

From Leslie Ratley-Beach, Director, Conservation Defense, Land Trust Alliance
December 4, 2015

Regarding: Amendment Clauses in Conservation Easements

Dear Amy-

In an abrupt and previously unannounced change at a workshop at Rally 2015, IRS trial attorney Marc Caine stated that he believes that general amendment clauses to conservation easements may disqualify a donated easement from a tax deduction. The Land Trust Alliance strongly believes this novel IRS interpretation of a federal law enacted in 1980 is deeply flawed. Furthermore, the Alliance will vigorously oppose IRS attempts to punish landowners simply for signing a conservation easement that includes an amendment clause.

The IRS has previously and rightly recognized the validity of amendments that increase the protections for land under easement, add acreage to the easement or correct errors. The Alliance finds it difficult to imagine any judge agreeing that a properly written amendment clause violates perpetuity if it includes the limitations and guidelines of the Amendment Principles from the 2007 *Amending Conservation Easements: Evolving Practices and Legal Principles*. Those Amendment Principles and Practice 11I from *Land Trust Standards and Practices* are noted below.

The Alliance sees this position as an IRS trial tactic – not law. Trial tactics do not determine Tax Court decisions. IRS trial attorneys look for any and all rationales to persuade the court the easement does not comply with the technical statutory and regulatory requirements so that they can avoid the difficulties of challenging perceived overvaluation. The Alliance does not provide legal, tax or other advice, but we do not foresee an increase in IRS conservation audits or a change in the how deductions are selected for audit which we understand is not based on anything other than numbers, which happens without anyone at the IRS seeing the easement.

Beyond the audit stage, the IRS litigation strategy apparently continues to become more aggressive. Taxpayers and their advisors can reduce the likelihood of an audit or court challenge by submitting a full and complete package of tax filing materials correct in every detail and refrain from any deduction overvaluation. The appraisal should comply with the regulations in every detail and document fully all value assumptions.

The Alliance recommends that land trusts hold steady in their established practices. The Alliance also strongly recommends to all conservation attorneys and professionals to continue to include well-drafted amendment clauses in conservation easements. If you do remove the clause, then the Alliance strongly recommends that the land trust obtain a written legal opinion to ascertain implications for future amendments. At minimum, the land trust may want to document in writing for the land trust's permanent records that the deviation from practice does not indicate a presumption against any amendment and that future amendments will be guided by the land trust's written amendment policy.

The Alliance has long held that amendment clauses in conservation easements serve to strengthen an easement and improve its enforceability. Rather than failing the requirement that an easement's conservation purposes be "protected in perpetuity," amendment clauses improve the chances that easements will be protected in the long term. They help conservation organizations properly address unforeseen circumstances with well-crafted guiding principles. To date, Tax Court decisions have ruled only against clauses that explicitly provided for removal of land from the easement.

Land trusts preparing year-end transactions may wish to review the Amendment Principles in the 2007 *Amending Conservation Easements: Evolving Practices and Legal Principles* and ensure any amendment clauses reflect the Amendment Principles. The Alliance specifically recommends an amendment clause "to allow amendments that are consistent with the overall purposes of the easement, subject to the requirements of applicable laws. Doing so clarifies up front for all parties that there are circumstances under which conservation easements may be modified." In addition, *Land Trust Standards and Practices* requires land trusts holding easements to have a written policy on amendments that articulates the principles and limitations for amendments.

In 2005, the Alliance specifically advised land trusts to include an amendment clause in their easements in

the *Conservation Easement Handbook*. Alliance guidance and publications support land trusts in developing responsible protocols that thoughtfully deal with the inevitable changes that conservation easement lands face. Amendment Principles from the 2007 *Amending Conservation Easements: Evolving Practices and Legal Principles*:

A conservation easement amendment should meet all of the following principles:

1. Clearly serve the public interest and be consistent with the land trust's mission
2. Comply with all applicable federal, state and local laws
3. Not jeopardize the land trust's tax-exempt status or status as a charitable organization under federal or state law
4. Not result in private inurement or confer impermissible private benefit
5. Be consistent with the conservation purpose(s) and intent of the easement
6. Be consistent with the documented intent of the donor, grantor and any direct funding source
7. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.

No amendment policy should be more permissive than these principles allow, but some land trusts may choose to adopt more conservative amendment guidelines.

Land Trust Standards and Practices 111. Amendments. The land trust recognizes that amendments are not routine, but can serve to strengthen an easement or improve its enforceability. The land trust has a written policy or procedure guiding amendment requests that: includes a prohibition against private inurement and impermissible private benefit; requires compliance with the land trust's conflict of interest policy; requires compliance with any funding requirements; addresses the role of the board; and contains a requirement that all amendments result in either a positive or not less than neutral conservation outcome and are consistent with the organization's mission.

For more information about conservation easements, please visit www.landtrustalliance.org. For technical assistance, please call your regional Alliance office or contact [Sylvia Bates](#), Director of Standards and Educational Services ([603-708-1073](tel:603-708-1073)) or [Leslie Ratley-Beach](#), Conservation Defense Director ([802-262-6051](tel:802-262-6051)). For inquiries regarding federal policy and process, please call [Russ Shay](#), Director of Public Policy ([202-800-2230](tel:202-800-2230)).

Best,
Leslie Ratley-Beach