

DOWN THE RABBIT HOLE WITH THE IRS' CHALLENGE TO PERPETUAL CONSERVATION EASEMENTS, PART TWO

by Jessica E. Jay

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SUMMARY

When the Internal Revenue Service began disallowing gifts of perpetual conservation easements for claimed failures of perpetuity requirements, it tumbled land trusts, landowners, and the U.S. Tax Court down the rabbit hole to a baffling land below. The Service's drop into matters beyond valuation and into elements intended and necessary for easement durability and flexibility has caused a confusing array of Tax Court decisions. Part One of this Article, last issue, examined how the Service lures the land conservation community and the Tax Court into Wonderland distortions, and the precarious tower of cards upon which its legal theories rest. Part Two, below, identifies the fundamental elements of law and the process of law to topple the Service's card construct, and awaken and return everyone to the world above ground.

Part One of this Article, which appeared in the February 2021 issue,¹ examined how the Internal Revenue Service (the Service) lures the land conservation community and the U.S. Tax Court into Wonderland distortions of perpetual land conservation law, and the precarious tower of cards upon which its legal theories rest. It explored how the conservation community and Tax Court came to

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be caught down a rabbit hole with the Service, and how that adversely affects the practice of land conservation.

This issue's Part Two will identify the fundamental elements of law and the process of law to topple the Service's card construct, and awaken and return everyone to the world above ground. Section I sets forth the straightforward framework of Internal Revenue Code (the Code) §170(h)(2)(C) and (5)(A) and the mechanism for perpetuating conservation purposes over time. This framework leads to the exposition of the intent behind the Code and U.S. Treasury Regulation (the Regulation) in Section II. The procedural implementation of that intent, including burden of proof, legislative grace, standard of review, scope of authority, and deference, follows to form the basis of Section III. Section IV uses existing law and process to demolish the Service's fantastical card world, and recommends using new and existing procedural tools and policy to refocus the Service on valuation and free the conservation community to continue its essential work of perpetual land conservation. Section V concludes by illustrating that when implemented correctly, the legal process can effect the proper intent and meaning of the law to deconstruct the Service's Wonderland of cards, and return everyone to the world above ground.

1. Jessica E. Jay, *Down the Rabbit Hole With the IRS' Challenge to Perpetual Conservation Easements, Part One*, 51 ELR 10136 (Feb. 2021).

I. Collapsing the Service's World of Cards: Plain Language and Construction of the Code and Regulation

"Have you guessed the riddle yet?" the Hatter said, turning to Alice again.

"No, I give it up," Alice replied: "what's the answer?"

"I haven't the slightest idea," said the Hatter.

"Nor I," said the March Hare.

Alice sighed wearily. "I think you might do something better with the time," she said, "than waste it in asking riddles that have no answers."

—Lewis Carroll, *Alice's Adventures in Wonderland*²

The straightforward application of the law as written mandates a close look at Code §170(h)(2)(C) and (5)(A), and Regulation §1.170A-14(b), (e), and (g). These subsections of the Regulation provide context for the requirements for the *grant* in perpetuity under Code §170(h)(2)(C), and for the perpetual *protection* of conservation purposes under Code §170(h)(5)(A).

Code §170(h)(2)(C) and (5)(A) establish the requirements for a conservation easement gift in space and time. Code §170(h)(2)(C) requires that a conservation easement be perpetual by the statement that a qualified real property interest be "a restriction (granted in perpetuity) on the use which may be made of the real property."³ Code §170(h)(5)(A) requires that an easement's purpose be protected over time by the statement that "[a] contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity."⁴ These two components of the Code are separate and distinct, to be met and proven separately, despite Service assertions to the contrary.⁵

In its disallowance of easement deductions, the Service falsely equates and then conflates the *grant* in perpetuity of Code §170(h)(2)(C) with the *protection* of conservation purposes over perpetuity of Code §170(h)(5)(A).⁶ The Service then argues qualification of an easement solely under a perpetuity standard it contrives under Code §170(h)(2)(C). The Service favors denying deductions under Code §170(h)(2)(C) over Code §170(h)(5)(A) because under

Code §170(h)(2)(C), the Service argues, an easement must be forever fixed in space at the time of its grant with little to no opportunity for change in the future; while under Code §170(h)(5)(A), changes may occur to and within the easement, provided that its conservation purposes continue to be protected over time.⁷ If an easement permits changes over time, the Service declares that it fails to identify the conserved property as granted in perpetuity under Code §170(h)(2)(C).⁸

As the discussion of the straightforward framework of plain language of the Code and Regulation illustrates below, the Service cannot ignore Code §170(h)(5)(A)'s processes for protection and perpetuation of conservation purposes over time in favor of disallowing every easement that purports to allow changes in the future under Code §170(h)(2)(C).⁹ The Service must analyze the property protected by the conservation easement *together with* the process for protection of conservation purposes over time. This analysis is required irrespective of whether the landowner reserves rights to use the land in a manner consistent with conservation-purpose protection. As discussed with the holdings in *Pine Mountain Preserve* and *Carter* in Part One, conservation easement drafters cannot predict the future, and not all easement aspects and configurations can be codified at the time of the gift, or be excluded from the gift.

As discussed in Part One, the Tax Court has not always accepted the cards dealt by the Service, most particularly when it set forth a clear distinction between Code §170(h)(2)(C) and Code §170(h)(5)(A), in *Belk*.¹⁰ The dissent in *Pine Mountain Preserve* also provided clarity on the dis-

2. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (London, Macmillan 1865) [hereinafter *WONDERLAND*].

3. I.R.C. §170(h)(2)(C) (2006). The reference to the perpetual term was in order to distinguish from the prior incarnation of the law that allowed an easement to be granted for a term of years. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1919; Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, §309, 91 Stat. 154.

4. See I.R.C. §170(h)(2)(C) (2006).

5. Because the Code does not state that the requirement under Code §170(h)(2)(C) for an easement to be granted in perpetuity is dispositive of the requirement under Code §170(h)(5)(A) that an easement's conservation purposes be protected in perpetuity, the two prongs must be met separately.

6. *Id.*

7. I.R.C. §170(h)(2)(C), (5)(A) (2006). Such changes include future rights to build structures (such as agricultural buildings and single-family residences), facilities appurtenant to those structures (such as barns, shade shelters, recreation structures, gazebos, fences, and roads), and building envelopes within which to later place these future structures, all with the easement holder's prior approval subject to Code §170(h)(5)(A) conservation-protection standard, and other regulations limiting the conduct of tax-exempt organizations.

8. By dodging the test of whether an easement perpetually protects conservation purposes over time under Code §170(h)(5)(A) and misdirecting the Tax Court's focus instead to Code §170(h)(2)(C), the Service is able to object to any and all changes permitted in an easement. Section II demonstrates how this characterization twists the actual intent and meaning of Code §170(h)(2)(C) and (5)(A). Unfortunately, not before the Tax Court had plunged unaware into the rabbit hole, taking landowners and the land trust community along with it to the upside down land below. See *infra* Section II.

9. When the Service audits a conservation easement deduction, it evaluates the deduction for compliance under the Code and Regulation. The Service cannot judge what might happen in the future except by evaluating the processes set out for protection in the deed of conservation easement. The processes together with holder discretion to oversee the exercise of such processes include the exercise of reserved rights, enforcement of violations, and approval or denial of proposed uses. This appears to be the main impetus behind the Service instead attacking the definition of the real property interest at the time of the gift. This is a tangible target the Service can address, rather than evaluating the processes and standards set out going forward in time, which involves trusting the easement holder to fulfill its responsibilities. Trust is the role the Service appears unwilling to acknowledge, but which courts cannot ignore.

10. *Belk v. Commissioner*, 140 T.C. 1, 12 (2013), *aff'd*, 774 F.3d 221, 228 (4th Cir. 2014); Brief of Land Trust Alliance, Inc. as Amicus Curiae for Petitioners-Appellants at 8-9, *Carter v. Commissioner*, Nos. 20-12200-C, 20-12201-C (11th Cir. Aug. 26, 2020) [hereinafter *Carter Amicus Brief*].

inction between the two sections: “[s]ection 170(h)(2)(C) does not refer to conservation purposes. That concept is found in the other perpetuity test, section 170(h)(5)(A), which bars a deduction ‘unless the conservation purpose is protected in perpetuity.’”¹¹ The dissent noted further, “the relative weakness of the easement deeds’ restrictions on the building areas is relevant only to whether the easements protect conservation purposes in perpetuity under section 170(h)(5)(A).”¹²

Analyzing deductibility in several cases based on whether the easements involved legitimate conservation purposes under Code §170(h)(4), the Tax Court examined if those purposes were “protected in perpetuity” under Code §170(h)(5)(A), and disregarded Code §170(h)(2)(C).¹³ The Tax Court in these cases limited the Code §170(h)(2)(C) inquiry to whether the landowner conveyed a grant of a restriction on the use of land in perpetuity.

In at least one case where the Tax Court accepted the Service-dealt hand that an easement failed perpetuity under Code §170(h)(2)(C), a circuit court rejected that holding. In *Bosque Canyon*, the U.S. Court of Appeals for the Fifth Circuit explicitly rejected the Tax Court’s focus on Code §170(h)(2)(C) when considering whether the conservation easement protected the conservation purposes in perpetuity.¹⁴

The ongoing effort by the Service to confound the Tax Court, set appellate courts against one another, and hurtle the entire area of law toward likely eventual resolution by the U.S. Supreme Court, exemplifies the current upside-down state of the law. This state of the law is baffling given the simple and straightforward framework created to evaluate qualification for tax deductions under Code §170(h)(2)(C) and (5)(A), and Regulation §1.170A-14(a), (b), (e), and (g)(5), respectively.

A. Deductibility Under Code §170(h)(2)(C) Is Simple in Normal Space and Time

Alice felt dreadfully puzzled. The Hatter’s remark seemed to have no sort of meaning in it, and yet it was certainly English.

“I don’t quite understand you,” she said, as politely as she could.

—Lewis Carroll, *Alice’s Adventures in Wonderland*¹⁵

11. *Pine Mountain Pres., LLLP v. Commissioner*, 151 T.C. 14, 70 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev’d in part, aff’d in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020); *see also* Carter Amicus Brief, *supra* note 10, at 16-19.
12. *Pine Mountain Pres.*, 151 T.C. at 91; *see also* Carter Amicus Brief, *supra* note 10, at 16-19.
13. *Champions Retreat Golf Founders, LLC v. Commissioner*, T.C.M. (CCH) 2018-146, at 17 (2018), *rev’d*, 959 F.3d 1033 (11th Cir. 2020); *Atkinson v. Commissioner*, T.C.M. (CCH) 2015-236 (2015); *Kiva Dunes Conservation, LLC v. Commissioner*, T.C.M. (CCH) 2009-145 (2009).
14. *Bosque Canyon Ranch II, L.P. v. Commissioner*, 867 F.3d 547 (5th Cir. 2017).
15. *WONDERLAND*, *supra* note 2, at 37.

Code §170(h)(2)(C) defines a “qualified real property interest” as “a restriction (granted in perpetuity) on the use which may be made of the real property.”¹⁶ The language “granted in perpetuity” of Code §170(h)(2)(C) was not always a part of the Code, however. When the U.S. Congress first created a deduction for donated conservation easements in 1976, an easement gift qualified as a real property interest if it had a term of at least 30 years.¹⁷ Congress amended the statute the next year in 1977 to require that a deductible easement be granted in perpetuity, as opposed to for a term of years.¹⁸ The words “granted in perpetuity” in §170(h)(2)(C) therefore have a specific, narrow meaning: a deductible conservation easement shall not be limited to a term of years, but must be granted in perpetuity.

As discussed in Part One, the Tax Court in *Belk* interpreted Code §170(h)(2)(C)’s “granted in perpetuity” language to mean that the boundaries of a conservation easement must be fixed at the time of the grant, such that allowing a substitution of the land under easement could not satisfy the “granted in perpetuity” definition.¹⁹ This holding in effect added another qualifying factor to Code §170(h)(2)(C) as a matter of doctrinal federal law.²⁰ Applying the plain language of Code §170(h)(2)(C) and the central holding of *Belk* creates a simple two-part test to determine whether an easement qualifies under Code §170(h)(2)(C): if at the time of an easement’s grant (1) it is granted for a perpetual term as opposed to a term of years, and (2) the land it protects is legally described with a boundary that is fixed in space.

The factors for the Service in analyzing the eligibility of conservation easements for tax deductions are therefore simple and straightforward. It needs to look first at what the easement physically restricts—where it is located, what are its boundaries. Second, it needs to look at what the easement temporally restricts—whether it is perpetual. The Service attacking easements that allow changes to boundaries or to building envelopes inside or outside of those boundaries as failing to identify the easement property “granted in perpetuity” under Code §170(h)(2)(C) obfuscates the real meaning of that clause.²¹ This carefully crafted misrepresentation of Code §170(h)(2)(C) provides the unfounded basis for the Service’s disallowance of a whole forest of conservation easements.

16. I.R.C. §170(h)(2)(C) (2006).

17. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1919.

18. Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, §309, 91 Stat. 154.

19. *Belk v. Commissioner*, 140 T.C. 1 (2013).

20. *See* Jessica E. Jay, *Understanding When Perpetual Is Not Forever: An Update to the Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements, and a Response to Ann Taylor Schwing*, 37 HARV. ENV’T L. REV. 247, 254 (2013) (explaining that while common, judge-made law would usually not control or influence statutory or regulatory doctrines, common law interpreting the Code and its Regulation would be considered doctrinal law on par with the Code itself: “Judge-made doctrinal law of the Code and Regulations therefore will be on even footing with those norms, when conflict exists with competing or inferior legal norms.”).

21. 26 U.S.C. §170(h)(2)(C).

1. The Regulation Supports the Narrow and Specific Scope of § 170(h)(2)(C)

The Code's attendant Regulation was crafted by the U.S. Department of the Treasury as a legislative rule, which having the force of law, construes, informs, and implements the qualifications for deductibility of conservation easements.²² The Code's reference to easements as perpetual, as opposed to for a term of years, and the requirement that purposes be perpetuated forever are reiterated in and reinforced by Regulation §1.170A-14(a) and (b).²³

The portion of the Regulation defining Code §170(h)(2)(C) consists of a small portion of subsection 1.170A-14(a), and subsection (b). Regulation §1.170A-14(a) in relevant part restates the definitions set out in Code §170(h) for a qualified conservation contribution, including that of a qualified real property interest, as well as of a qualified holder, conservation purposes, and exclusively for conservation purposes, which are to be protected in perpetuity: "A qualified conservation contribution [1A, B, C] is the contribution of a qualified real property interest [2C] to a qualified organization [3A, B] exclusively for conservation purposes [4A, 5A]. To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity [5A]."²⁴ As the bracketed references illustrate, the Regulation closely follows the language of Code §170(h) subsections 1, 2, 3, 4, and 5 and provides consistent definitions.

Regulation §1.170A-14(b)(1) defines "qualified real property interest," with specific focus on the meaning of real property interest, as the entire interest of the landowner, excluding an interest made up entirely of a mineral interest.²⁵ The Regulation allows the real property interest to be an undivided interest, but reminds that even with such an allowance, the conservation purposes still must be protected in perpetuity, with reference to Code §170(h)(5)(A).²⁶ The Regulation also allows that transfers of lesser ownership interests such as rights-of-

way will not defeat the qualification of real property as a real property interest.²⁷

Regulation §1.170A-14(b)(2) follows with the specific definition of what constitutes a "perpetual conservation restriction." A perpetual conservation restriction is defined by the Regulation the same way as it is in the Code, as a "qualified real property interest" that is "granted in perpetuity on the use which may be made of real property."²⁸ The Regulation includes easements, interests similar to easements, and restrictions in the definition of perpetual conservation restriction.²⁹

The final two sentences of Regulation §1.170A-14(b)(2) provide, "Any rights reserved by the donor in the donation of a perpetual conservation restriction must conform to the requirements of this section. See, e.g., paragraph (d)(4)(ii), (d)(5)(i), (e)(3), and (g)(4) of this section."³⁰ This instruction allows expressly for a landowner's reservation of affirmative rights to use land and water within a donated real property interest, provided that any such reserved rights conform to the requirements of the Regulation, and points specifically to consideration of scenic enjoyment under open space conservation purpose factors, historic land or structure factors, inconsistent uses permitted, and retention of qualified mineral interest, in examining impacts to protected conservation purposes.³¹

In requiring that landowners be mindful of factors, uses inconsistent with, and minerals in the perpetual protection of conservation purposes during the exercise of their reserved rights, the Regulation in effect blesses a landowner's reserved rights to use and build upon the land within a conservation easement. The Regulation makes no assertion that the reservation or exercise of such rights would or could somehow defeat the grant of a perpetual easement (as opposed to for a term of years) under Code §170(h)(2)(C) (nor even of the perpetual protection of conservation purposes under Code §170(h)(5)(A)). Such an argument appears only in the Service's Caterpillar-hookah pipe-induced hallucinations.

The Regulation therefore adopts the same straightforward question for qualification of a tax deduction posed by the framework of Code §170(h)(2)(C) under Regulation §1.170A-14(b)(2): is the real property interest a restriction granted in perpetuity (as opposed to for a term of years) on the use that may be made of real property? The only addition is the consideration of any rights reserved by the landowner conforming to and mindful of the factors set out in subsections (d)(4)(ii) and (d)(5)(i), inconsistent uses of (e)(3), and mineral limitations of (g)(4).³² These references apply only to the reservation of rights by a landowner, and do not act to defeat the grant in perpetuity of the real property under easement, and have nothing to do with the

22. JASPER J. CUMMINGS JR., *THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE: AN ANALYSIS OF FACT FINDING METHODS AND STATUTORY INTERPRETATION FROM THE COURT'S TAX OPINIONS, 1801-PRESENT*, at text associated with nn. 2019-22 (2d ed. 2016) (e-book) [hereinafter JURISPRUDENCE]:

- Legislative regulations "implement" and construe the statute and have the "force of law."
- Legislative regulations may address policy rather than legal determinations, or may apply the statute's stated general policy in detailed ways, but in either event are based on the view that the agency has sufficient expertise to make the policy judgments Congress did not have time to address.
- The Treasury must adopt legislative regulations (called substantive rules) with notice, comment, and hearing under the Administrative Procedure Act (APA).

Id. As a legislative regulation, any Service expansion of, or rulemaking regarding the Regulation, must be prepared in accordance with the APA, with public notice, comment periods, and hearings, and not effected through covert litigation strategy in individual taxpayer audits and cases.

23. Treas. Reg. §1.170A-14(a), (b) (1986).

24. *Id.* §1.170A-14(a).

25. *Id.* §1.170A-14(b)(1).

26. *Id.*

27. *Id.*

28. *Id.* §1.170A-14(b)(2).

29. *Id.*

30. *Id.*

31. *Id.* ("Any rights reserved by the donor in the donation of a perpetual conservation restriction must conform to the requirements of this section. See e.g., paragraph (d)(4)(ii), (d)(5)(i), (e)(3), and (g)(4) of this section.")

32. *Id.* §1.170A-14(b)(2), (d)(4)(ii), (d)(5)(i), (e)(3), (g)(4).

requirement to protect conservation purposes in perpetuity set out by Code §170(h)(5)(A).

B. Deductibility Under Code §170(h)(5)(A) Is Simple in Normal Space and Time

Here the Queen put on her spectacles, and began staring at the Hatter, who turned pale and fidgeted.

“Give your evidence,” said the King; “and don’t be nervous, or I’ll have you executed on the spot.”

This did not seem to encourage the witness at all: he kept shifting from one foot to the other, looking uneasily at the Queen, and in his confusion he bit a large piece out of his teacup instead of the bread-and-butter.

—Lewis Carroll, *Alice’s Adventures in Wonderland*³³

Code §170(h)(5)(A) instructs that for a conservation gift to be made “exclusively for conservation purposes” as required by Code §170(h)(1)(C), its conservation purpose must be protected in perpetuity.³⁴ The question of qualification for tax benefits therefore is whether the conservation easement includes terms ensuring perpetual protection of its conservation purposes in accordance with Code §170(h)(5)(A).

The answer is based on the following inquiries. First, what are the conservation purposes—identification and documentation of the protected conservation purposes—by description in the easement’s recitals and documentation by the environmental conditions report, also known as the baseline inventory? Second, what are the processes and the standard by which the conservation purposes’ perpetual protection is effected and ensured—through stewardship, monitoring, and enforcement of those purposes over perpetuity?

As to the second inquiry, conservation-purpose protection is not self-executing; it requires holder involvement. By requiring that an easement be granted exclusively for conservation purposes through the perpetual protection of those purposes, Congress in Code §170(h)(5)(A) implicitly relies on holder evaluation of conservation purposes, proposed uses, and the exercise of reserved rights at the outset of an easement’s grant, and holder oversight and enforcement of conservation purposes over time.³⁵ Continuing holder oversight also allows for future uncertainty to be resolved through holder action, such as approval or disapproval of proposed uses or the exercise of reserved rights, in order to ensure protection of conservation purposes. Easements can qualify for tax deductions therefore and progress through time without perfect certainty of all uses, impacts, and rights reserved at the time of grant, in reli-

ance on easement holders’ responsibility to forever protect conservation purposes.

Holders who fail to protect conservation purposes according to the standard of doing no harm do so at the risk of losing their qualified holder status under Code §170(h)(3), and their tax-exempt status under Code §501(c)(3). The Service and Tax Court cannot presume holders will shirk their responsibility to forever protect, especially in light of these fatal consequences. The role of holders in protecting conservation purposes is repeated and expanded upon in Regulation §1.170A-14(g)’s guidance on meeting the Code §170(h)(5)(A) test of granting an easement exclusively for conservation purposes by protecting such purposes in perpetuity.

1. The Regulation Supports Code §170(h)(5)(A)’s Broad Mandate, and Expands Upon Holders’ Role

Code §170(h)(5)(A) requires a grant to be made exclusively for conservation purposes, with perpetual protection of its conservation purposes, which is construed and informed by Regulation §1.170A-14(g).³⁶ Regulation §1.170A-14(g) implements the protected-in-perpetuity requirement of Code §170(h)(5)(A) by setting forth substantive rules to safeguard the conservation purpose of a conservation easement, most of which must be effected by the easement holder.³⁷

The Regulation presents several threshold requirements that holders must meet and review to ensure their ability to protect conservation purposes in perpetuity. In order to qualify for a tax deduction, the easement must be held by a qualified organization with the commitment to protect and the resources to enforce the restrictions of the easement over perpetuity under Code §170(h)(3) and Regulation §1.170A-14(c).³⁸ The holder must prove its commitment through its mission or tax-exempt purpose or both, as applicable, and prove its resources through its human and financial capital, although funds on hand are not a qualifying factor.³⁹ The requirement for holder commitment and resources enables holders to protect, defend, and enforce conservation purposes throughout time.

At the outset of an easement transaction, the holder also ensures a conservation easement protects one or more of the defined conservation purposes as required by Code §170(h)(4) and Regulation §1.170A-14(d), with the holder determining subjective values in the public’s interest, such as scenic open space enjoyment and significant public benefits.⁴⁰ The holder strikes the balance between inconsistent uses permitted and prohibited under Regulation §1.170A-14(e),⁴¹ and protects conservation purposes in perpetuity by legally enforceable restrictions pursu-

33. WONDERLAND, *supra* note 2, at 61.

34. I.R.C. §170(h)(5)(A), (1)(C) (2006).

35. Tax Reform Act of 1976, Pub. L. No. 94-455, §280B, 90 Stat. 1520, 1919.

36. I.R.C. §170(h)(2)(C), (5)(A) (2006); Treas. Reg. §1.170A-14(g) (1986).

37. I.R.C. §170(h)(5)(A) (2006); Treas. Reg. §1.170A-14(g) (1986).

38. I.R.C. §170(h)(3) (2006); Treas. Reg. §1.170A-14(c)(1) (1986).

39. I.R.C. §170(h)(3) (2006); Treas. Reg. §1.170A-14(c)(1) (1986).

40. I.R.C. §170(h)(4) (2006); Treas. Reg. §1.170A-14(d) (1986).

41. Treas. Reg. §1.170A-14(e) (1986).

ant to Regulation §1.170A-14(g)(1), in which the holder accesses, evaluates, and enforces violations on the easement property.⁴²

Regulation §1.170A-14(e) anticipates that certain uses by a landowner may need to be limited or prohibited if they are inconsistent with protection of specified conservation purposes.⁴³ Unless under certain, narrow circumstances where inconsistent uses may be permitted, the Regulation expressly prohibits uses that are inconsistent with a conservation easement's protected conservation purposes.⁴⁴ This contradicts the Service's assertions in *Pine Mountain Preserve* that amendments will allow inconsistent uses destructive of protected conservation values and other conservation interests such that the easement gift is rendered nonperpetual.

Further, all the subsections of Regulation §1.170A-14(g) support the holder's role in protecting conservation purposes in perpetuity:

- Regulation §1.170A-14(g)(1) requires that the retained interest in land under easement be subject to legally enforceable restrictions to prevent uses of that land inconsistent with the conservation purposes of the easement.⁴⁵
- Under Regulation §1.170A-14(g)(2), the easement holder ensures the subordination of any existing liens, mortgages, or debt to its right to perpetually enforce the easement.⁴⁶
- The holder uses a remoteness standard to evaluate whether on the date of the easement gift it appears that the possibility that any act or event will occur that could defeat the conservation interest is so remote as to be negligible as required by Regulation §1.170A-14(g)(3).⁴⁷
- It also uses the remoteness standard to evaluate whether the probability of extraction or removal of minerals from the easement property by any surface mining method is so remote as to be negligible under Regulation §1.170A-14(g)(4).⁴⁸
- The holder evaluates the documentation and impact of landowner's proposed reserved rights and uses during easement drafting, then oversees and enforces the future exercise of such rights and uses under Regulation §1.170A-14(g)(5), "Enforceable in perpetuity—Protection of conservation purpose where taxpayer reserves certain rights."⁴⁹

- Also under Regulation §1.170A-14(g)(5), the easement holder is responsible for evaluating and, if possible, balancing reserved rights and uses with protected purposes.⁵⁰

Easement holders implement Code §170(h)(5)(A)'s requirement for conservation-purposes protection with concrete documentation under Regulation §1.170A-14(g)(5)(i).⁵¹ Documentation is required when the landowner reserves rights the exercise of which could impair the conservation purposes. The Regulation therefore requires baseline data to be provided before the easement grant, sufficient to establish the condition of the property at the time of the gift, so the holder can evaluate impacts and enforce violations as necessary in the future.⁵²

The easement holder examines the protected conservation purposes and any of landowner's reserved rights at the outset of an easement's drafting. This is done by evaluating permitted uses in the context of impacts to protected conservation purposes as required by Code §170(h)(1)(a), (2)(C), and (5)(A) and Regulation §1.170A-14(a), (e), and (g).⁵³ Contrary to the Service's arguments in *Pine Mountain Preserve* and *Carter* that exercising reserved rights or adjusting included building envelopes after the grant of easement nullifies the perpetual nature of the gift, the implementation of Regulation §1.170A-14(g)(5) not only anticipates the exercise of reserved rights after the grant, it also expressly permits, under certain circumstances, reservation of such rights by landowners to engage in such acts as building improvements and developing minerals on land under easement.⁵⁴ Further, in anticipation of the exercise of such rights, the Regulation establishes the process of documentation for holders to gauge and examine the exercise of such rights in the context of the protected conservation purposes with potential impacts to the same.⁵⁵

Consider, for example, a conservation easement that protects the conservation purpose of significant wildlife habitat under Regulation §1.170A-14(d)(3). The holder drafts the easement, or evaluates a future amendment to the easement, to prevent inconsistent uses that would harm such habitat.⁵⁶ In no circumstance does Regulation §1.170A-14(e) allow that the mere consideration of consistency of use or alteration of such use on the land in protection of the easement's conservation purposes, either before or after an easement's grant, render an easement nonperpetual.⁵⁷ Rather, consideration and evaluation of the exercise of reserved rights under Regulation §1.170A-14(g) and prohibition or permission of inconsistent uses under Regulation §1.170A-14(e), as well as decisions relating to easement administration, stewardship, and enforcement, are

42. *Id.* §1.170A-14(g)(1).

43. *Id.* §1.170A-14(e).

44. *Id.*

45. I.R.C. §170(h)(2)(C), (5)(A) (2006); Treas. Reg. §1.170A-14(b)(2), (d)(4)(ii), (d)(5)(i), (e)(3), (g)(1), (4) (1986).

46. Treas. Reg. §1.170A-14(g)(2) (1986).

47. *Id.* §1.170A-14(g)(3).

48. *Id.* §1.170A-14(g)(4).

49. *Id.* §1.170A-14(g)(5).

50. I.R.C. §170(h)(5)(A) (2006); Treas. Reg. §1.170A-14(b), (e), (g)(5) (1986).

51. Treas. Reg. §1.170A-14(g)(5)(i) (1986).

52. I.R.C. §170(h)(5)(A) (2006); Treas. Reg. §1.170A-14(g)(5)(i) (1986).

53. I.R.C. §170(h)(1)(a), (2)(c), (5)(A) (2006); Treas. Reg. §1.170A-14(a), (e), (g) (1986).

54. Treas. Reg. §1.170A-14(g)(5) (1986).

55. *Id.*

56. *Id.* §1.170A-14(d)(3), (e).

57. *Id.* §1.170A-14(e).

all intentionally (and understandably) vested by Congress not with the Service, but with the easement holder.

As the final determination in the easement process, if at some point after the easement grant the holder evaluates and believes changes surrounding the easement property make accomplishment of the easement's protected conservation purposes impossible or impractical, the holder and the landowner together may seek to extinguish the easement using judicial proceedings. When the subsequent transfer of such unfettered property yields proceeds, the holder must dedicate these proceeds to the easement's original purpose under Regulation §1.170A-14(c)(2) and (g) (6).⁵⁸ The value of the easement gift is determined by qualified appraisal pursuant to Regulation §1.170A-14(h), which gift value the holder evaluates and, if appropriate, accepts.⁵⁹

Where the issue of valuation under Regulation §1.170A-14(h) is squarely within the purview of the Service, the consideration of the totality of reserved rights and inconsistent uses compared to the protection of conservation purposes is squarely within the purview of the easement holder. This is by design, as intended by the law, as drafted by Congress with the Code and by the Treasury Department with the Regulation. The Service's attempt to appropriate the holder's role of evaluating conservation impacts and protecting conservation purposes as opposed to its own role of valuing the easement gift, amounts to overreach under the law of the Code, Regulation, and Executive Orders, and defies the intent of the Code and Regulation, as stated by their creators.

Any expansion beyond these rules by the Service through its litigation strategy in audit and challenge of conservation easement deduction cases not only disregards explicit congressional intent regarding the role of easement holders, it may also constitute illegal rulemaking without

public notice, opportunity to comment, and discussion of the rule in open hearings as required by the Administrative Procedure Act (APA). It certainly violates the October 2019 Executive Orders requiring federal agencies including the Service to be transparent when drafting and issuing guidance documents, and to avoid unfair surprise when undertaking enforcement actions.⁶⁰ These Executive Orders require a process of rulemaking and transparency by the Service, in lieu of its current practice of revealing its interpretation and implementation of the Regulation through audits and litigation challenges to conservation easement deductions.

Congress purposefully trusted holders in the administration of easements and protection of conservation purposes in perpetuity. Remembering that what must be protected in perpetuity under the Code and Regulation is not any particular provision of an easement deed or any particular acre of land; rather, the protection is of the easement's conservation purposes themselves, which makes the easement holder's role even more important over time.⁶¹ Congress expressly dedicated these tasks to easement holders as the only entities qualified to both create and administer perpetual easements.⁶² Given the discretion extended by Congress to holders to evaluate reserved rights and inconsistent uses in favor of protecting conservation purposes, the Service and courts must not misconstrue and ignore these sections of the Code and Regulation granting discretion to easement holders.

II. In Trusts We Trust—Discretion by Design: Congressional Intent of the Law

“That proves his guilt,” said the Queen.

“It proves nothing of the sort!” said Alice. “Why, you don't even know what they're about!”

—Lewis Carroll, *Alice's Adventures in Wonderland*⁶³

Legislative history demonstrates that Congress entrusted qualified organizations to determine upfront whether an easement protects a qualifying conservation purpose and then to protect those purposes by evaluating the exercise of reserved rights, approval of uses, and enforcement of easement terms throughout the entire course of an ease-

58. *Id.* §1.170A-14(c)(2), (g)(6).

59. *Id.* §1.170A-14(a)-(h). The Service argues in *Pine Mountain Preserve* that it is possible to fail to create a perpetual restriction (granted in perpetuity, not for a term of years) on the use that may be made of the real property under Code §170(h)(2)(C). This is because a landowner has reserved too many rights to themselves under Regulation §1.170A-14(g) (5) and has been permitted too many inconsistent uses under Regulation §1.170A-14(e), so has not actually restricted the use of the property. This is false. It is a distinct inquiry from whether a landowner reserves so many rights to themselves that there is little to no value to their gift by way of a tax deduction. It is one thing to say that a landowner's reserved rights diminish the value of their conservation easement gift and then duel over what is the value relinquished through the easement versus that retained in rights by the landowner. It is another thing entirely to lop the head off of the conservation gift at the outset by deeming that a landowner's reserved rights and uses are so significant as to defeat the perpetual duration of the conservation easement and associated charitable gift.

Is it permissible for the Service to behead the gift from the outset and avoid holder discretion by deeming there to be too many reserved rights and inconsistent uses, and not enough conservation value in the gift, without looking at the attendant values of each? It is certainly conceivable that under the influence of magical mushrooms a landowner could shrink conservation value so small and grow reserved rights or inconsistent uses so large as to collapse to zero the value in a charitable gift, but would this also cause charitable intent and gift nullification? Under the Regulation, just as with the Code, the Service must rely on the judgment of the holder, acting under threat of severe penalties, including the “death penalty”—loss of exempt status—for failure to do its job and protect conservation purposes in perpetuity. This includes the assessment and balance of reserved rights and inconsistent uses against the protection of conservation values.

60. See Jenny L. Johnson Ware, *New Executive Orders Shift Conservation Easement Battleground*, TAX NOTES, Nov. 4, 2019, at 2 [hereinafter *CE Battleground*], available at <https://www.taxnotes.com/tax-notes-federal/charitable-giving/new-executive-orders-shift-conservation-easement-battleground/2019/11/04/2b2np> (“the new Executive Orders require federal agencies to be ‘transparent’ when drafting and issuing guidance documents (EO 13891) and to avoid ‘unfair surprise’ when undertaking enforcement actions (EO 13892)”); Exec. Order No. 13891, 84 Fed. Reg. 55235 (Oct. 15, 2019); Exec. Order No. 13892, 84 Fed. Reg. 55239 (Oct. 15, 2019).

61. See Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENV'T L. REV. 1 (2012).

62. See H.R. CONF. REP. NO. 95-263, at 3031 (1977); 1977-1 C.B. 519, 523.

63. *WONDERLAND*, *supra* note 2, at 66.

ment's existence. This judgment of, deference to, and trust in qualified organizations is not accidental; it is by design and fully intentional.

The congressional intent behind Code §170(h) entrusts decisionmaking authority, discretion, and judgment over easement configuration in space and over time to easement holders. Legal processes including the burden of proof, legislative grace, standard of review, and deference buttress this intent and the application of law as written. Entrustment to qualified holders of the perpetual protection of conservation purposes appears repeatedly throughout the legislative history that predates the enactment of Code §170(h): the Tax Reduction and Simplification Act of 1977 (TRSA); the Tax Reform Act of 1976/1986 (TRA); and the Tax Treatment Extension Act of 1980 (TTEA) all of which show purposeful trust in easement holders.⁶⁴

The U.S. Senate Finance Committee Report accompanying TTEA, for example, outlined the crucial role holders serve in stewarding and defending conservation easements and protecting conservation purposes: "The committee contemplates that the contributions will be made to organizations which have the commitment and the resources to enforce the perpetual restrictions and to protect the conservation purposes."⁶⁵ The Senate report further states regarding this commitment: "By requiring that the conservation purpose be protected in perpetuity, the committee intends that the perpetual restrictions must be enforceable by the donee organization (and successors in interest) against all other parties in interest (including successors in interest)."⁶⁶

Easement holder discretion to protect conservation purposes appears repeatedly in the TTEA, including as referring to aforementioned holder commitment and resources to enforce as intended to see conservation purposes actually carried out⁶⁷:

The committee does intend, however, to limit the deduction only to those cases where the conservation purposes will in practice be carried out. The committee contemplates that the contributions will be made to organizations which have the commitment and the resources to enforce the perpetual restrictions and to protect the conservation purposes.

As well as in the transfer of perpetual easements, wherein holder oversight is expressly tied to the perpetuation of conservation purposes:

The requirement that the conservation purpose be protected in perpetuity also is intended to limit deductible contributions to those transfers which require that the donee (or successor in interest) hold the conservation

easement (or other restriction) or other property interests exclusively for conservation purposes (i.e., that they not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction or property exclusively for conservation purposes).⁶⁸

The legislative history therefore demonstrates that Congress vested easement holders with the responsibility to protect conservation purposes in perpetuity, an intention that is featured not only in the legislative history, but also prominently throughout Code §170(h), the Regulation, and case law. Because of its prominence in the Code and the Regulation, most modern conservation easements establish the right of holders to exercise the discretionary authority in evaluating and protecting conservation purposes in perpetuity, as accorded by Congress in Code §170(h).⁶⁹

Congress purposefully intended to trust the judgment of holders throughout the duration of an easement. Code §170(h)(2)(C) and (5)(A) show this delegation of responsibilities to (en)trust the easement holder with identification of the easement details. This includes the internal and external boundaries, the reserved rights and permitted uses in the context of the protected purposes, the definition of protected conservation purposes, and the creation of processes ensuring protection over perpetuity, including during the exercise of reserved rights, in the face of inconsistent uses, and when modifying or terminating because of changed conditions.⁷⁰

Congress expressly dedicated these tasks to the easement holder as the (only) entity qualified to make such evaluations at the outset of the easement's creation, grant, and acceptance, as well as throughout the entire existence of the easement. Congress gave holders responsibility not just to evaluate the qualification of and to accept easements, but also to exercise oversight and effect purposes over perpetuity, from easement beginning to end, throughout the entire easement process. Congress also established the conservation-protection standard for holders to evaluate prospective easements and to enforce, adapt, and steward easements over time, requiring that the easement must be made exclusively for conservation purposes, meaning perpetual protection of the easement's purposes.

Congress therefore vested easement holders with discretion to address future uncertainty and weigh decisions using the conservation-protection standard. Because properties protected by conservation easements vary by geography, terrain, size, habitats, and many other attributes, characteristics, and values, the drafters of the Code and the Regulation intentionally set forth the conservation-purpose protection standard to guide easement holders in exercising their discretion, rather than imposing

64. TRSA, Pub. L. No. 95-30, §309, 91 Stat. 154 (1977); TRA, Pub. L. No. 94-455, 90 Stat. 1919 (1976); TTEA, Pub. L. No. 96-541, §6(a), 94 Stat. 3206 (1980).

65. S. REP. No. 96-1007, at 14 (1980), available at <https://www.finance.senate.gov/download/1980/09/30/tax-treatment-extension-act-of-1980-report-96-1007>.

66. *Id.*

67. *Id.*; 1980-2 C.B. 599 on TTEA, Pub. L. No. 96-541, 94 Stat. 3206 (1980).

68. TRSA, Pub. L. No. 95-30, §309(a), 91 Stat. 154 (1977) (codified as I.R.C. §170(f)(3)(B)(iii) (1977)); TTEA, Pub. L. No. 96-541, §6(a), 94 Stat. 3206 (1980) (codified as I.R.C. §170(f)(3)(iii) (1980)); S. REP. No. 96-1007, *supra* note 65, at 9.

69. Income Taxes; Qualified Conservation Contributions, 51 Fed. Reg. 1496, 1498 (Jan. 14, 1986), available at <http://cdn.loc.gov/service/ll/fedreg/fr051/fr051009/fr051009.pdf>.

70. *Id.*

rigid criteria.⁷¹ The Regulation's reliance on holder discretion using the conservation-purpose protection standard is evident in the history behind the drafting of Regulation §1.170A-14's creation.

The history behind the Regulation also emphasizes the importance of holders' discretionary role and the Service's lack of expertise to make the subjective determinations of "significant public benefit" and "scenic enjoyment," which responsibility should instead be delegated to either a private organization or to another governmental agency with acknowledged expertise in that area.⁷²

The proposed Regulation did not, however, include any of the examples included in the final Regulation §1.170A-14(f). The examples were added to the final Regulation with specific attention to inconsistent uses, after "[c]ommenters felt that the proposed regulations were not specific enough regarding permitted inconsistent uses."⁷³ The specific examples were therefore deliberately added to the Regulation to illustrate the balance of inconsistent uses and reserved rights with holder's discretion and approval in light of impacts to conservation values. Examples such as these, together with the legislative history, assist courts, including the Tax Court and circuit courts, in their own respective evaluation of the appropriateness of the Service's challenges to conservation easement gifts.

The Tax Court and appellate courts have acknowledged the importance of the legislative history and the framework for holder judgment and decisionmaking based on conservation-purpose protection behind Code §170(h)(2)(C) and (5)(A), and Regulation §1.170A-14(e) and (g), among others.⁷⁴ One of the best assessments and descriptions of the legislative history is in the 1982 *East* opinion. The court takes deep, Caterpillar-like consideration of all the legislative history for Code §170(h)(5)(A) (and references *Glass* doing the same) in a discussion of protection over perpetuity in the context of a mortgage subordination, in addition to retained rights, consistent uses, and the holder's role in determining what "exclusively for conservation purposes" means.⁷⁵

The Tax Court explains that the perpetuity requirement of Code §170(h)(5)(A) had its origins in the TRSA, "wherein Congress temporarily allowed a charitable contribution deduction for an 'easement with respect to real property granted in perpetuity to . . . [a governmental unit or qualifying charitable organization] exclusively for conservation purposes.'"⁷⁶ The court quotes the conference report on TRSA at length as further explaining the role of easement holders in conservation-purpose protection:

While it is intended that the term "conservation purposes" be liberally construed with regard to the types of property

with respect to which deductible conservation easements . . . may be granted, it is also intended that contributions of perpetual easements . . . qualify for the deduction only in situations where the conservation purposes of protecting or preserving the property will in practice be carried out. Thus, it is intended that a contribution of a conservation easement . . . qualify for a deduction only if the holding of the easement . . . is related to the purpose or function constituting the donee's purpose for exemption (organizations such as nature conservancies, environmental, and historic trusts, State and local governments, etc.) and the donee is able to enforce its rights as holder of the easement . . . and protect the conservation purposes which the contribution is intended to advance.⁷⁷

The Tax Court also refers the parties to the legislative history when detailing that Congress acknowledged the protection of a conservation easement by holders in the Act of Dec. 17, 1980. The court quoted the Act at length, noting that the Act extended the deduction for a charitable gift of a qualified conservation easement permanently, and quoted the Senate report accompanying the enactment as stating:

The bill retains the present law requirement that contributions be made "exclusively for conservation purposes." Moreover, the bill explicitly provides that this requirement is not satisfied unless the conservation purpose is protected in perpetuity. The contribution must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of the retained interest inconsistent with the conservation purposes.⁷⁸

The court also hones in on the requirement for perpetual conservation-purpose protection being inextricably linked to holder oversight and discretion, by calling out the legislative history limiting successor holders to those promising to perpetually protect conservation purposes.⁷⁹ In footnote 10, the court also refers to the *Glass* case for a similar exposition of legislative history, noting that the U.S. Court of Appeals for the Sixth Circuit in that case also examined the legislative history of the requirement that a gift of a conservation easement be exclusively for conservation purposes.⁸⁰ And after examining the origins of Code §170(h)(5)(A) "and its relevant legislative history and regulatory interpretation in mind," the court "returned to the question of whether the donated property was protected in perpetuity."⁸¹

71. *Id.*

72. *Id.*

73. *See id.* at 1497.

74. I.R.C. §170(h)(2)(C), (5)(A) (2006); Treas. Reg. §1.170A-14(e), (g) (1986).

75. 1982 E., LLC v. Commissioner, T.C.M. (CCH) 2011-84, slip op. at 16-19 (2011).

76. TRSA, Pub. L. No. 95-30, §309(a), 91 Stat. 154 (1977).

77. 1982 E., LLC, T.C.M. (CCH) 2011-84, slip op. at 16-19 (quoting H.R. CONF. REP. NO. 95-263, at 3031 (1977); 1977-1 C.B. 519, 523).

78. *Id.* (quoting Act of Dec. 17, 1980, Pub. L. No. 96-541, §6(a), 94 Stat. 3206).

79. *Id.* (quoting S. REP. NO. 96-1007, *supra* note 65, at 13-14; 1980-2 C.B. 599, 605-06).

80. *Glass v. Commissioner*, 124 T.C. 258, 277-80 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006).

81. 1982 E., LLC, T.C.M. (CCH) 2011-84, slip op. at 16-19.

Moreover, Code §170(h)(2)(C) cannot be separated from or exist apart from Code §170(h)(5)(A). The Code requires the long-term look at perpetuity and requisite accompanying deference to the judgment of easement holders. As discussed, this is as intended by Congress when it *entrusted* decisions regarding uses and the exercise of reserved rights over time to holders. The oversight of the exercise of reserved rights and balancing of uses within a conservation easement, therefore, is critically important for holders to protect purposes in perpetuity or suffer the consequences under Code §§501(c)(3) and 170(h)(3).

The Service and Tax Court can examine easement qualifications under Code §170(h)(2)(C) and (5)(A) at the grant of an easement. The holder's job is to administer the easement throughout its life. That is a role that cannot be effected, approximated, circumscribed, contorted, or appropriated by the Service. If the legal requirements are met as Congress intended (discussed in Section IV), then easements must be found to be deductible at their outset, even if they contain variables or uncertainty. Congress was straightforward about meeting definitions in drafting an easement, and after the Service's review if or when an easement is audited, it falls to the holder to exercise judgment and discretion in pursuit of the perpetual protection of conservation purposes.

Understanding and shaping the procedural rules for the Service's challenges to and courts' review of perpetual conservation easements helps to inform landowners' and the conservation community's understanding of what is allowable and disallowable in terms of process. Applying the proper process to conservation easement transactions is essential.

III. Process and Procedural Rules of Grace, Deference, Discretion, and Trust

"Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice. Nobody moved.

—Lewis Carroll, *Alice's Adventures in Wonderland*⁸²

Evaluating the body of tax law of conservation deductions as effected by the Service, Tax Court, and reviewing courts

82. WONDERLAND, *supra* note 2, at 67.

of appeals requires consideration of the rules of process and procedure in creating this law. Such rules include questions of whether to shift the burden of proof, whether to demur to legislative grace, what is the proper standard of review, how to incorporate judicial precedent, and whether to afford deference to the Service, easement holders, courts and, most importantly, to the law itself. All of this is considered in the context of reining in overreach and arbitrary and capricious behavior.

After examination, it becomes clear that the most crucial procedural aspects require the Service to shoulder the burden of disproving qualification for conservation easement deduction, as reviewed by courts using an ordinary standard of review, relying on judicial precedent broadly, and deferring directly to the Code and Regulation. When the procedural requirements of shifting the burden, deferring to the law, and considering precedent broadly are acknowledged, the conservation community, all levels of courts, and even the Service, can extract themselves from the rabbit hole and the land below.

Like the Queen of Hearts, the Service would prefer to pronounce its sentence first followed by a verdict afterwards in all its challenges and disallowances of conservation easement deductions; the Service essentially pronounces a sentence and verdict simultaneously when denying that a conservation easement has any conservation value or monetary value, thereby disallowing the deduction. Further, by deliberately obscuring and frequently changing its rules for implementing the law of conservation easement gifts, the Service forces close scrutiny of the processes by which it enforces the Regulation and Code, and legal review of the same.⁸³ This examination includes the burden of proof, legislative grace, standard of review, and direct deference, not to the Service's arbitrary decisions, but to the law as it is written.

The Service's bewildering and rapidly changing rules can only be discerned through patterns within its audit and litigation strategy, one case at a time, and so painfully slowly, mutedly, and piecemeal, that it harkens back to a tortured conversation with the Caterpillar in Wonderland: "'That is not said right,' said the Caterpillar. 'Not quite right, I'm afraid,' said Alice, timidly; 'some of the words have got altered.' 'It is wrong from beginning to end,' said the Caterpillar decidedly, and there was silence for some minutes."⁸⁴

The characters at play in this procedural Wonderland include the largely self-governed Service,⁸⁵ which appears at times to be exempted from strict adherence to the APA and is often afforded harmful deference by reviewing courts.⁸⁶ Additionally, the singularly situated Tax Court, which only follows precedent of appellate courts within a participating taxpayer's circuit, also affords great deference to the Ser-

83. *CE Battleground*, *supra* note 60, at 9.

84. WONDERLAND, *supra* note 2, at 28.

85. See JURISPRUDENCE, *supra* note 22, at text associated with n. 743 ("[t]he Service's stated rule that none but the Supreme Court's interpretations of the Code bind them").

86. APA, 5 U.S.C. §§551 et seq.

vice's decisions.⁸⁷ And the courts of appeals, whose review and scrutiny of Tax Court decisions is constrained to and restricted by each taxpayer's circuit's own narrow body of precedent, unlike any other appellate process, also creates the potential for affording illogical, irrational deference to Service decisions.⁸⁸

Moreover, when the Service stops serving mysterious mushrooms to the judiciary under the guise of expertise and deference, the illusion that all conservation easement holders are wrongdoers and all conservation easement transactions are illegitimate will evaporate. Only then will the Service stop imposing restrictions beyond the scope of its authority. It, too, will emerge from the rabbit hole with the conservation community and the judiciary, to focus on the true bad actors in tax abuse, the perpetrators of syndicated conservation transactions. The Service is uniquely situated to shift the focus of its time, energy, and resources to this critically important endeavor, given its orientation both as the creator and enforcer of federal conservation tax law.

A. Legislative Grace, Statutory Construction, and the Burden of Proof

"Consider your verdict," the King said to the jury.

"Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"

—Lewis Carroll, *Alice's Adventures in Wonderland*⁸⁹

The Service is unique in its disposition as the semi-autonomous creator, administrator, and enforcer of tax laws, not unlike the Queen of Hearts' role of lawmaker, judge, jury, and executioner. After several incarnations of a national tax collection bureau funding various wars, including the War of 1812 and the Civil War, by collecting internal taxes, President Harry Truman in 1952-1953 reorganized the Federal Bureau of Internal Revenue to the form it takes today as the Internal Revenue Service.⁹⁰

The Service was created under Code §7803 and organized under the Secretary of the Treasury's authority to administer and enforce the country's internal revenue laws under Code §7801.⁹¹ The Service, in its role of drafting regulations in support and interpretation of the Code, in effect becomes semi-autonomous as the creator of the rules explaining how to become eligible for conservation easement tax deductions. The Service strains credulity in this

role, however, when it refuses to issue clear rules and only promotes its interpretation of the Regulation through its audit and litigation of conservation easement deductions, and relies on the unfair weighting of legislative grace in its favor.⁹²

One prominent historic presumption of the Service's role in evaluating tax deductions is that it has a right to deny tax deductions in general based on the doctrine of legislative grace.⁹³ The Service's determinations denying tax deductions carry a heavy burden for the taxpayer to overturn, by proving that they are, in fact, entitled to their claimed deductions.⁹⁴ Although charitable deductions have been deemed a matter of legislative grace,⁹⁵ recent conservation easement legal precedent argues otherwise.⁹⁶

Where the Sixth Circuit in *Glass* favorably cites the traditional legislative grace doctrine as applicable in matters of charitable deductions, the Fifth Circuit in *Bosque Canyon* more pointedly disputes such application.⁹⁷ The Sixth Circuit in *Glass* allows that the Service has the power to deny grace: "[d]eductions are a matter of legislative grace, and the taxpayer must satisfy the specific statutory requirements claimed to reduce a tax liability."⁹⁸ The *Glass* court likewise provides that the burden is on the taxpayer to prove eligibility for a tax deduction, making no distinction about whether the deduction is charitable or not: "The Commissioner's deficiency determinations are presumed correct and the taxpayer bears the burden of proving otherwise."⁹⁹

By contrast, the Fifth Circuit in *Bosque Canyon II* specifically rejects legislative grace as applicable to conservation easement deductions in a 2-1 split decision reversing

92. *CE Battleground*, *supra* note 60, at 5.

93. See Tax Court Rule 142(a), 60 T.C. 1057, 1133 (1973); *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

94. See Tax Court Rule 142(a); *INDOPCO, Inc.*, 503 U.S. at 84; *New Colonial Ice Co.*, 292 U.S. at 440; *Welch*, 290 U.S. at 115.

95. *White v. United States*, 305 U.S. 281 (1938); *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943) ("we examine the argument in the light of the now familiar rule that an income tax deduction is a matter of legislative grace, and that the burden of clearly showing the right to the claimed deduction is on the taxpayer"); *New Colonial Ice Co.*, 292 U.S. at 440; *Deputy v. du Pont*, 308 U.S. 488, 493 (1940) (whether and to what extent deductions shall be allowed "depends upon legislative grace, and only as there is clear provision therefor can any particular deduction be allowed").

96. *Glass v. Commissioner*, 471 F.3d 698 (6th Cir. 2006) (citing *Ekman v. Commissioner*, 184 F.3d 522, 524 (6th Cir. 1999)); see also *Green v. United States*, 116 A.F.T.R.2d 2015-6668 (W.D. Okla. 2015); *Weingarden v. Commissioner*, 825 F.2d 1027 (6th Cir. 1987) (acknowledging that generally statutes imposing a tax are construed liberally, in favor of the taxpayer, while statutes allowing deductions and exemptions are strictly interpreted, being "matters of legislative grace"); *id.* at 1029 (citing *Porter v. Commissioner*, 288 U.S. 436, 442 (1933); 1 MERTENS LAW OF FEDERAL INCOME TAXATION §§3.05, 3.07 (1986) (internal quotations omitted)); *id.* (citing *Helvering v. Bliss*, 293 U.S. 144, 150-51 (1934) (further citations omitted, internal quotations omitted)) (distinguishes statutes regarding charitable deductions, stating they are not matters of legislative grace, but rather "expression[s] of 'public policy'" and such "[p]rovisions regarding charitable deductions should . . . be liberally construed in favor of the taxpayer"); *id.* (citing *Hartwick Coll. v. United States*, 801 F.2d 608, 615 (2d Cir. 1986)) (even if the language of the statute were unclear, a liberal construction in favor of the taxpayer would be appropriate).

97. *Glass*, 471 F.3d 698 (citing *Ekman*, 184 F.3d at 524-25).

98. *Id.*

99. See *Glass*, 471 F.3d 698 (citing *Ekman*, 184 F.3d at 524).

87. See JURISPRUDENCE, *supra* note 22, at text associated with n. 746 ("[t]he *Golsen* rule binds the Tax Court to the appellate decisions in the circuit to which the case is appealable").

88. See *id.* ("the Tax Court will follow its own prior decisions, absent contrary controlling circuit rules").

89. WUNDERLAND, *supra* note 2, at 61.

90. Internal Revenue Service (IRS), *IRS History Timeline: 1765-1776, Taxed and Revolution*, <https://www.irs.gov/irs-history-timeline> (last updated Feb. 25, 2020).

91. See IRS, *The Agency, Its Mission, and Statutory Authority*, <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last updated Sept. 28, 2020); I.R.C. §§7801, 7803 (1986).

and remanding to the Tax Court. It states: “[M]ost IRC [Internal Revenue Code] provisions that intentionally create narrow ‘loopholes’ to cover narrowly specific situations are deemed to have been adopted in an exercise of legislative grace and thus are subject to strict construction. That does not apply, however, to deductions for conservation easements granted pursuant to IRC §170(h).”¹⁰⁰

Removing the presumption of legislative grace shifts the burden to the Service to disprove qualification for the tax deduction under Code §7491, particularly where the taxpayer presents credible evidence under Code §7491(a).¹⁰¹ Under Code §7491(a), the burden shifts when the taxpayer produces credible evidence of facts relevant to ascertaining the liability of the taxpayer. The Code states: “(1) General rule: If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.”¹⁰²

The Tax Court has seen fit to reject legislative grace and shift the burden of proof to the Service to prove *disqualification* in several cases to date. In *Atkinson*, the Tax Court, in making an inconsistent use, reserved rights, and conservation-purpose protection determination, held that the taxpayers provided credible evidence that the easements at issue met the conservation purpose of providing wildlife habitat, such that the burden of proof shifted to the Service under Code §7491(a).¹⁰³ But by contrast, the Tax Court found that the taxpayers did not provide credible evidence regarding open space purposes, and the burden did not shift on that aspect.¹⁰⁴

In *Butler*, the Tax Court also shifted the burden of proof to the Service on another consideration of inconsistent uses, reserved rights, and protected conservation purposes, because the Butlers cooperated with the Service’s requests for documents and the Tax Court found that they introduced credible evidence concerning the qualification of conservation easements under Code §170(h).¹⁰⁵ The Tax Court concluded that the taxpayers presented credible evidence that reserved rights were not inconsistent with conservation purposes, and the Service presented none to the contrary, so that the taxpayers satisfied the burden of proof.¹⁰⁶

The only testimony the Service offered regarding whether the retained rights were consistent with the con-

servation purpose was correspondence between their counsel and environmental consultants about building sites, while the Butlers presented extensive evidence regarding perpetuating the conservation purposes.¹⁰⁷ Even though the Tax Court found the taxpayers’ evidence on their exercise of reserved rights’ effect on protected conservation purposes to be sparse, the burden of proof still shifted to the Service. The Tax Court found that the Service did not meet its burden, and concluded that the reserved rights in the easements were not inconsistent with the protection of the significant wildlife habitat, and therefore met the requirements of Code §170(h)(4)(A)(ii) and Regulation §1.170A-14(d)(3).¹⁰⁸

Should there be any doubt about the merits of shifting the burden to the Service to *disprove* qualification for charitable deductions, and conservation easements in particular, one only has to consider the dearth of affirmative statements by the Service as to what is their interpretation and implementation of the Regulation in question. Landowner-taxpayers therefore should be able to bolster this position by submitting with their tax return and Form 8283 a detailed checklist, supplied by the Service, identifying and itemizing with specificity their qualification for the benefit. This would be particularly helpful in the absence of any affirmative statements by the Service as to what their interpretation and implementation of the Regulation for conservation easement tax deductions actually is.

The checklist should state at a minimum under Code §170(h)(2)(C) that the easement is perpetual and not for a term of years, and under Code §170(h)(5)(A) that it was granted and recorded in the taxable year of the deduction, that the title is unified in the grantor, and that any debt has been subordinated to the right of the holder to enforce in perpetuity. Further, if minerals are separated, there is a mineral remoteness letter, and termination is by judicial proceedings with proceeds after transfer of the property to the holder, with no separation of proceeds flowing to third parties.¹⁰⁹ Although the Service has a similar checklist for purposes of auditing conservation easement transactions, this qualification checklist would need to be provided to landowners by the Service to submit together with their Form 8283 for review. If the Service would refuse to provide such a checklist, conservation easement donors could craft a checklist of their own to submit with their tax returns, which would also suffice to shift the burden of proof to the Service to disprove their qualification for a tax deduction.

The Service could respond to such donor checklists by identifying technical flaws, such as incorrect recording dates, inadequate subordination agreements, missing or incorrect data on Form 8283, timing of receipt of con-

100. *Bosque Canyon Ranch II, L.P. v. Commissioner*, 867 F.3d 547, 553-54 (5th Cir. 2017).

101. See I.R.C. §7491(a) (1986):

Burden shifts where taxpayer produces credible evidence (1) General rule. If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

102. *Id.*

103. *Atkinson v. Commissioner*, T.C.M. (CCH) 2015-236 (2015). See also I.R.C. §7491(a) (1986).

104. *Butler v. Commissioner*, T.C.M. (CCH) 2012-72 (2012).

105. *Id.* at 9, 35.

106. *Id.*

107. *Id.*

108. *Id.*; I.R.C. §170(h)(4)(A)(ii) (2006); Treas. Reg. §1.170A-14(d)(3) (1986).

109. To distinguish the transaction from one that is syndicated, the checklist can identify whether it is a family partnership owning the property for more than a year, or another type of pass-through entity with an easement value of less than 2.5 times the basis of the encumbered land. The checklist together with the opportunity to cure will also help the Service identify syndicators who are unable to correct or cure fatal pass-through flaws or overvaluation aspects demonstrated by the checklist answers.

temporaneous gift acknowledgment letter, and incorrect dates for appraisal, baseline inventory, or mineral report. The Service could then either deem the documentation substantially compliant, or afford landowners and easement holders an opportunity to cure flaws. If technical flaws could not be corrected, the Service could deem the transaction as substantially complying with the technical requirements of the Code and Regulation.

Despite Service protestations, audits, and litigation of these ephemeral “Cheshire cat-like” aspects, technical flaws do not actually undermine the merit or substance of the perpetual nature or conservation protections contained within those easements. The opportunity to cure or finding of substantial compliance would shift the emphasis from technical errors currently promoted by the Service, to properly recognizing the protection of the conservation purposes as the paramount inquiry during review of documentation or audit. Perpetual conservation would be ensured, therefore, while technical errors are cured through appropriate corrective action or evaluated and deemed substantially compliant. Overvaluation, by contrast, must be addressed on its own terms.

The Service already encourages taxpayers to contact the Service if they have any questions and to make use of checklists in its Publication 5349, recommending taxpayers use the Service’s “tax prep checklist.”¹¹⁰ The Service’s shift of its audit checklist to use by and for taxpayers likely would take very little effort or resources and, in turn, save millions of taxpayer dollars in unnecessary and non-substantive conservation easement audits, challenges, and litigation.¹¹¹ Such a checklist also furthers the taxpayer’s credible evidence under Code §7491(a), thereby affirmatively shifting the burden of proof to the Service with regard to evaluating the qualifications of a conservation contribution under Code §170(h) and Regulation §1.170A-14A, to which the Service and Tax Court already owe deference.

B. *The Service’s Interpretation of and Tax Court Deference to the Regulation*

“What IS the use of repeating all that stuff,” the Mock Turtle interrupted, “if you don’t explain it as you go on? It’s by far the most confusing thing I ever heard!”

—Lewis Carroll, *Alice’s Adventures in Wonderland*¹¹²

As a general matter, the Service drafts regulations to implement tax law and to provide certainty to taxpayers as to a law’s effect or application.¹¹³ Since the Service’s drafting of Regulation §1.170A-14 in 1986 interpreting and implementing Code §170(h), the Service and courts have been

required to defer to that Regulation: “We . . . must defer to Treasury Regulations that ‘implement the congressional mandate in some reasonable manner.’”¹¹⁴

To be clear, such deference is to the Regulation itself, not to the Service’s application of the Regulation in denying tax benefits in audit or litigation. The Service has to follow the law as written by Congress just like everyone else—the Service’s drafting of a brief with their position on deductibility or their vocalization of an argument at trial in Tax Court is not in and of itself an administrative interpretation or implementation of the law under the APA.¹¹⁵ The Service has to follow the Code and its own Regulation as written, as do taxpayers, landowners, easement holders, and courts alike, and not change its interpretation or implementation with the whims of audit or litigation strategy.¹¹⁶

The Tax Court in *Oakbrook Holdings* evaluated and gave deference to Regulation §1.170A-14(g)(6)’s treatment of proceeds following termination of a perpetual conservation easement, finding the Regulation to be properly promulgated and valid under the APA, even though its statutory parent, Code §170(h), is silent on the matter at issue, that of appropriate proceeds apportionment.¹¹⁷ Because Regulation §1.170A-14(g)(6) imposes a requirement regarding proceeds after termination of an easement that is not set forth in Code §170(h), the Tax Court appropriately treated the Regulation as a legislative rule.¹¹⁸ And because Congress did not address whether proceeds limitations are appropriate under the termination provision, the Tax Court looked to the Regulation, and gave deference thereto because it was reasonable, and not “arbitrary, capricious, or manifestly contrary to the statute.”¹¹⁹ The court also cites the Regulation’s long unchanged status and age as adding to the presumption of reasonableness.¹²⁰ In sum, the court upheld the Regulation’s approach to proceeds as “a ‘reasonable interpretation’ of the law Congress enacted.”¹²¹

The dissent disagreed, noting that the inquiry as to the validity of the Regulation was inappropriate, and had the effect of endorsing the Service’s rulemaking beyond the language of the Regulation and without administrative process.¹²² “In so doing, it endorses the gloss that the Commissioner has applied to the regulation with respect to donor improvements—a topic wholly absent from the text of the regulation.”¹²³ As the dissent rightly implies, whether

110. I.R.S. Pub. 5349 (2019).

111. *CE Battleground*, *supra* note 60, at 9.

112. *WONDERLAND*, *supra* note 2, at 58.

113. See T.D. 8069, 1986-1 C.B. 89; 51 Fed. Reg. 1496, 1498 (Jan. 14, 1986) (citing 26 U.S.C. §7805 as authority for the issuance of the regulations and explaining the regulations were issued through notice-and-comment procedure of the APA).

114. *Commissioner v. Portland Cement Co. of Utah*, 450 U.S. 156, 169 (1981) (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)).

115. APA, 5 U.S.C. §§551 et seq.

116. *CE Battleground*, *supra* note 60, at 9.

117. *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. No. 10, at 25 (2020). See also *Lumpkin One Five Six, LLC v. Commissioner*, T.C.M. (CCH) 2020-94 (2020) (Service challenges for nonperpetual proceeds clause with reduction in value for improvements; Tax Court affirms citing *PBBM-Rose Hill* and *Coal Property* for proceeds, and *Oakbrook* and *Chevron* for validity of proceeds regulation).

118. *Oakbrook*, 154 T.C. at 17.

119. *Id.* at 26-27 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 844, 14 ELR 20507 (1984); APA, 5 U.S.C. §706(2)(a)).

120. *Id.* at 31.

121. See *id.* at 27 (citing *Chevron*, 467 U.S. at 844).

122. *Id.* at 45.

123. *Id.* at 45-46.

a regulation is consistent with its statutory authority is one matter; whether an administrative agency such as the Service can conduct rulemaking beyond the language of a regulation without following administrative procedures is quite another, and is wholly inappropriate.

When the Service takes a position that is inconsistent with its own Regulation, this distorts the administrative rulemaking process required by the APA and leads the Tax Court or courts of appeals to ignore portions of the Regulation.¹²⁴ For example, by ignoring Example 4 of §1.170A-14(f) dealing specifically with the scenario of reserved building rights presented in *Pine Mountain Preserve*, the Service asks the Tax Court and the U.S. Court of Appeals for the Eleventh Circuit to disregard components of its own Regulation.¹²⁵ (The Tax Court in *Carter* does not repeat this error, and addresses Example 4 head-on, attempting to distinguish its facts by arguing the example does not address the timing of fixing of building areas.)¹²⁶ The Service cannot adjust the content of the Regulation to suit its current whim of disallowing conservation easements with adjustable internal building envelope boundaries and by misdirecting courts away from the relevant components of the law. Rather, it must “use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.”¹²⁷

Although courts must observe the Service’s implementation of Code §170(h) through Regulation §1.170A-14 and other guidance, such as its private letter rulings (PLRs), the Service cannot substitute its own judgment for the Regulation, unless it is “arbitrary, capricious, or manifestly contrary to the statute.”¹²⁸ (The Court in *Carter* rejected any reliance on PLRs, citing Code §6110(k)(3) (“Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.”)).¹²⁹ In the case of a court providing *Chevron* and *Auer* deference to the Service’s interpretation of Regulation, “a court may not substitute its own construc-

tion of a statutory provision for a reasonable interpretation made by the administrator of an agency.”¹³⁰ As the Supreme Court held in *Auer*, an agency’s interpretation of its regulation is controlling unless “plainly erroneous or inconsistent with the regulation.”¹³¹

Reliance on *Chevron* and *Auer* is likely justified in conservation easement cases where the Service is disallowing deductions for components plainly contrary to the Regulation, such as the interpretation of Example 4 of Regulation §1.170A-14(f) referenced in *Pine Mountain Preserve* and *Carter*, or a mad hatter’s concoction, such as the prohibition on amendment clauses in *Pine Mountain Preserve*. The Service’s interpretation of its own Regulation is unreasonable, plainly erroneous, and inconsistent with the Regulation itself.¹³² Moreover, where the Service refuses to uphold Regulation §1.170A-14’s own standard of protecting conservation purposes in perpetuity, as effected by an easement holder’s discretion, oversight, and judgment in assessing the exercise of reserved rights, balancing uses against protecting purposes, and enforcing and stewarding conservation easements over perpetuity, *Chevron* and *Auer* deference to the Regulation itself is appropriate. Such would be in a court’s own judgment, however, as opposed to the Service’s topsy-turvy interpretation of the Regulation.¹³³

Further, the fact that the Service disallows conservation deductions in which donors retain rights to develop portions of the property under easement later in time as in *Pine Mountain Preserve* and *Carter* in effect expunges Regulation §1.170A-14(g)(5) from the law. Regulation §1.170A-14(g)(5) provides a tax deduction for a perpetual conservation easement in anticipation of its donor reserving certain rights to be exercised later in time with the holder’s approval.¹³⁴ Disallowance on the basis of future exercise of reserved rights recognized at law is therefore plain error, inconsistent with the language of the Regulation, and worthy of substitution of judgment.

The Supreme Court in its June 26, 2019, opinion in *Kisor v. Wilkie* underscores, however, that *Auer* should be applied only when a regulation is ambiguous:

[W]e have adopted the presumption—though it is always rebuttable—that “the power authoritatively to interpret its own regulations is a component of the agency’s delegated

124. See *id.*; *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206, 45 ELR 20050 (2015) (citing *Federal Commc’ns Comm’n v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009)).

125. See *Pine Mountain Pres., LLLP v. Commissioner*, 151 T.C. 14 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev’d in part, aff’d in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020); *Treas. Reg. §1.170A-14(f)*, ex. 4 (1986).

126. *Carter v. Commissioner*, T.C.M. (CCH) 2020-21, at 22-23 (2020).

127. *Perez*, 135 S. Ct. at 1206 (citing *Fox Television Stations, Inc.*, 556 U.S. at 515).

128. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 844, 14 ELR 20507 (1984); see JURISPRUDENCE, *supra* note 22, at text associated with nn. 1958-68:

The deference principles can affect the outcome of federal tax disputes over seemingly ambiguous provisions of the Code Until the Supreme Court more clearly resolves the confusion about deference to Treasury regulations, . . . The net effect is to mostly collapse all of the tests of regulations into a facts-and-circumstances analysis wherein deference increases as the need for the regulatory guidance increases (when statutory ambiguity or gaps are found plus some reason to think Congress intended Treasury to supply the specificity), and deference decreases as the instructions provided by Congress increase in specificity and scope (or at least the Court thinks it knows what the statute means).

Id.

129. *Carter*, T.C.M. (CCH) 2020-21, at 24.

130. *Chevron*, 467 U.S. at 843-44. JURISPRUDENCE, *supra* note 22, at text associated with nn. 1970-71, quoting *Chevron*:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [However,] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

131. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal citations omitted). See also JURISPRUDENCE, *supra* note 22, at text associated with n. 2017 (“the Supreme Court even uses *Chevron* to give extra weight to an agency’s interpretation (even in briefs) of its own regulations”).

132. *Pine Mountain Pres., LLLP v. Commissioner*, 151 T.C. 14, 91 (2018), *appeal docketed*, No. 19-12173 (11th Cir. June 5, 2019), *rev’d in part, aff’d in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020); *Treas. Reg. §1.170A-14(f)* (1986).

133. See *Treas. Reg. §1.170A-14(b)*, (c), (d), (e), (g) (1986).

134. *Id.* §1.170A-14(g)(5).

law making powers.” Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.¹³⁵

According to *Kisor*, where there is ambiguity, courts, including the Tax Court and circuit courts of appeals, shall defer to the Service’s prior interpretations, including the Regulation and their relevant PLRs.¹³⁶

Several courts of appeals have shown deference to the Service’s interpretation of the Regulation when finding its application to be reasonable. In *Mitchell II*, the U.S. Court of Appeals for the Tenth Circuit affirmed the Tax Court, showing deference to the Service’s interpretation of its own regulations, holding that Regulation §1.170A-14(g)(2) unambiguously provides that subordination is a prerequisite to a deduction and cannot occur after the donation.¹³⁷ The Tenth Circuit also agreed with the Tax Court that the remote future event exception of Regulation §1.170A-14(g)(3) does not apply to the mortgage subordination requirement.¹³⁸ Citing the Tenth Circuit’s decision and reasoning in *Mitchell II*, the U.S. Court of Appeals for the Ninth Circuit affirmed similar facts in *Minnick II*, finding that the plain meaning of Regulation §1.170A-14(g)(2) requires mortgage subordination at the time of the easement’s conveyance while noting that even if the Regulation was ambiguous, the Service’s interpretation of it was reasonable and thus merited judicial deference.¹³⁹

However, *Chevron* and *Auer* deference to Regulation §1.170A-14 itself still applies when the agency responsible for interpreting it, here the Service, is unreasonable, or its interpretation is erroneous or inconsistent with the law itself, or both.¹⁴⁰ Moreover, federal courts may be less likely to defer to the Service’s interpretation of its own rules following the dissent to *BNSF Railway Co. v. Loos*.¹⁴¹ The dissent commended the majority for not applying *Chevron* deference to the agency’s interpretation:

Instead of throwing up our hands and letting an interested party—the federal government’s executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous

reading of the statute, the Court today buckles down to its job of saying what the law is in light of its text, its context, and our precedent.¹⁴²

By contrast, the Tax Court goes to great lengths to support its refusal to substitute its own judgment for the Service’s in *Oakbrook Holdings*, even when the Service’s interpretation of the proceeds section of Regulation §1.170A-14(g)(6) is admittedly wholly unsubstantiated.¹⁴³ The Tax Court is still unwilling to substitute its own reasoning, even while acknowledging that the Service supplied no statutory basis for its disallowance of the proceeds provision at issue.¹⁴⁴ The court notes that as long as it can reasonably discern the Service’s *path*, it will “uphold a decision of less than ideal clarity.”¹⁴⁵ Unfortunately, for all current and future conservation easement donors and holders, the Service’s “path” leads straight down the rabbit hole, with the Tax Court in tow, and will remain so for as long as the Tax Court refuses to hold the Service accountable for fabricating its own rules outside the language of the Code or Regulation, and without administrative procedures.

Should the Service continue to ignore its own Regulation in disallowing conservation easements that create holder discretion to approve and disapprove reserved rights, amendments, and proposed uses evaluating impacts in light of conservation-purpose protection, the only recourse for landowners and holders will be to continue to appeal such cases to their appropriate appellate court. This forum, however, is also limited in the scope of its review. In an area of law as confusing as one would expect when the principal characters have been subjected to endless forms of nonsense and arbitrary behavior, one thing should be clear: when the Service contradicts and encourages courts to ignore its own Regulation, such actions are unreasonable, erroneous, and inconsistent with the Regulation and should, therefore, be rejected and substituted.

In lieu of relying on the misjudgment and misrepresentations of the Service, courts, including the Tax Court and courts of appeals, should instead defer directly to the language of the Regulation as controlling and render interpretations accordingly whether under *Chevron* and *Auer*, or *Kisor*.¹⁴⁶ In Wonderland, it is strangely expected that the Tax Court is limited in what legal precedent it can apply in reviewing the Service’s irrational disallowances. Such unusual procedural constraints should not, however, be used to deter the Tax Court from rejecting the Service’s distortion of the Regulation guiding conservation easement deductions.

135. *Kisor v. Wilkie*, No. 18-15, 2019 WL 2605554, at *6, 49 ELR 20113 (June 26, 2019) (internal citations omitted).

136. *Id.*

137. *Mitchell v. Commissioner*, 775 F.3d 1243 (10th Cir. 2015) (*Mitchell III*), *aff’d* 138 T.C. No. 16 (2012) (*Mitchell I*); T.C.M. (CCH) 2013-204 (2013) (*Mitchell II*).

138. *Mitchell II*, T.C.M. (CCH) 2013-204.

139. *Minnick v. Commissioner*, 796 F.3d 1156 (9th Cir. 2015) (*Minnick II*), *aff’d* T.C.M. 2012-345 (2012) (*Minnick I*).

140. *Kisor*, 2019 WL 2605554, at *8.

141. Stephanie Cumings, *Gorsuch Dissent Could Signal Beginning of the End for Chevron*, TAX NOTES, Mar. 5, 2019; *BNSF Ry. Co. v. Loos*, No. 17-1042, 139 U.S. 893, 904-909 (2019); *see also* JURISPRUDENCE, *supra* note 22, at text associated with nn. 1969-70 (“*Chevron* deference may be falling out of favor with the Republican Justices more than with the Democratic appointed Justices. The doctrine can best be viewed as one of those New Deal ideas related to robust administrative agencies, which should be anathema to the current group of Republican-appointed Justices: Why would they want to defer to federal agencies, in preference to Congress or themselves?”).

142. *BNSF Ry. Co.*, No. 17-1042, 586 U.S. at 26.

143. *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. No. 10, at 18 (2020).

144. *Id.*

145. *Id.* (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

146. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 14 ELR 20507 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997); *Kisor v. Wilkie*, No. 18-15, 2019 WL 2605554, 49 ELR 20113 (June 26, 2019).

C. Tax Court Judicial Deference to Appellate Courts in Applying Precedent

Alice thought she might as well go back, and see how the game was going on, as she heard the Queen's voice in the distance, screaming with passion. She had already heard her sentence three of the players to be executed for having missed their turns, and she did not like the look of things at all, as the game was in such confusion that she never knew whether it was her turn or not.

—Lewis Carroll, *Alice's Adventures in Wonderland*¹⁴⁷

The Service's intransigent refusal to disclose guidance for qualifying conservation tax deductions and its tyrannical approach to declaring failures under the law only through pronouncements in audit and litigation is poor tax policy, and a gross disservice to taxpayers and Congress.

Congress originally established the Tax Court under Article I of the U.S. Constitution as the Board of Tax Appeals as an independent administrative agency in the executive branch responsible for reviewing actions of the Service by hearing disputes about taxes without requiring the taxpayer to pay any tax.¹⁴⁸ Congress renamed the Board of Tax Review the "Tax Court" in 1969 and recreated the agency as a court of law with full judicial powers, all the while curiously keeping the court within the executive branch.¹⁴⁹

The goal of the quasi-judicial, quasi-executive Tax Court operating independently within the executive branch was to aid in the administration of complex tax laws; however, the Tax Court's autonomy was limited by requiring that its decisions be reviewable by circuit courts of appeals.¹⁵⁰ While the self-described mission of the Tax Court now is to provide a national forum to expeditiously resolve disputes between taxpayers and the Service while carefully considering the merits of each case and ensuring the uniform interpretation of the Code and application of tax law, such uniformity becomes a challenge when the precedent the Tax Court can review is limited.¹⁵¹

The *Golsen* rule limits the Tax Court to apply only the precedent, rulings, and law applicable to the federal circuit court to which the case would be appealable by the taxpayer.¹⁵² The Tax Court must therefore follow the binding precedent of the court of appeals that would hear the appeal of the decision in that particular case.¹⁵³ This means that in circuits that have no precedent, the Tax Court can make its own law, and can selectively ignore precedent from other circuits in which the case is not appealable. Rather than resulting in uniform application of tax law, the Tax Court itself and each circuit are now developing their own independent body of tax law precedent.

The taxpayers in the appeal for an en banc hearing with the Ninth Circuit in *Altera Corp. v. Commissioner* argued the rejection of relevant precedent as outside jurisdiction will lead to confusing and contradictory tax law. Because of the Tax Court's national jurisdiction but ability to ignore precedent from other taxpayer circuit courts, the taxpayers posited, when it hears cases from outside the Ninth Circuit, "the result is that taxpayers in California almost certainly will be treated differently from taxpayers in Massachusetts, Illinois, and Texas, simply because of geography."¹⁵⁴

A case to that point in conservation tax deduction appeals, the Tax Court rejected a courts of appeals opinion as precedential, stating it lay outside the appeal of a particular case. The Tax Court in *Pine Mountain Preserve* was not persuaded by the Fifth Circuit opinion in *Bosque Canyon* and declined to follow that court's reasoning because it was not appealable to the Fifth Circuit, stating:

We are not bound to follow the Fifth Circuit's BC Ranch II, L.P. opinion in cases appealable in other circuits. See *Golsen v. Commissioner*, 54 T.C. 742, 756-757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Upon careful reconsideration of our precedents and the relevant

Tax Court has different types of opinions. Only full opinions and memo opinions set official precedent.

A. Bench Opinion—the judge orally opines in court during the trial session; the opinion cannot be relied on as precedent.

B. Summary Opinion—cannot be relied on as precedent, and the decision cannot be appealed.

C. Tax Court Opinion or Memorandum Opinion—The chief judge decides whether an opinion in a regular case will be issued as a memorandum opinion or as a Tax Court opinion. Generally, a memorandum opinion is issued in a regular case that does not involve a novel legal issue and that addresses cases where the law is settled or factually driven. A memorandum opinion can be cited as legal authority, and the decision can be appealed. Generally, a Tax Court opinion is issued in a regular case when the Tax Court believes it involves a sufficiently important legal issue or principle. A Tax Court opinion can be cited as legal authority, and the decision can be appealed.

152. *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir.). See JURISPRUDENCE, *supra* note 22, at text associated with n. 746 (the *Golsen* rule binds the Tax Court to the appellate decisions in the circuit to which the case is appealable). See also *Taxation. In General. Tax Court Must Follow Decisions of Court of Appeals With Appellate Jurisdiction Over Case at Bar*, 70 HARV. L. REV. 1313 (1957), available at <https://www.jstor.org/stable/1337431>; *Controversy Between the Tax Court and Courts of Appeals: Is The Tax Court Bound by the Precedent of Its Reviewing Court?*, *supra* note 150.

153. *Golsen*, 54 T.C. at 746.

154. *Altera Corp. v. Commissioner*, Nos. 16-70496, 16-70497, at 27 (9th Cir. June 7, 2019).

147. WUNDERLAND, *supra* note 2, at 47.

148. U.S. Tax Court, *Mission*, <https://www.ustaxcourt.gov/mission.html> (last visited Feb. 7, 2021); U.S. Tax Court, *History*, <https://www.ustaxcourt.gov/history.html> (last visited Feb. 7, 2021); HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* (2d ed. 2014), https://www.ustaxcourt.gov/resources/book/Dubroff_Hellwig.pdf; U.S. CONST. art. I; Revenue Act of 1924 §1003(b), 43 Stat. 253 (codified at 26 U.S.C. §1141); JURISPRUDENCE, *supra* note 22, at text associated with n. 2562 ("The Revenue Act of 1924 created the Board of Tax Appeals as an independent agency in the executive branch.")

149. See JURISPRUDENCE, *supra* note 22, at text associated with nn. 2556-57 ("The Board of Tax Appeals (renamed the 'Tax Court of the United States' in 1942)" recreated the agency as court of law with full judicial powers, all the while curiously keeping the court within the executive branch.)

150. See *Controversy Between the Tax Court and Courts of Appeals: Is the Tax Court Bound by the Precedent of Its Reviewing Court?*, 7 DUKE L.J. 45 (1957), available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1640&context=dlj>.

151. *Id.*; see also U.S. Tax Court, *Guidance for Petitioners: After Trial*, https://www.ustaxcourt.gov/petitioners_after.html (last visited Feb. 8, 2021). The

appellate opinions, we are not persuaded to abandon our earlier view.¹⁵⁵

Instead, the court elected to apply the reasoning of the U.S. Court of Appeals for the Fourth Circuit in *Belk*: “We think the Fourth Circuit’s analysis of this issue in *Belk* was correct, and we think that Judge Dennis (authoring the dissent) was correct in believing that the scenario presented by *Bosque Canyon* (and this case) cannot meaningfully be distinguished from the scenario presented by *Belk*.”¹⁵⁶

When the Tax Court in *Pine Mountain Preserve* declined to follow the Fifth Circuit opinion in *Bosque Canyon* because the case was appealable to the Eleventh Circuit, it demonstrated the absurd proposition that it will only afford the *Bosque Canyon* opinion precedential weight when considering cases within that specific jurisdiction. Such is opposed to having or choosing to apply that reasoning and analysis to other factually similar conservation tax cases:

Because *Pine Mountain* had its principal place of business in Alabama, appeal of this case (absent stipulation to the contrary) would lie to the U.S. Court of Appeals for the Eleventh Circuit. That court has not addressed the question presented here. Nor have we discovered, in other opinions of that court, any indications as to how it might rule on this issue.¹⁵⁷

This evasiveness, marked by the Tax Court’s ability to behave like the bewildered King of Hearts in selecting any precedent to follow or avoid, insinuates a level of unpredictability and instability not found in any other aspect of the U.S. judicial system and one that disadvantages taxpayers subject to Tax Court review. It further undermines the confidence of the public in our judiciary.

Another reason the Tax Court likely declined to follow *Bosque Canyon II* in *Pine Mountain Preserve* is that the Fifth Circuit took the step of applying ordinary, as opposed to strict, statutory construction to analyze the conservation tax deductions.¹⁵⁸ This is in addition to rejecting legislative grace and shifting the burden of proof from the taxpayer to the Service as discussed previously. In so doing, the Fifth Circuit asserted that strict construction did not apply to charitable conservation deductions given the manner in which and the reasons for why §170(h) of the Code was created:

It was adopted (1) at the behest of conservation activists, not property-owning, potential-donor taxpayers (2) by an overwhelming majority of Congress (3) in the hope of adding untold thousands of acres of primarily rural

property for various conservation purposes—acreage that would never become available for conservation if land-owning potential donors were limited to the traditional method of conveyance, i.e., transferring the full fee simple title of such properties.¹⁵⁹

The Fifth Circuit makes a strong case for ordinary rather than strict standard of review of statutory interpretation for conservation tax deductions. If the Tax Court were required to consider all relevant precedent, as opposed to just that of the circuit court of appeals of the easement donor, the standard of review for all conservation tax deductions could compellingly be argued to be ordinary based on this precedent. Then, it could not be rejected by the Tax Court, as it did in *Pine Mountain Preserve*.¹⁶⁰ In the meantime, uncertainty of the ordinary versus strict standard of review for conservation tax deductions will likely lead to future conflicts at the Tax Court and circuit courts, the resolution of which would come only with a Supreme Court ruling on the matter.

Even leaving aside the current standard of review disparity, the Tax Court should not be at liberty to ignore the long-standing principle of statutory construction that statutes and regulations must be interpreted according to their plain meaning.¹⁶¹ A plain reading of the Regulation should afford the landowner in *Pine Mountain Preserve*, *Carter*, and other similarly situated landowners a deductible conservation gift, given that the easement holder is exercising discretion to evaluate proposed uses, the exercise of reserved rights, enforcement, and amendment of perpetual conservation easements using the very protection of conservation purposes required by the Code and Regulation.

D. Appellate Court Standard of Review of the Tax Court

As they walked off together, Alice heard the King say in a low voice, to the company generally, “You are all pardoned.”

“Come, that’s a good thing!” she said to herself, for she had felt quite unhappy at the number of executions the Queen had ordered.

—Lewis Carroll, *Alice’s Adventures in Wonderland*¹⁶²

With limited exceptions, taxpayers have an automatic right of appeal from decisions of the Tax Court.¹⁶³ The circuit courts were once limited to a deferential standard of review of Tax Court decisions in such appeals, stemming from the Supreme Court deci-

155. *Pine Mountain Pres., LLLP v. Commissioner*, 151 T.C. 14, 41 (2018), appeal docketed, No. 19-12173 (11th Cir. June 5, 2019), *rev’d in part, aff’d in part, vacated and remanded*, No. 19-11795 (11th Cir. Oct. 22, 2020).

156. *Id.*

157. *Id.*

158. *Bosque Canyon Ranch II, L.P. v. Commissioner*, 867 F.3d 547 (5th Cir. 2017).

159. *Id.* The *Bosque Canyon II* dissent refers to the majority’s standard as “impermissibly lax.” *Id.* at 560.

160. *Pine Mountain Pres.*, 151 T.C. at 10-11.

161. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

162. *WONDERLAND*, *supra* note 2, at 51.

163. *JURISPRUDENCE*, *supra* note 22, at text associated with n. 2570 (Congress adopted what became §7482(a) of the Code, requiring that Tax Court decisions be reviewed in the same manner as decisions of district courts sitting without a jury, instead of defer to the specialty court.).

sion in *Dobson v. Commissioner*.¹⁶⁴ In *Dobson*, the Supreme Court applied a deferential standard of review analogous to that of agency decisions to the Tax Court.¹⁶⁵

Congress, concerned about the potential for Tax Court bias, subsequently enacted the predecessor to Code §7482(a)(1), requiring a de novo standard of review for the circuit courts in all tax cases, which was intended to override the Supreme Court deference assigned by *Dobson*.¹⁶⁶ Treating Tax Court decisions the same as those of district courts in tax cases, or nonjury cases, seems to be the more judicious approach, as required by amended Code §7441, which also removed the Tax Court from the executive branch.¹⁶⁷ However, references to and appreciation for *Dobson* appear to persist today, setting the Tax Court's decisions above and apart from those of other trial-level courts, as well as of the circuit courts themselves.

When legal errors are identified in the Tax Court's application of the Code or Regulation, such determinations should be subject to de novo review, as was the case in *Glass*: "the Tax Court's findings of fact are reviewed for clear error, and its application of the law to the facts is reviewed *de novo*."¹⁶⁸ While the Tax Court continues to rule without a jury today, like the Queen of Hearts, and its decisions are meant to be reviewed in the same manner as those of the district courts sitting without a jury under Code §7482(a)(1),¹⁶⁹ subtle, almost subliminal application of *Dobson* appears to continue. Even though it seems manifestly unfair that appellate courts would defer to the interpretations of the Tax Court more than they do to those of the federal district courts, such references and apparent deference appears to continue.¹⁷⁰

In the conservation easement valuation tax deduction case of *Roth v. Commissioner* decided by the Tenth Circuit in 2019, the court favorably cites *Dobson* in its discussion of overstatement of value penalties, noting that "[w]hile we are not bound by the Tax Court's decisions, we conform to them where possible in the interest of 'uniform administration.' *Dobson*, 320

U.S. at 502."¹⁷¹ Moreover, the court explains its deference to Tax Court decisions as plainly derivative of *Dobson*:

We review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. §7482(a)(1). Our review of the Tax Court's interpretation of law is de novo. *Esgar Corp. v. Comm'r*, 744 F.3d 648, 652 (10th Cir. 2014). Although the Tax Court's decisions "may not be binding precedents . . . , uniform administration would be promoted by conforming to them where possible," *Dobson v. Comm'r*, 320 U.S. 489, 502, 64 S. Ct. 239, 88 L. Ed. 248 (1943). Therefore, we consider rulings by the Tax Court on matters of law to be persuasive authority, "especially if consistently followed," *Esgar*, 744 F.3d at 652.¹⁷²

Further, in the amicus brief submitted by law academics and professors arguing against the appeal for an en banc hearing by the Ninth Circuit in *Altera Corp. v. Commissioner*,¹⁷³ the amici attempt to dispel the notion that there continues to be any validity to *Dobson*, as implied by *Altera*. They insist that "[a]ny *Dobsonesque* argument that attempts to invert the institutional relationship between the trial-level Tax Court and the Courts of Appeals is obsolete."¹⁷⁴ Yet, the amici favorably characterize the appreciation the Ninth Circuit has for Tax Court opinions as respect, and attempt to distinguish this from deference: "The Ninth Circuit still periodically observes that the 'special expertise' of the Tax Court in the field of tax law is 'entitled to respect.' . . . But respect does not mean irrational deference, even on questions of tax law."¹⁷⁵

What is abundantly apparent in both of these cases is that, despite protestations to the contrary, subtle as well as overt reliance on and reference to the supposedly dead *Dobson* principle continues to pervade appellate review. Affording the Tax Court opinions even the tiniest amount of extra weight or deference is not only unjust to those taxpayers seeking appeals of its decisions, it is unequitable to the courts of appeals and the entire judicial system reviewing those cases.

The fact that the Tax Court can give more deference to the Service, and ignore precedent where it has been reversed both within and outside of its appeal circuit, while the courts of appeals still have to apply the law of their circuit only, highlights that the entire judicial process for tax controversies is as mad as a March Hare. And that, in Wonderland, the process badly needs to be stood back on its feet. At the very least, the Tax Court should not be allowed to ignore the precedent of all appeals courts, even those that have reversed it, and the courts of appeals should not provide any special deference to Tax Court opinions that would distinguish treatment of its holding from that of a district court opinion in a case without a jury.

164. *Dobson v. Commissioner*, 320 U.S. 489 (1943).

165. Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014) [hereinafter *(Un)Appealing Deference*], available at <http://scholarship.law.duke.edu/dlj/vol63/iss8/6>. See also JURISPRUDENCE, *supra* note 22, at text associated with n. 2556 (The Tax Court always rules without a jury and its decisions are reviewed in the same manner as decisions of the district courts sitting without a jury, under §7482(a)(1). However, it has not always been so. For about 20 years, the fact-findings of the Board of Tax Appeals (renamed the Tax Court of the United States in 1942) were supposed to be unreviewable, under the "Dobson rule," named after the case that belatedly enforced a statute making the Tax Court fact finding-unreviewable.).

166. Act of June 25, 1948, ch. 646, §36, 62 Stat. 869, 991 (codified as amended at I.R.C. §7482(a)(1) (2012)).

167. I.R.C. §7441 (1986); *Battat v. Commissioner*, 148 T.C. No. 2, (U.S.T.C. Feb. 2, 2017):

In the Tax Reform Act of 1969 (1969 Act), Pub. L. No. 91-172, sec. 951, 83 Stat. at 730, Congress deleted from I.R.C. sec. 7441 the designation of the Tax Court as an independent agency within the executive branch. In 1971 we said that under the 1969 Act the Tax Court is no longer within the executive branch. *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971).

168. *Glass v. Commissioner*, 471 F.3d 698 (6th Cir. 2006) (citing *Ekman*, 184 F.3d 522, 524-25 (6th Cir. 1999)).

169. I.R.C. §7482(a)(1) (1986).

170. *Id.*

171. *Roth v. Commissioner*, No. 18-9006, 922 F.3d 1126, 1135 (10th Cir. 2019).

172. *Id.* at 7.

173. Brief of Law Academics and Professors as Amicus Curiae in Opposition to the Petition for Rehearing En Banc at 28, *Altera Corp. v. Commissioner*, Nos. 16-70496, 16-70497 (9th Cir. June 7, 2019).

174. *Id.*

175. *Id.* at 27.

In the short term, there will likely continue to be review of Tax Court and district court decisions on tax matters by courts of appeals. The courts of appeals apply varying degrees of deference and standards of review; thus, the march appears to be to the Supreme Court for resolution of such discrepancies, or to Congress to amend federal tax laws to create uniformity and certainty surrounding qualifying for conservation tax deductions.¹⁷⁶

IV. Beyond the Rabbit Hole: Where Do We Go From Here?

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to,” said the Cat.

—Lewis Carroll, *Alice’s Adventures in Wonderland*¹⁷⁷

Like Alice, the conservation community and easement donors need to escape the rabbit hole, and re-enter the world above ground to return to essential conservation work on behalf of the general public. The Service and Tax Court also need to be rescued from Wonderland. Once back above ground, the Service must refocus and redouble its efforts to curtail syndication tax abuse by looking not at the infinitesimally tiny technical aspects, or tallest of serpentine substantive components, but plainly at the inflated valuation of conservation deductions, especially those in syndicated conservation transactions. The Service has help in this task by the use of a compliance checklist, standardization of review procedure, application of law as written, and removal of inappropriate deference in evaluating conservation tax deductions. The legal and procedural guides discussed herein lead the way out for the conservation community, donors, Service, and Tax Court to return to the land above the rabbit hole.

From a legal standpoint, the Code, Regulation, legislative history, and relevant case law afford discretion, guided by a conservation-purposes protection, for holders in drafting, administering, and enforcing conservation easements. The letter and construction of the law demonstrates that Congress entrusted qualified organizations to identify, evaluate, administer, steward, and enforce easements using the conservation-protection standard of doing no harm to conservation purposes. Plain language, statutory construction, congressional intent, and precedent form the basis to escape the rabbit hole, and require that valid conservation easement donations not be disallowed by virtue of non-substantive, technical missteps of the easement donor or holder, nor by manufactured substantive arguments surrounding perpetuity.

Process and procedural rules for conservation easements merit standardization of review by and of the Tax Court beyond limited courts of appeals’ jurisdiction. Tax Court

review should be of precedent from all courts of appeals, with deference using the ordinary standard of review of the plain language of the Code and Regulation themselves. This is as opposed to the Service’s interpretation of the same, and would go hand-in-hand with shifting of the burden of proof to the Service to disprove qualification based on information and documentation provided through the compliance checklist.

Further, in order to honor the intent of the Code and Regulation as drafted, the purpose of which were to inspire, and not quell, interest in granting perpetual conservation easements, certain technical flaws should be recognized as substantially complying with requirements of the Code and Regulation. This would include receipt of a contemporaneous gift acknowledgment letter or timing thereof, content of Form 8283, and timing of recording of conservation easements, none of which potentially undermine the merit of the perpetual nature or conservation promises contained within easements. Alternatively, donors and holders should be given an opportunity to cure and correct technical flaws such as incorrect recording dates, inadequate subordination agreements, missing data on Form 8283, incorrect dates for appraisal, baseline inventory, or mineral reports, after receiving notice of non-technical compliance from the Service.

The Service should also publish a practical, common-sense checklist of precise technical and substantive compliance components for perpetual easement deductibility that both they and taxpayers seeking tax deductions can rely on to ensure awareness of and consistency with such requirements. Easement donors and land trusts who meet all the requirements of a compliance checklist of technical, substantive, and timing requirements would then reap the benefit of compliance in the form of ordinary scrutiny, as opposed to strict scrutiny of their transaction, with a shift in the burden of proof to the Service to prove noncompliance. If the Service is unwilling to create such a checklist, or publish its audit checklist toward the same end, easement donors can instead submit such a checklist voluntarily, to assist with the Service’s review of their conservation deduction compliance, as well as distinguish their transactions from syndicated or overvalued transactions.

Moreover, easements with technical variations in proceeds allocations, amendment provisions, or termination procedures should not be grounds for disallowance, because these variations are important and in some cases necessary or required to the administration of easements over perpetuity, such as in New York State, where amendment provisions are required by state law.¹⁷⁸ Instead, there should be broader acceptance of such variations as essential to perpetual conservation easement stewardship, if easement holders are entrusted with the responsibility for shepherding protected conservation purposes through time. Such tolerance would refocus review

176. (Un)Appealing Deference, *supra* note 165, at 1835-95.

177. WONDERLAND, *supra* note 2, at 35.

178. N.Y. ENV’T CONSERV. LAW §49-0307 (2013) (Requirement for amendment provisions to be included in the deed of conservation easement: “Procedures for modifying or extinguishing conservation easement. 1. A conservation easement held by a not-for-profit conservation organization may only be modified or extinguished: (a) as provided in the instrument creating the easement.”).

away from irrelevant technical errors to the protection of the easement's conservation purposes and valuation.

If the Service will not voluntarily comply with Executive Orders requiring express, transparent, and fair guidance without surprise for substantive and technical compliance with the Code and Regulation, and instead insist on proceeding with their opaque, one-sided, and torturous approach of revealing ephemeral rules only through audit and litigation, Congress can do it for them. New language can be added to Code §170(h) (which will require the Treasury to amend Regulation §1.170A-14 accordingly) to bolster the law for transparency, equity, and clarity such as follows:

- *Burden of Proof.* Under this §170(h) and its attendant Regulation, the burden of proof shall rest with the Service to disprove qualification for conservation tax deductions based on taxpayer's use of a technical and substantive compliance checklist developed and published by the Service, which shall be submitted together with taxpayer's tax return and Form 8283.
- *Standard of Review.* When reviewing consistency with this §170(h) and its attendant Regulation, the Service and reviewing courts, including the Tax Court, district courts, courts of appeals, and Supreme Court, shall use ordinary scrutiny with the tax deduction standards set forth herein and shall accord no special deference to opinions of the Tax Court.
- *Technical Errors or Omissions.* For technical errors or omissions in complying with this §170(h) and its attendant Regulation, taxpayers and donees shall receive an opportunity to cure such errors or omissions. If correction cannot be obtained, the Service and reviewing courts shall consider the totality of the transaction to determine whether substantial compliance has been attained for technical aspects of conservation transactions. This could be crafted as follows: "Any donor of a qualified conservation contribution (as defined in paragraph (1)) who receives notice from the Secretary of failure to comply with any requirement of this section, or any requirement of subsections 170(f)(8), 170(f)(11), or 170(f)(13), shall have 120 days from the date of such notice, plus any extensions granted by the Secretary for reasonable cause, to correct such failure; provided that actions inconsistent with the conservation purposes (as defined in paragraph (4)) of such contribution have not occurred on the real property that is the subject of such contribution between the date of such contribution and the date of such correction."
- *Deference to the Law as Written.* The Service and reviewing courts shall defer to the language of this Code section and its attendant Regulation rather than defer to the Service's interpretation of the same.

- *Application of the Law.* With regard to this §170(h) and its attendant Regulation, the Tax Court shall strive for uniformity of the application and development of law with respect to applying the precedent set by all courts of appeals; and courts of appeals shall afford no special deference to decisions of the Tax Court.

Refocusing on valuation and allowing easement holders to protect conservation purposes will bring the Service itself into compliance with Executive Order No. 13892's command that administrative enforcement action take place only "in a manner that would not cause unfair surprise." The Service should therefore revert to its congressionally mandated role in policing these easement donations—ensuring that taxpayers are not getting away with excessive valuations—leaving the protection of the conservation purpose to the easement holder.

V. Conclusion

"Who cares for you?" said Alice . . . "You're nothing but a pack of cards!"

At this the whole pack rose up into the air, and came flying down upon her: she gave a little scream, half of fright and half of anger, and tried to beat them off, and found herself lying on the bank, with her head in the lap of her sister, who was gently brushing away some dead leaves that had fluttered down from the trees upon her face.

—Lewis Carroll, *Alice's Adventures in Wonderland*¹⁷⁹

The Service has every right to enforce the law as it is written and stop wrongdoing. But it should do so by examining valuation first and foremost, and focus on the granular aspects of conservation easement terms only after the valuation examination concludes. Valuation, after all, is arguably where the Service's expertise lies, not in ruminations and ruination over the meaning of perpetuity. As Judge Mark Holmes states in his dissent from *Oakbrook*, the Service and Tax Court are razing entire forests of conservation easements using perpetuity as a means to circumvent traditional value examination:

Conservation-easement cases might have been more reasonably resolved case-by-case in contests of valuation. The syndicated conservation-easement deals with wildly inflated deductions on land bought at much lower prices would seem perfectly fine fodder for feeding into a valuation grinder. Valuation law is reasonably well known, and valuation cases are exceptionally capable of settlement Yet we've come to a point where we are disallowing a great many conservation-easement deductions altogether, not for exaggeration of their value or lack of conservation purpose, but because of very con-

179. WONDERLAND, *supra* note 2, at 68.

testable readings of what it means for an easement to be perpetual.¹⁸⁰

The Service's plunge into matters beyond valuation and into elements intended and necessary for conservation easement durability and flexibility over perpetuity has caused a confusing legacy of Tax Court decisions built on a tottering tower of cards, in a Wonderland that subverts the true meaning of perpetuity present in the Code and its Regulation. In so doing, the Service has also distorted and destabilized the otherwise sturdy foundation of law surrounding perpetual conservation easements as described, defined, and intended by Congress. The intent behind and plain meaning of the Code and Regulation requires trust in easement holder discretion to ensure conservation-purpose protection from the outset of an easement's prospective grant, through approval, documentation, enforcement, defense, modification, permitted and prohibited uses, and the exercise of reserved rights.

When implemented correctly, legal process can and will effect that intent and meaning by providing legislative grace, burden of proof, standard of review, deference, and a compliance checklist for guidance to deconstruct the Service's Wonderland of cards, and return everyone to the world above ground. There, the Service can properly refocus on abusive overvaluation and wrongdoing via syndicated tax deduction transactions, as well as provide consistent review using bona

fide legal and procedural means of evaluating non-syndicated, properly valued perpetual easement transactions.

"What do you know about this business?" the King said to Alice.

"Nothing," said Alice.

"Nothing whatever?" persisted the King.

"Nothing whatever," said Alice.

"That's very important," the King said, turning to the jury. They were just beginning to write this down on their slates, when the White Rabbit interrupted:

"Unimportant, your Majesty means, of course," he said in a very respectful tone, but frowning and making faces at him as he spoke.

"Unimportant, of course, I meant," the King hastily said, and went on to himself in an undertone, "important—unimportant—unimportant—important—" as if he were trying which word sounded best.

—Lewis Carroll, *Alice's Adventures in Wonderland*¹⁸¹

180. *Oakbrook Land Holdings, LLC v. Commissioner*, 154 T.C. No. 10, at 126-27 (2020).

181. WUNDERLAND, *supra* note 2, at 64-65.