservation easements primarily abuse the tax framework through grossly inflated appraisals that lead to overstated tax deductions, the IRS should devote most of its conservation easement auditing resources to investigating appraisers and appraisals.

Currently, the IRS compiles and publishes an annual list of tax scams to avoid.¹¹⁰ The IRS may consider creating a similar database of appraisers who have made substantial or gross valuation statements in past conservation easement transactions. Specifically, any appraiser who has been “blacklisted” pursuant to 31 U.S.C. §§ 330(b)–(c) is added to this appraiser database. Consequently, any transactions involving these listed appraisers are immediately suspect and subject to more stringent IRS scrutiny. As the current law stands, appraisers are potentially liable for only a 125 percent maximum penalty when making substantial or gross valuation statements, and they often avoid this liability by passing a low bar standard of showing a reasonable belief that their appraisal was accurate. While a database of blacklisted appraisers would not increase appraiser penalties, it could nevertheless provide the IRS with a more streamlined method of identifying suspect conservation easement transactions, thus conserving auditing resources and expediting IRS auditing efforts overall.

The IRS is taking measures to more quickly identify flawed appraisals by breaking down procedural safeguards that otherwise protect appraisers against

¹⁰⁶ Elkind, *supra* note 72.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* (referencing SCE advocacy groups (i.e., Partnership for Conservation, EcoVest) who spent up to \$5 million in lobbying).

¹⁰⁹ *See* Press Release, LTA, Land Trust Alliance Statement on Updated IRS Data Regarding Abusive Conservation Easement Tax Shelters (Feb. 25, 2020), <https://www.landtrustalliance.org/land-trust-alliance-statement-updated-irs-data-regarding-abusive-conservation-easement-tax-shelters> [<https://perma.cc/PX39-DHWN>] (referencing data from 2016 and 2017 that show approximately \$13 billion in deductions).

¹¹⁰ IRS, *Dirty Dozen*, <https://www.irs.gov/newsroom/dirty-dozen> [<https://perma.cc/RP P6-MHHM>] (last visited June 1, 2021) (“The Dirty Dozen represents the worst of the tax scams.”).

penalties and disciplinary referrals.¹¹¹ In the past, an IRS appraiser would recommend to a Revenue Agent penalties against an appraiser for valuation misstatements; that recommendation would undergo an extensive, multitiered review process before the Revenue Agent could consider it.¹¹² Recently, the IRS eliminated this multitiered review process, now allowing the Revenue Agent to consider violations once an IRS appraiser's recommendation receives approval from their immediate supervisor.¹¹³ Some argue that this measure provides too much discretion to IRS Revenue Agents, who likely have little experience in or knowledge of the valuation process.¹¹⁴ Despite those limitations, this measure signals a shift in IRS auditing practices, suggesting that the agency is taking necessary aggressive steps toward uncovering flawed appraisals.

Ultimately, an appraisal database compiled by the IRS, paired with the agency's recent changes to appraiser penalties, may fulfill syndicated conservation easement enforcement objectives. For one, this database would disincentivize appraisers from providing substantial or gross valuation statements because their susceptibility to penalties is greater. Second, this database would limit the amount of substantial or gross valuation statements because blacklisted appraisers realize their appraisals warrant heightened scrutiny, and thus would be less willing to make substantial or gross valuation statements. Furthermore, wealthy taxpayers seeking tax deductions would be less willing to work with blacklisted appraisers because the IRS could more easily uncover a syndicated conservation easement scheme involving a blacklisted appraiser. Moreover, syndicators would have fewer appraisers to draw from when executing these fraudulent transactions.

While more efficient IRS auditing measures that target appraisers and appraisals will likely slow the rate of syndicated conservation easement schemes, this alone will not curb the practice entirely. Instead, penalties leveled against taxpayers and appraisers must be harsher overall, and the IRS must actually pursue this line of enforcement against syndicators.

In June 2020, the IRS offered a limited-time settlement program to taxpayers with pending docketed Tax Court cases relating to syndicated conservation

¹¹¹ I.R.S. Int. Gdnc. Memo. LB&I-20-0120-001 (Jan. 22, 2020) <https://www.irs.gov/pub/foia/ig/lmsb/lbi-20-0120-0001.pdf> [<https://perma.cc/R8QP-MD5N>].

¹¹² Hale E. Shepard, *Conservation Easement Enforcement: IRS Quietly Eliminates Procedural Protections for Appraisers*, J. OF TAXATION 17, 25 (May 2020), <https://www.chamberlainlaw.com/assets/htmldocuments/IRS%20removes%20procedural%20protection%20for%20appraisers.pdf> [<https://perma.cc/7WJN-JPYV>] (citing IRM 20.1.12.7.4) (“Following the former process from start to finish, the IRS would not assess . . . penalties against an appraiser until the matter had been considered by at least five separate, experienced IRS employees.”).

¹¹³ *See id.*

¹¹⁴ *See id.* at 26 (arguing that IRC § 6695(a) Penalty Case Reviews may be troublesome for partnerships and appraisers).

easements.¹¹⁵ The settlement terms include: disallowing any deduction resulting from the syndicated conservation easement; allowing a deduction of the amount the invested taxpayers invested toward the scheme, but also requiring them to pay a reduced penalty; and disallowing sponsors and other similar parties any deductions of cost and requiring them to pay the maximum penalty.¹¹⁶ This settlement program may help clear up current syndicated conservation easement-related cases in the Tax Court docket, but the IRS needs to pursue more aggressive penalties against both the taxpayers and sponsors of syndicated conservation easement schemes once they are in court. The language in the settlement does require parties to agree to several important caveats, including allowing the IRS to seek further penalties and conduct criminal investigations,¹¹⁷ but this remains merely prospective because the IRS has yet to pursue criminal penalties or sanctions against any parties engaging in conservation easement syndications.¹¹⁸

It is unclear why prosecutors have yet to bring criminal charges against syndicators. Tax evasion is a felony after all,¹¹⁹ and those engaging in syndicated

¹¹⁵ I.R.S. News Release, IR-2020-130 (June 25, 2020) [hereinafter IRS Offers Settlement], <https://www.irs.gov/newsroom/irs-offers-settlement-for-syndicated-conservation-easements-letters-being-mailed-to-certain-taxpayers-with-pending-litigation> [<https://perma.cc/2MXD-Z8LY>].

¹¹⁶ *See id.* The IRS announced its first settlement under the program in August 2020, with Coal Property Holdings, LLC, a Tennessee-based syndicate. *See also* I.R.S. News Release, IR-2020-196: Settlements Begin in Syndicated Conservation Easement Transaction Initiative (Aug. 31, 2020) [hereinafter Settlements Begin], <https://www.irs.gov/newsroom/settlements-begin-in-syndicated-conservation-easement-transaction-initiative> [<https://perma.cc/9ERM-P7KP>].

¹¹⁷ IRS Offers Settlement, *supra* note 115; I.R.S. Notice CC-2021-001, 10 (Oct. 1, 2020) (“Neither this settlement initiative, nor any settlement executed therefrom, will have any effect, limitation, or prohibition against the IRS asserting promoter, material advisor, appraiser, or return preparer penalties, discipline under Circular 230, or any other penalty, addition to tax, or additional amount. Execution of a Closing Agreement under this initiative does not preclude the IRS from investigating any associated criminal conduct or recommending prosecution for violation of any criminal statute.”).

¹¹⁸ Despite its first announced settlement with Coal Property Holdings, LLC, the IRS has yet to pursue any further penalties against the syndicate. However, it may be too early to determine whether the IRS actually will take advantage of the “further penalties” terms built into the settlement agreement. *See Settlements Begin, supra* note 116. The Dept. of Justice has filed a complaint against Georgia-based syndicators. *See generally* Complaint, U.S. v. Zak et al., No. 1:18-cv-05774-AT (N.D. Ga., Dec. 18, 2018). But the complaint seeks only injunctions and disgorgement of profits, rather than criminal penalties. *See id.* Two class action suits have been filed against syndicators. *See generally* Lechter et al. v. Aprio, LLP, et al. No. 1:20-cv—01325-AT (N.D. Ga. March 26, 2020); Turk et al. v. Morris, Manning & Martin, LLP, et al. No. 1:20-cv-02815-AT (N.D. Ga. July 3, 2020). Whether the syndicators will be found criminally liable remains to be seen.

¹¹⁹ 26 U.S.C. § 7201.

conservation easement schemes likely meet the elements of evasion of assessment¹²⁰ because these schemes rely on overvalued conservation easements that create inflated tax deduction values. In other words, the taxpayers engaging in these schemes are not actually entitled to all of the deductions that they claim through syndicated conservation easements. Therefore, it is somewhat likely that syndicate groups may be liable for tax evasion at the very least. While the IRS may pursue this line of argument through its settlement program, the agency has yet to do so. Regardless, the IRS can pursue the “further penalties” option only when parties agree to settlements.¹²¹ This creates a perverse incentive for those engaged in particularly flagrant conservation easement syndication schemes; why would a syndicate group agree to settle when doing so would open it up to criminal investigations? As such, there likely are many syndicated conservation easement parties that will choose not to engage in settlements, instead choosing to battle it out through Tax Court and, at worst, receive appraiser penalties.

As it stands now, the punishment for those engaged in syndicated conservation easement schemes remains inadequate and likely fails in deterring parties from participating in these schemes.

B. Shortcomings of the Charitable Conservation Easement Program Integrity Act

The thrust of the CCEPIA is important because it targets wealthy taxpayers and limits their ability to receive a quick profit from syndicated conservation easements,¹²² but its effectiveness would be limited because it fails to address several key underlying causes.

¹²⁰ *Id.* (“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”). Evasion of assessment is a category of tax evasion, and the “willful attempt in any manner to evade or defeat any tax” See *Sansone v. United States*, 380 U.S. 343, 354 (1965).

¹²¹ See Dylan Moroses, *Several IRS Divisions Probing Conservation Easement Abuse*, LAW360: TAX AUTHORITY (Nov. 12, 2019, 6:14 PM EST), <https://www.law360.com/tax-authority/articles/1219136/several-irs-divisions-probing-conservation-easement-abuse> [<https://perma.cc/TD2U-H8UD>].

¹²² See Charitable Conservation Easement Program Integrity Act of 2019, S. 170, 116th Cong. (1st Sess. 2019) (limiting the aggregate amount of a partner’s annual tax deductions for qualified conservation contributions of a partnership to 2.5 times the partner’s adjusted basis in the partnership).

1. *Uniformity in State Law*

Despite many states incorporating some form of conservation easement-related tax law into their statutes,¹²³ such laws still vary from state to state. This may explain why a majority of syndicated conservation easements occur in only a small minority of states,¹²⁴ where state tax codes make financial incentives for conservation easement donors greater¹²⁵ or less demanding than conservation easement requirements in other states.¹²⁶ Congress should also consider legislation that would incentivize states to follow a uniform set of guidelines for conservation easement tax incentives. For instance, if a state follows federal guidelines, it will receive federal funds for acquiring trail easements and open space. Such legislation would not only encourage uniformity in state-based conservation easement tax law, but also promote states to pursue conservation easement transactions that are both transparent and accessible to the public.

2. *A Legally Mandated Set of Standards and Practices*

The CCEPIA fails to address how charitable organizations are not required by law to follow standards and practices for conservation easement transactions. Although the LTA oversees a robust accreditation program,¹²⁷ participation is merely voluntary, and none of the biggest syndicated conservation easement perpetrators are accredited.¹²⁸ This problem could be addressed by further tightening the requirements of a “qualified organization,”¹²⁹ such as capping conservation easement tax deductions at a low ceiling unless donated through an LTA-accredited organization. This requirement would disincentivize syndicators from working

¹²³ See Cheever & McLaughlin, *supra* note 13, at 117 (describing how states eventually adopted their own “conservation easement enabling statute.”).

¹²⁴ See Looney, *supra* note 3.

¹²⁵ See, e.g., JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 29 (2005), <https://www.lincolnist.edu/sites/default/files/pubfiles/reinventing-conservation-easements-full.pdf> [<https://perma.cc/3L67-F39F>] (“For example, Virginia offers easement donors extremely attractive income tax credits equal to 50[%] of the easement’s value and allows the donor to sell these credits to another taxpayer for whom the credits would generate greater financial benefit.”) (citation omitted).

¹²⁶ See, e.g., S.B. 901(2), 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (requiring landowners that donate conservation easements with forest land to “to maintain and improve forest health through promotion of a more natural tree density, species composition, structure, and habitat function . . . ,” among other stewardship responsibilities. *Id.*).

¹²⁷ See Christina Soto, *The Impact of Accreditation*, SAVING LAND MAGAZINE (Winter 2019), <https://www.landtrustalliance.org/news/impact-accreditation> [<https://perma.cc/SZJ7-XR8R>] (summarizing the scope of LTA’s accreditation program).

¹²⁸ See Elkind, *supra* note 72 (naming the Partnership for Conservation and EcoVest as major syndicator organizations and stating that “[t]he Land Trust Alliance. . . refused to accredit any trust accepting syndicated deals.”).

¹²⁹ I.R.C. § 170(h)(3).

around LTA's widely accepted standards and practices¹³⁰ and (based on the abundance of LTA-accredited land trusts across the country)¹³¹ likely would not pose a barrier to entry for well-intentioned conservation donors from donating valuable land.

3. *Heightened Scrutiny Toward Appraisals*

Syndicated conservation easement schemes abuse the tax framework through grossly inflated appraisals. Much to the disadvantage of auditors, “[c]onservation easement appraisals are described by some in the business as part art and part science, with appraisal results varying with the appraiser’s expertise and chosen methodology.”¹³² As a result, appraisers have abundant discretion in determining the value of a proposed conservation easement donation, a major advantage for syndicators. To prevent appraisers from providing grossly inflated property appraisals, a third-party panel (e.g., the IRS, the United States Committee on Finance, etc.) should automatically review the valuation of any conservation easement donation that meets a certain tax value threshold. This practice would provide neutral oversight of the valuation process and likely deter “friendly property appraisers” from abusing their discretion.¹³³ At the very least, this practice could help the IRS streamline its auditing efforts toward high-value conservation easement donations and more quickly uncover some of the larger syndicated conservation easement transactions.

IV. CONCLUSION

Syndicated conservation easements cost taxpayers billions of dollars each year. For stakeholders working to curb the practice, no obvious panacea exists. However, if the IRS reworks its overall strategy in combatting syndicated conservation easements, and Congress hones in on appraisals and passes legislation that promotes both state tax law uniformity and legally-mandated standards and practices, then the conservation easement may be restored to its original purpose—private land conservation for the public good.

¹³⁰ See LTA Standards and Practices, *supra* note 83.

¹³¹ See *Accredited Land Trust Statistics*, LAND TRUST ACCREDITATION COMMISSION, <https://www.landtrustaccreditation.org/about/accredited-land-trust-statistics> [<https://perma.cc/S2PT-V5EM>] (last visited June 1, 2021) (“As of February 2021, there are 446 accredited land trusts in 46 U.S. states and territories.”).

¹³² Pidot, *supra* note 125, at 29.

¹³³ See Adkisson, *supra* note 71.