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## CONSERVATION EASEMENTS & RENEWABLE ENERGY: WHY CONSERVATION VALUES SHOULD EMBRACE WIND AND SOLAR

Lindsey W. Hromadka\*

### I. INTRODUCTION

Conservation easements have emerged as arguably one of the most effective private conservation tools employed by landowners, nonprofit organizations, and government agencies.<sup>1</sup> The rise in the use of conservation easements has coincided with the development of wind and solar production, which have grown exponentially over the last few decades, both in the commercial and residential realms.<sup>2</sup> Conservation easements and energy production are not typically perceived as having cooperative or synchronous goals since traditional energy development requires disturbing the environment, whereas a conservation easement's purpose is to permanently protect resources on the property.<sup>3</sup> Thus, these two competing interests have historically been pitted against one another.<sup>4</sup>

Renewable energy, however, presents a solution to the competition between the desire to be environmentally conscious and the need for energy to power our lives. Environmental groups have recognized the low impact of renewable energy on the environment and, "because of concern about the potentially devastating impacts of climate change," they have "expressed general support for expansion of renewable energy."<sup>5</sup> Renewable energy production, specifically wind and solar energy, and conservation easements have harmonious goals and should be employed together in an effort to conserve lands, reduce emissions, and create a sustainable future. Given the potentially enormous tax incentive associated with conservation ease-

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1. Gerald Korngold, *Conservation Easements and the Development of New Energies: Fracking, Wind Turbines, and Solar Collection*, 3 LA. ST. U. J. OF ENERGY L. & RESOURCES 101, 102 (2014).

2. *Id.*

3. Land Trust Alliance, *What You Can Do: Benefits for Landowners*, LANDTRUSTALLIANCE.ORG, <https://perma.cc/4V5S-SLUP> (last visited Nov. 17, 2015).

4. See generally Jacob P. Byl, *Conserving a Place for Renewable Power*, 29 J. ENVTL. L. & LITIG. 303 (2014).

5. Amy Wilson Morris & Jessica Owley, *Mitigating the Impacts of the Renewable Energy Gold Rush*, 15 MINN. J.L. SCI. & TECH. 293, 297 (2014).

ments,<sup>6</sup> this article argues the relevant Internal Revenue Service (IRS) regulations that control whether or not a conservation easement is deductible should be amended to expressly allow for and encourage wind and solar energy production.

Part II provides background on conservation easements. Part III discusses solar and wind energy production. Part IV lays out the current state of interaction between conservation easements and renewable energy, including environmental concerns and easements as mitigation tools in commercial-scale projects. Part V proposes that the IRS amend the current definition of “conservation purposes” found at 26 U.S.C. § 170(b) and in the applicable Treasury Regulations to allow for renewable energy production. Anticipating the IRS’ hesitancy to enact this proposal or an alternative proposal, the IRS should expressly provide that renewable energy production is not an “inconsistent use” within the purposes of conservation easements. Additionally, the IRS should not amend its policies to allow for commercial-scale solar and wind development on property encumbered by conservation easements; rather, the amended language referenced above should only apply to residential use. And finally, Part VI concludes by emphasizing the role tax policy can play in the fight against climate change.

## II. CONSERVATION EASEMENTS

### A. Background & History

Conservation easements are legally binding agreements that maintain the current state of the property’s baseline condition at the time the easement was enacted in perpetuity by limiting certain uses and preventing development of the land.<sup>7</sup> A private landowner can donate or sell the easement, often for significant tax benefits if certain requirements are met.<sup>8</sup> A public agency or a private organization, typically a land trust, holds the easement and is tasked with monitoring the land annually to enforce the landowner’s promise not to exercise the rights forfeited by the easement.<sup>9</sup>

6. See Elliott G. Wolf, *Simultaneously Waste and Wasted Opportunity: The Inequality of Federal Tax Incentives for Conservation Easement Donations*, 31 STAN. ENVTL. L. J. 15, 317 (“With respect to income tax, donors can claim the fair market value of the easement at the time of the donation as a charitable deduction of up to *fifty percent* of their taxable income in a given year . . . by comparison, for ordinary charitable donations, donors can only deduct a maximum of *thirty percent* of their taxable income.”) (emphasis added).

7. Byl, *supra* note 4, at 307.

8. *Id.* at 308–309.

9. The Nature Conservancy, *Conservation Easements: What Are Conservation Easements?*, NATURE.ORG, <https://perma.cc/AKF5-YPJH> (last visited Oct. 29, 2015); see also Treas. Reg. § 1.170A-14(g)(5)(ii) (2009).

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The idea that landowners can retain certain rights to their property while extinguishing others in their “bundle of rights” is rooted in English common law, which informed the U.S. legal system.<sup>10</sup> Conservation easements emerged with this idea in mind, motivated by a desire to “protect land for future generations while allowing owners to retain many private property rights and to live on and use their land.”<sup>11</sup> Landowners donate or sell conservation easements to protect their land for a variety of reasons, including preservation of important natural areas, wildlife habitat, water resources, and open space.<sup>12</sup>

The first land trust in the United States, the Trustees of Public Reservations, was established in 1891 in Massachusetts, but the Nature Conservancy nationalized the acquisition of private lands for conservation purposes in the 1950s.<sup>13</sup> The Uniform Law Commission drafted the Uniform Conservation Easement Act in 1981, which has been adopted by 22 states and the District Of Columbia.<sup>14</sup> However, all 50 states have adopted enabling statutes that strengthen the legal status of conservation easements by “remov[ing] the common law impediments to the creation and validity of conservation easements.”<sup>15</sup> Thus, the conservation easement movement has been evolving for more than 30 years and is growing rapidly; the acreage protected by conservation easements nearly doubled between 2000 and 2010, from 24 million acres to 47 million acres.<sup>16</sup>

## B. Tax Considerations

### 1. Qualified Conservation Contribution

The financial advantages associated with tax deductions can act as a significant incentive for landowners to donate their rights to develop their land by entering into a conservation easement.<sup>17</sup> Although state property and income tax reductions are available in some states, the most impactful

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10. The Nature Conservancy, *supra* note 9.

11. *Id.*

12. 26 U.S.C. § 170(h)(4)(A) (2015); KATIE CHANG, 2010 NATIONAL LAND TRUST CENSUS REPORT 2 (Rob Aldrich & Christina Soto eds., 2011), available at <https://perma.cc/TM49-WSHH>.

13. Korngold, *supra* note 1, at 101 n.1.

14. Unif. Law Comm’n, *Conservation Easement Act*, UNIFORMLAWS.ORG, <https://perma.cc/H7CA-ANS6> (last visited Nov. 1, 2015).

15. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 426 (2005).

16. CHANG, *supra* note 12, at 5; but see also *National Conservation Easement Database*, CONSERVATIONEASEMENT.US, <https://perma.cc/2VT4-M4LC> (last visited Nov. 7, 2015) (reporting only 23.3 million acres protected as of July, 2015).

17. Byl, *supra* note 4, at 308.

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tax benefit to the landowner is federal.<sup>18</sup> The Internal Revenue Code (the “Code”) allows landowners to deduct the value of the “qualified conservation contribution” from the taxpayer’s income or from the estate for a set number of years.<sup>19</sup> Current law allows landowners to deduct the value of the donated conservation easement up to 50% of their taxable income for 15 years.<sup>20</sup> If the majority of the landowner’s income is from agricultural operations, then the value could be deducted up to 100 percent of their income.<sup>21</sup> Thus, conservation easements can play a significant role in estate planning, especially for farmers and ranchers.<sup>22</sup>

Because tax benefits play such a huge role in incentivizing landowners to enter into conservation easements, the law regarding conservation easements closely resembles applicable IRS regulations.<sup>23</sup> The Code specifies that only “qualified conservation contributions” are deductible.<sup>24</sup> Qualified conservation contributions must be: “[1] of a qualified real property interest, [2] to a qualified organization, and [3] exclusively for conservation purposes.”<sup>25</sup>

A “qualified real property interest” means the landowner has the entire interest of the property plus a remainder interest and has contracted to perpetually restrict the way in which the property may be used through the conservation easement.<sup>26</sup> Many states<sup>27</sup> allow for term easements, which are conservation easements that only last a set amount of years, but private organizations and landowners must be aware that the IRS will not grant the deduction for an easement that does not encumber the land forever.<sup>28</sup> A “qualified organization” is either a 501(c)(3) non-profit organization established for the sole purpose of preserving land (usually known as a land trust), or a government body.<sup>29</sup>

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18. *Id.* at 308–309; *see also e.g.*, MONT. CODE ANN. § 76–6–208 (2015) (allowing property to be taxed based on the “restricted purposes for which the property may be used”).

19. 26 U.S.C. § 170(b)(1)(E) (2015).

20. *Id.*

21. *Id.*

22. *Byl, supra* note 4, at 309.

23. *Id.*

24. 26 U.S.C. § 170(h)(1).

25. *Id.*

26. *Id.* § 170(h)(2).

27. *See e.g.*, MONT. CODE ANN. § 76–6–202; TEX. PARKS & WILD. CODE ANN. § 84.004; S.D.C.L. § 1-19B-57; ALA. CODE § 35-18-2; WIS. STAT. ANN. § 700.40; *etc.*

28. 26 U.S.C. § 170(h)(2)(C).

29. *Id.* § 170(h)(3).

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## 2. Conservation Purposes &amp; Inconsistent Uses

The easement must be granted “exclusively for conservation purposes.”<sup>30</sup> The regulations list five specific conservation purposes that qualify:

- [1] the preservation of land areas for outdoor recreation by, or the education of, the general public,
- [2] the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem,
- [3] the preservation of open space (including farmland and forest land) where such preservation is
  - [a] for the scenic enjoyment of the general public, or
  - [b] pursuant to a clearly delineated Federal, State or local governmental conservation policy, and will yield a significant public benefit o
- [4] the preservation of an historically important land area or a certified historic structure.<sup>31</sup>

The IRS uses an “inconsistent use” test when deciding if the easement is used exclusively for conservation purposes.<sup>32</sup> An inconsistent use is a use of the property that is in conflict with the conservation purposes. Because the use could potentially harm a conservation interest, the IRS disallows the deduction if an inconsistent use is found.<sup>33</sup> The regulations give several examples of inconsistent uses, such as the use of pesticides when the purpose of the easement is to maintain wildlife habitat, or building a single home on a 90-acre parcel when the purpose of the easement is to conserve the scenic view.<sup>34</sup> Inconsistent uses are permitted only where they are “necessary for the protection of the conservation interests that are the subject of the contribution.”<sup>35</sup>

The Treasury regulations applicable to the charitable tax deduction for conservation easements do not discuss solar or wind energy production, nor are they included in any of the examples given to provide insight for practitioners.<sup>36</sup> However, the regulations do discuss subsurface oil, gas and mineral rights by specifying that when such rights are not included in the gift, the landowner will not be able to take advantage of the deduction because the easement will not be considered exclusively for conservation purposes.<sup>37</sup> The regulations specify that although the landowner may not engage in “any method of mining that is inconsistent with the particular con-

30. *Id.* § 170(h)(1)(C).

31. *Id.* § 170(h)(4)(A).

32. I.R.S., *Conservation Easement Audit Techniques Guide* 27 (2012); *see also* Treas. Reg. § 1.170A-14(e)(2)–(3) (2008).

33. Treas. Reg. § 1.170A-14(e)(2)–(3); I.R.S., *supra* note 32, at 21.

34. Treas. Reg. §§ 1.170A-14(e)(2), (f).

35. *Id.* § 1.170A-14(e)(3).

36. *Id.*

37. Korngold, *supra* note 1, at 115–116.

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servation purposes” of the conservation easement, “a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irretrievably destructive of significant conservation interests.”<sup>38</sup> For example, the regulations provide a tax deduction would not be denied for production facilities “concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.”<sup>39</sup>

### III. RENEWABLE ENERGY

Renewable energy has dramatically increased in the United States energy portfolio. In 1980, less than 0.25% of U.S. energy came from renewable sources not including hydropower, but by 2010, non-hydro renewable power comprised 4% of U.S. energy production.<sup>40</sup> From 2005 to 2014, wind production rose from approximately 17,000 Mwh to approximately 180,000 Mwh, 10 times itself, and photovoltaic solar (“PV”) grew by 1,000 times—by far the two fastest growing renewable energy technologies in the U.S.<sup>41</sup>

#### A. Solar

PV energy converts solar energy to electric energy through photovoltaic cells.<sup>42</sup> There are two types of PV systems.<sup>43</sup> The most common is a flat-plate module, which uses panels to respond to either direct or diffuse sunlight.<sup>44</sup> Fixed flat-plate modules are lightweight and do not require extra equipment.<sup>45</sup> The second type of PV system is a concentrator PV system, which uses less solar cell material than flat-plate modules but can be significantly more expensive because of the tracking technology required.<sup>46</sup> Residential solar panels can be rooftop panels or an independently constructed panel in the vicinity of the residence. Commercial-scale solar farms require

38. Treas. Reg. § 1.170A-14(g)(4)(i).

39. *Id.*

40. Byl, *supra* note 4, at 312.

41. U.S. ENERGY INFO. ADMIN., ELECTRIC POWER MONTHLY WITH DATA FOR SEPTEMBER 2015 table 1.1.A. (2d ed. 2015) (note: numbers are updated periodically; these reflect the latest numbers before this article went to print.).

42. Office of Energy Efficiency & Renewable Energy, *Photovoltaic System Basics*, ENERGY.GOV (Aug. 20, 2013), <https://perma.cc/58DG-EWC7> [hereinafter Office of Energy Efficiency & Renewable Energy, *PV System*].

43. *Id.*

44. Office of Energy Efficiency & Renewable Energy, *Flat-Plate Photovoltaic System Basics*, ENERGY.GOV (Aug. 20, 2013), <https://perma.cc/33BR-KGAR> [hereinafter Office of Energy Efficiency & Renewable Energy, *Flat-Plate*].

45. *Id.*

46. Office of Energy Efficiency & Renewable Energy, *Concentrator Photovoltaic System Basics*, ENERGY.GOV (Aug. 20, 2013) <https://perma.cc/ATS3-WS79>.

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multiple massive panels spread over the land. The cost of solar has dropped to 1% of what it was 40 years ago, making it more affordable to landowners and small business owners.<sup>47</sup>

Solar energy development presents two problems in the context of conservation easements. First, residential-scale PV panels and concentrator systems are often thought of as unsightly, which could detract from “scenic view” purposes; a relevant consideration only if that is one of the conservation purposes in the conservation easement. This unsightly characteristic has caused litigation in the nuisance arena and has led to many residential covenants banning solar panels.<sup>48</sup> Second, solar needs a significant amount of land; scientists estimate one mere megawatt of installed solar capacity requires several acres.<sup>49</sup> Thus, if the easement’s conservation purpose is open space for scenic enjoyment, preservation of land for outdoor recreation and/or natural habitat for wildlife, plants, and other ecosystems, the IRS could likely deny the tax benefit because these uses require open and pristine land free from obvious obstructions. Because commercial-scale solar energy production requires a great deal of land, whereas residential-scale production does not (in fact the solar energy production can be a part of the residence itself), this article argues two different solutions for commercial-scale and residential-scale solar energy production included in conservation easements in Part V.

### B. Wind

Charles F. Brush developed the first windmill to generate electricity in 1888 in Cleveland, Ohio.<sup>50</sup> From that time until 2014, more than 60,000 MWs of wind energy capacity have been installed in the U.S.<sup>51</sup> Wind power works by converting the natural wind in our atmosphere into mechanical energy and then into electricity.<sup>52</sup> Commercial-scale wind turbines have three blades, which sit on a steel tubular tower up to 325-feet tall and can be seen from miles away.<sup>53</sup> Wind turbines for residential-scale production are

47. U.S. Dept. of Energy, *Get Your Power from the Sun: A Consumer’s Guide* 3 (Dec. 2003), available at <https://perma.cc/2MAN-7J4A> (“Although PV now costs less than 1% of what it did in the 1970s, the amortized price over the life of the system is still about 25 cents per kilowatt-hour”).

48. See e.g. *Faler v. Haines*, 104 A.D.3d 1120 (N.Y. App. Div. 2013); *Byl*, *supra* note 4, at 313.

49. Union of Concerned Scientists, *Solar Power Plants: Large-Scale PV*, UCSUSA.ORG, <https://perma.cc/BA5K-ZNVN> (last visited Apr. 22, 2016).

50. See *Mr. Brush’s Windmill Dynamo*, 63 *Sci. Am.* 384, 389 (1890), available at <https://perma.cc/BE5Z-2BCE>.

51. Am. Wind Energy Ass’n, *Wind Energy Facts at a Glance*, AWEA.ORG, <https://perma.cc/H8UU-KHX9> (last visited Nov. 7, 2015).

52. Am. Wind Energy Ass’n, *Wind 101: The Basics of Wind Energy*, AWEA.ORG, <https://perma.cc/G26F-4GQT> (last visited Nov. 7, 2015) [hereinafter American Wind Energy Ass’n., *Wind 101*].

53. *Id.*

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typically 80-foot tall, which is “about twice the height of a neighborhood telephone pole.”<sup>54</sup> To power an average American home, the wind turbine has five kilowatts of capacity with a base diameter of approximately 18 feet.<sup>55</sup> Wind turbines need a site with unobstructed access to wind, and require a significant amount of land to comply with the relevant “setback rules and practical realities” of wind energy production, such as siting, setbacks, and necessary installation of roads.<sup>56</sup>

Given that wind energy production requires a great deal of space, yet only five percent of the land is actually covered by wind turbines, farms and ranches are an ideal setting for wind farms.<sup>57</sup> Landowners can substantially increase their income by allowing wind turbines on their land while farming operations on the rest of their land are relatively unaffected.<sup>58</sup> Moreover, the federal government subsidizes wind energy production on agricultural lands by providing guaranteed loan financing and grant funding to agricultural producers to purchase and install renewable energy systems.<sup>59</sup>

The federal government also encourages landowners to conserve working agricultural lands through the Agricultural Conservation Easement Program (“ACEP”), which prevents “conversion of productive working lands to non-agricultural uses.”<sup>60</sup> The Natural Resources Conservation Service “may contribute up to 50 percent of the fair market value of the agricultural land easement.”<sup>61</sup> In 2014, the ACEP program facilitated 485 conservation easements, resulting in the protection of more than 140,000 acres across the U.S.<sup>62</sup> ACEP conservation easements, as well as non-ACEP conservation

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54. Am. Wind Energy Ass’n., *FAQs for Small Wind Systems*, AWEA.ORG, <https://perma.cc/A7X3-B4U5> (last visited Nov. 7, 2015) [hereinafter American Wind Energy Ass’n, *FAQs*].

55. *Id.*

56. *Id.*; Byl, *supra* note 4, at 313.

57. Shane Thin Elk, *The Answer is Blowing in the Wind: Why North Dakota Should Do More to Promote Wind Energy Development*, 6 GREAT PLAINS NAT. RESOURCES J. 110, 114 (2001) (citing SIDNEY BOROWITZ, *FAREWELL FOSSIL FUELS: REVIEWING AMERICA’S ENERGY POLICY* 151 (Plenum Press 1999) (“Wind power production requires a great deal of space. Because of the turbulence created by the rotating blades, the machines have to be placed between 150–300 meters apart. An efficient wind farm must have at least 100 of these machines.”)).

58. *Id.* at 114–115 (quoting Howard A. Learner, *Cleaning, Greening, and Modernizing the Electric Power Sector in the Twenty-first Century*, 14 TUL. ENVTL. L.J. 277, 297 (2001) (“farmers can often increase their incomes by 50% or more”)).

59. USDA, *Rural Energy for America Program Renewable Energy Systems & Energy Efficiency Improvement Loans & Grants*, RD.USDA.GOV, <https://perma.cc/X7YC-RZEB> (last visited Nov. 15, 2015).

60. USDA, Natural Res. Conservation Serv., *Agricultural Conservation Easement Program*, NRCS.USDA.GOV, <https://perma.cc/8DU5-HEY9> (last visited Nov. 17, 2015).

61. *Id.*

62. USDA, Natural Res. Conservation Serv., *NRCS Conservation Programs*, NRCS.USDA.GOV, <https://perma.cc/9B4J-C7S4> (last visited Nov. 17, 2015).

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easements, aided in the Fish and Wildlife Service's recent decision not to list the Greater Sage Grouse as endangered or threatened.<sup>63</sup>

### C. Green Power

The Environmental Protection Agency ("EPA") classifies green power as "a subset of renewable energy . . . that provide[s] the highest environmental benefit."<sup>64</sup> The EPA categorizes solar, wind, biogas, biomass, low-impact hydro, and geothermal built within the last 15 years as "green power" because they produce no fossil fuels and they generate electricity with a superior environmental profile.<sup>65</sup> The EPA's Green Power initiative is significant because it enhances the argument that conservation purposes can be consistent with wind and solar production.

## IV. CURRENT STATE OF INTERACTION BETWEEN RENEWABLE ENERGY & CONSERVATION EASEMENTS

Today, the landscape for residential- or commercial-scale solar or wind production on conserved lands seems to be hesitant at best and prohibitive at worst.<sup>66</sup> Environmentalists fear mass solar and wind energy development will inevitably lead to a "transformation of the landscape" and they caution against "blanketing the earth with panels and turbines as a means to save it."<sup>67</sup> However, the land trust community as represented through the Land Trust Alliance, the credentialing body for land trusts in the U.S., has recognized the need for clean, renewable energy and has committed to evaluating wind and solar projects on a case-by-case basis: "Land trusts help align conservation with clean energy by identifying resources that should be protected, as well as sites that are suitable for solar and wind generation."<sup>68</sup> This approach seems suitable for commercial-scale renewable energy development in new easements, but it is not sufficient for residential conservation easements where landowners simply want the ability to produce their

63. Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59858, 59872–59873 (Oct. 2, 2015) (finding "Conservation efforts . . . were deemed complete and effective at addressing the primary threats . . . [e]xamples of these projects include conservation easements").

64. EPA, *Green Power Market*, EPA.GOV, <https://perma.cc/A2EJ-76QF> (last visited Nov. 7, 2015).

65. *Id.*

66. See e.g., Land Trust Alliance, *Emerging Issues*, LANDTRUSTALLIANCE.ORG, <https://perma.cc/CS9H-LDFM> (last visited Nov. 8, 2015) (giving the following example: "Sometimes, the claim is made that new transmission lines are necessary to deliver power from new sources of renewable energy, such as solar and wind farms. However, careful analysis is required to determine whether proposed lines would actually advance renewable energy.").

67. Julian Spector, *The Environmentalist Case Against 100% Renewable Energy Plans*, CITYLAB (July 20, 2015), <https://perma.cc/3GM8-JDNM>.

68. Land Trust Alliance, *supra* note 66.

own energy. Moreover, this case-by-case approach does not address the more than 100,000 easements already in existence.<sup>69</sup>

#### A. Amending Easements

Amending conservation easements in any fashion is generally strongly discouraged because the IRS views amendments as threatening the perpetual nature of the easement.<sup>70</sup> The Uniform Conservation Easement Act gives a court the power to modify a conservation easement “in accordance with the principles of law and equity.”<sup>71</sup> The drafters of the Uniform Conservation Easement Act acknowledge a perpetual restriction on property can fail its conservation purposes because of changed conditions, such as due to weather or unforeseen circumstances, and thus allow for the changed condition doctrine.<sup>72</sup> The common law changed condition allows a court to amend or terminate a conservation easement when “changed conditions in and around the property have frustrated the servitude’s purpose or created an undue hardship on the owner of the land.”<sup>73</sup> The American Law Institute (“ALI”) encourages courts to approach the modification of conservation easements according to the charitable trust doctrine of *cy pres*.<sup>74</sup> If a charitable trust fails of its purposes because the charity is impossible, inexpedient, or impracticable, a court will apply *cy pres* to substitute a different charity

69. *National Conservation Easement Database*, *supra* note 16.

70. I.R.S., *supra* note 32, at 16 (stating “The restriction on the use of the real property must be enforceable in perpetuity . . . .An easement is not enforceable in perpetuity if it allows amendments that change the nature of the restrictions imposed on the property.”).

71. Nat’l Conference of Comm’rs on Unif. State Law, *Uniform Conservation Easement Act* 7 (2007).

72. *Id.* at 7–8.

73. Daniel P. Harvey, *Conservation Easements and the Doctrine of Changed Conditions: A Comparative Analysis of the New York and Arkansas Statutes*, 18 *BUFF. ENVTL. L.J.* 267, 273 (2011) (quoting Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 *HASTINGS L.J.* 1187, 1188 (1989)).

74. Harvey, *supra* note 73; Nat’l Conference of Comm’rs on Unif. State Law, *supra* note 71, at 8; *see also* 3 *RESTATEMENT OF PROPERTY: SERVITUDES* § 7.11 (2000): A conservation servitude held by a governmental body or conservation organization may not be modified or terminated because of changes that have taken place since its creation except as follows: (1) If the particular purpose for which the servitude was created becomes impracticable, the servitude may be modified to permit its use for other purposes selected in accordance with the *cy pres* doctrine, except as otherwise provided by the document that created the servitude. (2) If the servitude can no longer be used to accomplish any conservation purpose, it may be terminated on payment of appropriate damages and restitution. Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude. (3) If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination. (4) Changes in the value of the servient estate for development purposes are not changed conditions that permit modification or termination of a conservation servitude.

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that approaches the original charitable purpose as close as possible.<sup>75</sup> The Uniform Act does not directly address the charitable trust doctrine; however, the drafters agree with the ALI that the “existing case and statute law of adopting states *as it relates to . . . the enforcement of charitable trusts*” should apply to conservation easements.<sup>76</sup>

Land trusts typically allow amendments to conservation easements to fix typographical errors or other minor technical mistakes and amendments that enhance the conservation purposes, such as adding more restrictions to the easement.<sup>77</sup> Any other amendment will likely receive high scrutiny.<sup>78</sup> The hesitancy behind modifying an easement lies in allowing an inconsistent use and obviating the conservation purpose of the conservation easement.<sup>79</sup> Additionally, land trusts fear the impact an amendment can have on the tax considerations of their 501(c)(3) non-profit tax status.<sup>80</sup> If a land trust allows a landowner to amend the conservation easement and the IRS finds the landowner received any kind of pecuniary benefit, the land trust is in jeopardy of losing its tax-exempt status.<sup>81</sup> If a land trust lost its 501(c)(3) status, it would most likely be ineligible to continue operations, as most states require the private organization holding the conservation easement be a certified 501(c)(3) non-profit.<sup>82</sup> Moreover, while some states allow conservation easements to be amended as any other easement, others require court approval and attorney general participation for an amendment that “‘materially detract[s] from the conservation value’ of the protected property.”<sup>83</sup>

The IRS and land trusts would almost certainly reject the modification of conservation easements to allow for commercial-scale renewable energy production. This is especially true because a renewable energy project

75. Mark S. Dennison, *Circumstances Warranting Application of Cy Pres Doctrine to Modify Terms of Charitable Trust*, 88 Am. Jur. Proof of Facts 3d 469, § 2 (updated Apr. 2016).

76. Nat’l Conference of Comm’rs on Unif. State Law, *supra* note 71, at 9 (emphasis added).

77. Allan Beezley, *Amending Conservation Easements*, CCLT.ORG, <https://perma.cc/L8WQ-6GZ8> (last visited Nov. 8, 2015).

78. See LAND TRUST ALLIANCE, *AMENDING CONSERVATION EASEMENTS: EVOLVING PRACTICES AND LEGAL PRINCIPLES* 17–18 (2007), available at <https://perma.cc/42JU-PAPQ>.

79. *Id.*

80. Beezley, *supra* note 77; see also 26 U.S.C. § 501(c)(3) (2012); Treas. Reg. § 1-501(c)(3)-1 (WestlawNext through July 2, 2014).

81. 26 U.S.C. § 501(c)(3) (stating that “no part of the net earnings of which inures to the benefit of any private shareholder or individual”).

82. See *e.g.*, MONT. CODE ANN. § 76–6–204 (2015) (titled “Acquisition of conservation easements by qualified private organizations”) (emphasis added); N.C. GEN. STAT. ANN. § 113A-235; COLO. REV. STAT. ANN. § 12-61-724; KY. REV. STAT. ANN. § 262.900; see also LAND TRUST ALLIANCE, *supra* note 78, at 13.

83. Nancy A. McLaughlin and Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, UTAH L. REV. 811, 830 (2013); LAND TRUST ALLIANCE, *supra* note 78, at 26 (quoting ME. REV. STAT. ANN. § 477-A (2015)).

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would create impermissible private benefit through royalties by “conveying a net financial gain (more than incidental private benefit) to any private party.”<sup>84</sup> If the landowner agreed to take no royalties from the wind energy production, the organization holding the conservation easement would have to carefully scrutinize the conservation purposes to see if the wind farm would be consistent with said purposes.<sup>85</sup>

On the other hand, residential-scale solar or wind production: 1) is on a much smaller scale, usually requiring solar rooftop panels or one 80-foot-tall windmill;<sup>86</sup> 2) would be an incidental private benefit because it only benefits the landowner’s electric needs;<sup>87</sup> and 3) is far more likely to be amenable than commercial-scale, for-profit renewable energy production. Although residential-scale energy production would save the landowner money in the long run by allowing them to produce their own energy, the IRS would likely find this benefit as “incidental” and thus, acceptable.<sup>88</sup> Additionally, land trusts would be less hesitant to approve an amendment allowing for residential energy production because it serves a conservation purpose by promoting clean energy production and energy independence.<sup>89</sup> Although commercial-scale solar and wind energy achieve the same clean energy goals, the financial incentive to landowners paired with the potential detrimental effects of large energy production on conserved land would most likely disqualify an amendment allowing industrial energy production.<sup>90</sup>

### B. Environmental Concerns

Understanding why land trusts are hesitant to allow for solar and wind production on conservation easement lands necessitates a look at the environmental concerns associated with commercial-scale energy projects. Solar and wind have their own unique issues; however, common to both are concerns about wildlife and habitat destruction, open space considerations, and the impossibility of preserving land in its natural state.

84. LAND TRUST ALLIANCE, *supra* note 78, at 25 (emphasis omitted).

85. See Treas. Reg. § 1.170A-14 (2009).

86. U.S. DEPT. OF ENERGY, SOLAR SYSTEMS FOR EXISTING RESIDENTIAL INSTALLATIONS (2009), available at <https://perma.cc/WHW4-U52F>; Am. Wind Energy Ass’n, *FAQs for Small Wind Systems*, AWEA.ORG, <http://www.awea.org/Issues/Content.aspx?ItemNumber=4638&navItemNumber=727> (last visited Apr. 22, 2016).

87. Treas. Reg. § 1.170A-1, 4(e)(1) (2008).

88. *Id.* §§ 1.170A-14(e)(1)–(2) (“A deduction will not be denied under this section when incidental benefit inures to the donor merely as a result of conservation restrictions limiting the uses to which the donor’s property may be put . . . [or] if under the circumstances, those uses do not impair significant conservation purposes.”).

89. *Id.*

90. *Id.*

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## 1. Wildlife

Wind turbines present many environmental issues in the context of conservation easements.<sup>91</sup> For example, turbines are known to cause a significant amount of premature deaths of birds and bats, although the actual numbers are controversial.<sup>92</sup> Moreover, commercial-scale wind farms cause widespread habitat interruption because they require thousands of acres for the necessary infrastructure to operate the farms.<sup>93</sup> A host of environmental laws are implicated by commercial-scale wind energy production, such as the Migratory Bird Treaty Act, the Endangered Species Act, and the National Environmental Policy Act.<sup>94</sup> The controversy between wind energy production and wildlife death and habit destruction has prompted U.S. Fish and Wildlife to promulgate voluntary guidelines for wind energy development.<sup>95</sup> The wind industry is also invested in addressing wildlife concerns by founding, for example, the American Wind Wildlife Institute, a partnership between wind energy industry leaders, wildlife management groups, and science and environmental groups to document the impacts of wind energy on wildlife and create cutting edge solutions to minimize those impacts.<sup>96</sup>

Likewise, commercial-scale solar development directly and indirectly threatens wildlife through habitat destruction caused by fugitive dust and dust suppressants, impacts of installing roads and off-site construction, and increased noise.<sup>97</sup> Moreover, the heavy impact of construction activities in the desert can cause burrow collapse, which has the potential to trap and kill subterranean animals.<sup>98</sup> Many of the environmental concerns arise from the

91. See e.g., Cassie Tigue, Note, *Wind Energy Development and Protection of Wildlife: Creating a Balance Between Two Competing Interests*, 45 TEX. ENVTL. L.J. 223 (2015).

92. *Id.* at 224; see e.g., Inst. for Energy Research, *License to Kill, Wind and Solar Decimate Birds and Bats*, [HTTP://INSTITUTEFORENERGYRESEARCH.ORG](http://instituteforenergyresearch.org) (Apr. 29, 2015), <https://perma.cc/LE3H-7466> (stating that “Every year 573,000 birds (including 83,000 raptors) and 888,000 bats are killed by turbines—30 percent higher than the federal government estimated in 2009.”).

93. Tigue, *supra* note 91, at 225; see also HOWARD G. WILSHIRE, JANE E. NIELSON & RICHARD W. HAZLETT, *THE AMERICAN WEST AT RISK: SCIENCE, MYTHS AND POLITICS OF LAND ABUSE AND RECOVERY* 342 (2008) (stating that “A 200-unit wind farm with 56-foot rotor diameters built on steep slopes, and including turbine pads, access roads, and transmission facilities, physically disturbs 210 acres of land.”).

94. Tigue, *supra* note 91, at 225–238.

95. *Id.* at 238–239; see also U.S. FISH AND WILDLIFE SERV. WIND TURBINE GUIDELINES ADVISORY COMM., WIND TURBINE GUIDELINES ADVISORY COMMITTEE RECOMMENDATIONS i, (2010), available at <https://perma.cc/2CCH-W2LC>.

96. Am. Wind Energy Ass’n, *Wind Energy is Beneficial to Wildlife; Industry Proactively Addresses Impacts*, [AWEA.ORG](http://awea.org), <https://perma.cc/B2N7-KW74> (last visited Dec. 2, 2015); Am. Wind Wildlife Inst., *Who We Are*, [AWWI.ORG](http://awwi.org), <https://perma.cc/FA63-ERLV> (last visited Dec. 2, 2015).

97. Jeffrey E. Lovich & Joshua R. Ennen, *Wildlife Conservation and Solar Energy Development in the Desert Southwest, United States*, 61 *BIOSCIENCE* 982 (2011).

98. Lovich & Ennen, *supra* note 97, at 97.

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nature of solar energy projects, which require large land areas to harness sunlight.<sup>99</sup>

## 2. *Open Space & Scenic Preservation*

Because of the large land area required, solar production also presents issues related to open space and scenic preservation. The same can be said for wind production, which needs thousands of acres of pristine areas with high wind potential, such as the plains in Texas and North Dakota.<sup>100</sup> Wind turbines' great height also potentially alters scenic views, whereas the necessary infrastructure of the operations can potentially destroy the open space character of land.

### C. *The Tax Code & Commercial-Scale Renewable Energy*

Commercial-scale wind and solar do not fit within the majority of conservation purposes established by the Code because of the potential adverse impacts to wildlife and significant land use requirements.<sup>101</sup> However, the Code specifically allows for the preservation of open space “pursuant to a clearly delineated Federal, State, or local governmental conservation policy, [which] will yield a significant public benefit.”<sup>102</sup> The federal government, in its quest to promote green energy and combat climate change evinced by enacting the Clean Power Plan<sup>103</sup> and classifying wind and solar production as “green energy,”<sup>104</sup> should thus promulgate a clear policy that commercial-scale wind and solar production, if built, maintained and operated according to best practices, should fall under this safe-harbor in the Code. The projects would still have to preserve open space, which is possible if they are sited with the awareness to preserve open space scenic views, or if the commercial project is limited to a small land area. The regulations provide a “general declaration of conservation goals by a single official or legislative body is not sufficient.”<sup>105</sup> However, where a state has created an Environmental Trust and accepts land according to an intensive review, it will essentially create a rebuttable presumption that the land qualifies for the de-

99. Tigue, *supra* note 91, at 225; *see also* Mark Jaffee, *NREL Determines Land Area Needed for Solar Power*, DENV. POST (Aug. 4, 2013), <https://perma.cc/5GHW-22SN> (estimating 32 acres of solar arrays needed to power one thousand families).

100. Tigue, *supra* note 91, at 225 (quoting ERNEST E. SMITH ET AL., TEXAS WIND LAW ch. 10 (Matthew Bender 2014)).

101. Treas. Reg. § 1.170A-14(d)(4)(ii) (2009).

102. 26 U.S.C. § 170(h)(4)(A)(iii)(II) (2012).

103. EPA, FACTSHEET: THE CLEAN POWER PLAN, RENEWABLE ENERGY IN THE CLEAN POWER PLAN, available at <https://perma.cc/7BPW-KG3V>.

104. *See* EPA, *supra* note 64.

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

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duction.<sup>106</sup> To illustrate this conservation purpose, the regulations provide that farmland preserved pursuant to a state program for flood prevention and control would be sufficient.<sup>107</sup>

On November 10, 2015, the Department of the Interior and the State of California announced the final environmental review of the Desert Renewable Energy Conservation Plan (“DRECP”).<sup>108</sup> The DRECP is an innovative plan, which looks at the landscape as a whole by providing protection and conservation for wildlife, recreation, and cultural resources in the California desert while encouraging streamlined renewable energy development in the right places.<sup>109</sup> If this policy were to clearly state commercial- and residential-scale wind and solar farms are allowed on land encumbered by conservation easements, this would most likely pass the IRS’s strict deduction guidelines.<sup>110</sup>

Renewable energy advocates should take the initiative and focus on lobbying federal, state or local governments to pass clear policy legislation that would satisfy the IRS’s requirements.

*D. Conservation Easements as Mitigation Tools for Commercial-Scale Solar and Wind Development*

Conservation easements can be used as mitigation tools for all types of commercial-scale energy projects, including renewable energy.<sup>111</sup> However, these conservation easements are different than the easements discussed throughout this paper. The easements are not donated, but are instead tools employed by renewable energy developers to offset the adverse environmental impacts of the wind or solar farm.<sup>112</sup> The protected land is often off-site, which can allow for enhanced conservation, but can also ignore the habitat destruction and wildlife displacement on-site by shifting the focus to the off-site protected land.<sup>113</sup> Local governments can be given substantial deference in enacting laws that require conservation easements as

106. *Id.* § 1.170A-14(d)(4)(iii)(B).

107. *Id.* § 1.170A-14(d)(4)(iii)(A).

108. Desert Renewable Energy Conservation Plan, *What Is the DRECP?*, DRECP.ORG, <https://perma.cc/5C8G-JBWW> (last visited Dec. 3, 2015).

109. *Id.*

110. Paige Blankenbuehler, *Latest: California’s plan for Conservation-minded Energy Development Takes a Step Forward*, HIGH COUNTRY NEWS (Dec. 2, 2013), <https://perma.cc/XS8L-H3PN> (There are issues to overcome with this policy. For example, the plan likely separates conserved lands from lands for development, and the plan only addresses public lands. Conservation easements are for use on private lands.).

111. Morris & Owley, *supra* note 5, at 330–332.

112. *Id.* at 381.

113. *Id.* at 372–373.



mitigation tools.<sup>114</sup> Land use law merely requires exacted conservation easements bear a “reasonable relationship” to the development of the area and the resulting disruption caused by the farms.<sup>115</sup>

V. INCORPORATING SOLAR AND WIND DEVELOPMENT AS ACTIVITIES  
EXPRESSLY AUTHORIZED BY CONSERVATION EASEMENTS  
WITH THE HELP OF THE IRS

The inherent conflicts existing between conservation goals and renewable energy production demand the IRS clarify the tax consequences of allowing for wind or solar production in conservation easements. Without an official IRS stance, both land trusts and landowners will not entertain clean energy production on conservation easement lands for fear of a disallowed tax deduction. However, residential green power production and commercial green power production should be handled differently.

A. *IRS Regulations: Residential*

When solar and wind production are consistent with conservation values on conservation easement lands, the IRS should find residential solar and wind fulfill the independent conservation purpose of allowing for clean energy production to enable U.S. energy independence and to mitigate the negative effects of climate change. Residential energy production should be defined as only allowing for as many solar panels or wind turbines that would power the existing structures on the property, as well any potential buildings allowed in the reservation of rights in the conservation easement. Further, each specific conservation easement should delineate where on the property the wind turbine or solar panels are allowed through attached exhibits, such as within 100 feet of the residence or other suitable place that would not disturb other conservation purposes. The regulations promulgated by the IRS should be consistent with the EPA’s “green power” definition of wind and solar as zero-polluters.<sup>116</sup> It is imperative, however, that each conservation easement is drafted on a case-by-case basis (as is already the norm) specifically with a renewable energy production goal in mind. For example, if the property is across the road from a national park,<sup>117</sup> a

114. *Bldg. Indus. Ass’n of Centr. California v. Cnty. of Stanislaus*, 118 Cal. Rptr. 3d 467 (Cal. App. 2010) (holding that the county’s requirement that a developer dedicate one acre of farmland for every acre developed was within the County’s police power); *see also* Jessica Owley, *THE ENFORCEABILITY OF EXACTED CONSERVATION EASEMENTS*, 36 Vt. L. Rev. 261, 283 (Winter 2011).

115. *Bldg. Indus. Ass’n*, 118 Cal. Rptr. 3d at 474; *see also* Mark S. Dennison, *Zoning: Challenge to Imposition of Development Exactions*, 36 Am. Jur. Proof of Facts 3d 417, § 12 (updated April 2016).

116. *See* EPA, *supra* note 64.

117. *See* Treas. Reg. § 1.170A-14(f) (ex: 3–4) (“H owns Greenacre, a 900-acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. All of Greenacre is clearly visible from a nearby

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wind turbine would be less appropriate. Solar rooftop panels, however, would be acceptable because they would be consistent with the scenic preservation purpose since the panels are on the existing structure and therefore do not distract from the view.

Moreover, if a conservation easement's purpose is for preservation of outdoor recreation, such as a trail system, solar panels would be more appropriate because they would not deter from the trail scenery or disrupt the wildlife, which a wind turbine would be more likely to do. A wind turbine would be more appropriate if the residence is a historic building and there are acceptable out-of-sight areas allowing for significant wind channels. Additionally, wind turbines and solar panels are equally appropriate on farms where conservation easements are in place because wind allows for multiple uses of the land, and solar panels on the rooftop of a residence do not detract from the agriculture purpose of the easement.

Alternatively, if the IRS is hesitant to directly issue affirmative regulations concerning residential use of wind and solar, the IRS should *not* categorize the production as an "inconsistent use."<sup>118</sup> It can do this by simply including an example addressing wind and/or solar production, or by issuing a Revenue Ruling.<sup>119</sup> By explaining that residential wind and solar production will not be viewed as an inconsistent use, the Code can incentivize easement holders and land trusts to allow for the production of clean energy, thereby fostering an environmentally conscious policy. Whichever option the IRS chooses, it should follow the EPA's lead and encourage green energy production, especially when great efforts are going to be needed in the next decade for states to adequately comply with the Clean Power Plan.<sup>120</sup> Although commercial-scale wind and solar farms will arguably allow for greater impact on climate change than residential-scale wind and solar, this policy should only go so far as to encourage energy production on conservation easement lands that would more likely than not disturb the conservation purposes.

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national park . . . even as little as one home for each 90 acres, would destroy the scenic character of the view. Accordingly, no deduction would be allowable under this section. EXAMPLE 4. Assume the same facts as in example (3), except that not all of Greenacre is visible from the park and the deed of easement allows for limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park. . . . Accordingly, the donation qualifies for a deduction under this section.").

118. See *e.g. id.* Treas. Reg. § 1.170A-14(e)(3).

119. See *e.g.* Rev. Rul. 2003-123 (Dec. 15, 2003) (clarifying that a trust is not allowed a charitable or distribution deduction regarding a contribution to charity of trust principal that meets qualified conservation contribution under Treas. Reg. § 170(h)).

120. EPA, FACT SHEET: CLEAN POWER PLAN, available at <https://perma.cc/789J-Y5J3> ("Nationwide, the Clean Power Plan will help cut carbon pollution from the power sector by 30 percent from 2005 levels").

*B. IRS Regulations: Industry*

The significant environmental concerns commercial wind and solar projects potentially pose make it unlikely these projects will be allowed on conserved lands, unless the federal government or states promulgate policies expressly establishing that wind and solar energy production serve an important conservation purpose. However, commercial solar and wind projects can mitigate the adverse impacts on the environment with conservation easements, regardless if they are used on-site or off-site.

Commercial-scale wind and solar projects should not be able to obtain conservation easements on land where they intend to build large-scale projects. First, assuming commercial-scale wind and solar projects were classified as an independent conservation purpose so as to promote clean energy and reduce the adverse impacts of climate change, this would be in direct conflict with the perpetual nature of conservation easements because these projects have expiration dates and typically only function on a 15 to 25-year lease.<sup>121</sup> Second, assuming the renewable energy company owned property encumbered by a conservation easement, should for-profit companies receive the benefit of a tax-deductible property purchase? The policy answer is not very clear. On the one hand, we should reward our corporations for engaging in the conservation process. But the benefit of the tax deduction could very possibly inure to the shareholders creating an impermissible inurement, which will likely not be viewed as “incidental” and thus acceptable.<sup>122</sup> Although clean energy production can significantly benefit the environment and the economy, the prospect of always allowing for-profit production that could compromise principles inherent in conservation easements is too great of a gamble. Additionally, the company will most likely not be able to overcome the great hurdle of private inurement, which prevents the tax deduction under the Code.

*C. Draft Language for Residential Conservation Easements*

New conservation easements should be drafted with the following language to allow landowners to reserve the right to pursue energy independence and establish residential wind and/or solar production:

**Wind:** Landowner hereby reserves the right to purchase, construct and erect one (1) wind turbine up to eighty-feet-tall (80 ft.) and eighteen (18) feet in diameter for the sole purpose of creating electricity for landowner’s use. The pursuit of clean energy goals is consistent with the conservation values ex-

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121. See e.g. DAVID FELDMAN & ROBERT MARGOLIS, TO OWN OR LEASE SOLAR: UNDERSTANDING COMMERCIAL RETAILERS’ DECISIONS TO USE ALTERNATIVE FINANCING MODELS 5 (2014), available at <https://perma.cc/E47E-JA8S>.

122. Treas. Reg. § 1.170A-14(e)(1).

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pressed in this Easement by reducing the threat of climate change. Landowner's intent of this reservation is to achieve energy independence, which may result in an incidental and insignificant financial benefit, but is nonetheless consistent with the exclusive conservation purposes of this Easement.

Solar: Landowner hereby reserves the right to purchase, construct and erect solar photovoltaic panels either as roof-top panels or as two (2) free-standing panels within 100-feet (100 ft.) of the residence for the sole purpose of creating electricity for landowner's use. The pursuit of clean energy goals is consistent with the conservation values expressed in this Easement by reducing the threat of climate change. Landowner's intent of this reservation is to achieve energy independence, which may result in an incidental and insignificant financial benefit, but is nonetheless consistent with the exclusive conservation purposes of this Easement.

The prescriptive language is necessary for two reasons. First, this specificity in the reservation of rights assists land trusts in monitoring the easements annually to make sure landowners are not in violation of the conservation easement terms. Second, the strict language increases the chances the landowner's deduction will be approved because the IRS will know exactly what is allowed in the future and where it is allowed to occur. Existing easements should only attempt to amend and add this language if they truly intend on pursuing wind or solar energy production on their property.

Alternatively, new easements should include the following amendment language, which the IRS will review upon its acceptance of the easement property as a "qualified conservation contribution."<sup>123</sup> Landowners might prefer an amendment allowing for renewable energy instead of an outright reservation because, although they may not be planning on renewable energy production, they recognize their heirs, successors, and assigns should have the opportunity. Additionally, land trusts that desire to encourage residential renewable energy production in all of their easements may choose to adopt amendment language specifically addressing the topic. New language, shown in italics below, and the subsequent IRS approval will easily allow landowners to take advantage of the amendment process by pointing to the intent and language in the easement itself:

If circumstances arise under which an amendment to or modification of this Easement would be appropriate, *such as for the production of solar and/or wind production for the purpose of generating green energy to power the residence and property, consistent with the Conservation Values*, Landowner and Holder may jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualifications of this Easement under any applicable laws. Any amendment must be consistent with the conservation purposes of this Easement, must not affect its perpetual duration, and either must enhance, or must have no effect on, the Conservation Values which are protected by this Easement. Furthermore, any amendment must not result in

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123. *Id.* § 1.170A-14.

prohibited inurement or private benefit to Landowner or any other parties. Any Easement amendment must be in writing, signed by both parties, and recorded in the Public Records of \_\_\_\_\_ County.<sup>124</sup>

If a landowner is certain he or she will want to produce wind or solar energy, he or she should insert one of the above reservation clauses in their easement. If a landowner might want to install renewable energy at some point in the future, he or she should still expressly reserve the option. The amendment clause is merely a tool land trusts can use to promote renewable energy production. Similarly, landowners can use the clause if they have no intention of wind or solar production, but have foresight about the perpetual nature of the easement.

## VI. CONCLUSION

Tax regulations and policy can play a pivotal role in encouraging clean energy production and enabling energy independence. Although land trusts and landowners might be willing to amend an easement or convey a new one allowing for wind and solar production, only the IRS can help these stakeholders sleep better at night knowing their transaction will achieve the tax and conservation goals as intended. By promoting tax policies that align with the EPA's green power policy and the Obama administration's push to combat climate change, the federal government can make substantial progress in encouraging conservation and sound energy policy.

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124. Taken from LAND TRUST ALLIANCE, *supra* note 78, at 115. However, I have italicized my original words and have changed Grantor and Grantee to Landowner and Holder, as that is the common vernacular in Montana.