

UNDERSTANDING THE ROLES OF GOVERNMENT IN CONSERVATION EASEMENT TRANSACTIONS

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ABSTRACT

Government is involved in all conservation easement transactions—whether as authorizer, funder, or holder. These governmental roles often work in concert, but not always; there is potential for conflict between various entities involved in securing lands for long-term conservation outcomes. This Article explores these tensions and considers how understanding the various roles that government may play can help inform conservation practice and assist in the design of conservation easements that best leverage governmental involvement.

To this end, Part I provides a general overview of conservation easements with a focus on working lands conservation easements. Part II examines the six specific roles that government can play with regard to conservation easements. Part III explores the Agricultural Conservation Easement Program (ACEP) and the Regional Conservation Partnership Program (RCPP). Part III also explores the various stakeholders involved in working lands protection, how their priorities help to shape the legislative design of the ACEP and RCPP, and how these programs operate on the ground with an eye to the upcoming 2023/24 Farm Bill. Last, Part IV provides recommendations on how segmenting the government’s various roles can help to mitigate conflict and evaluate how and what functions (and at what level) government should undertake versus private land trusts. As conservation easements continue to play an increasingly important role in land conservation efforts nationally, understanding the varied roles that government plays in these transactions can determine how this involvement should be structured to maximize the conservation benefits.

TABLE OF CONTENTS

INTRODUCTION	723
I. UNDERSTANDING CONSERVATION EASEMENTS AND WORKING LANDS CONSERVATION EASEMENTS	725
<i>A. Providing a Working Definition</i>	725
<i>B. Examining the Shift Toward Conservation Easements</i>	728
1. The Changing Nature and Scale of Conservation Threats	729

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2. Emergence of Conservation Easements as a Conservation Tool	730
3. Expansion of the Types of Lands Targeted for Conservation.....	731
4. Increasing Project Cost and Expansion of Funding Streams..	732
C. <i>Working Lands Conservation Easements</i>	733
1. Agricultural Conservation Easements	734
2. Working Forest Conservation Easements.....	735
D. <i>Fee Versus Conservation Easement Acquisition</i>	736
II. EXPLORING GOVERNMENTAL ROLES.....	738
A. <i>Authorizer</i>	738
B. <i>Funder</i>	741
1. Tax Incentivized Conservation Easements.....	741
2. Purchased Conservation Easements	744
3. Exacted Conservation Easements	746
4. Mitigation Banking.....	746
C. <i>Holder</i>	747
D. <i>Backup Holder</i>	749
E. <i>Land Manager</i>	750
F. <i>Landowner</i>	750
III. EVALUATING POTENTIAL CONFLICTS.....	751
A. <i>NRCS and Its Conservation Easement Programs</i>	752
1. A Brief History of NRCS and Conservation Easements	752
2. Agricultural Conservation Easement Program	754
a. ACEP-WRE.....	754
b. ACEP-ALE.....	756
3. The Regional Conservation Partnership Program (RCPP).....	758
B. <i>Understanding Potential Conflicts</i>	761
1. Goals of Federal Government.....	761
a. Protecting the Federal Investment	761
b. Standardization.....	762
c. Efficiency	763
2. Goals of Land Trusts and Partner Agencies	763
a. Programmatic Flexibility	764
b. Project Flexibility	764
c. Efficiency	765
d. Leveraging Governmental Role	766
C. <i>Evolutions in ACEP-ALE and Defining the Working Relationship</i>	767
1. Deed Terms	767
2. ALE Farm Plan.....	768
3. Easement Monitoring	768
4. Right of Enforcement	769
IV. RECOMMENDATIONS FOR ADDRESSING PROGRAMMATIC DELIVERY	770
A. <i>Understand Roles and Goals</i>	770

B. Identify Roles.....	770
C. Design Programs to Avoid Conflict.....	771
CONCLUSION.....	771

INTRODUCTION

Conservation easements, a tool frequently used by conservation advocates to secure specific and generally perpetual land management objectives, require government intervention at multiple points.¹ First, states *authorize* these transactions through their enabling laws.² Second, federal, state, and local governments *fund* these transactions through appropriations designed to acquire these interests from landowners or by allowing landowners to claim charitable deductions for conserving their lands.³ Third, agencies at all levels of government often *hold* conservation easements by stewarding properties that are subject to these protective agreements.⁴ Fourth, agencies are often called upon to act as a *back-up* holder of conservation easements to safeguard the public's investment in lands. Fifth, governmental bodies *manage* conserved lands by agreeing to take on affirmative responsibilities within conservation easements, such as managing public recreation on the conserved lands.⁵ Last, governmental entities occasionally *own* conserved lands by acquiring previously conserved lands in fee.⁶ Governmental intervention directly influences every conservation easement transaction, even those that are seemingly designed

1. SALLY K. FAIRFAX, LAUREN GWIN, MARY ANN KING, LEIGH RAYMOND, & LAURA A. WATT, *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY*, 1780–2004 5–7 (2005); *see also* John B. Wright, *Reflections on Patterns and Prospects of Conservation Easement Use*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 498, 498–505 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (providing overviews of conservation transactions).

2. Nancy A. McLaughlin & Jeff Pidot, *Conservation Easement Enabling Statutes: Perspectives on Reform*, 3 UTAH L. REV. 811, 811–13 (2013) (profiling state enabling statutes and how to improve these acts to advance conservation objectives). Conservation easements are a function of state property law and were generally barred at common law by various principles such as the rule against perpetuities. States had to revise their laws of servitudes to allow for the existence of conservation easements. *See, e.g.*, John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENV'T LAW. 319, 324 (1997) (discussing this evolution); Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENV'T L.J. 2, 17–21 (1989) (also discussing this evolution).

3. *See, e.g.*, LAND TRUST ALLIANCE, *WORKING WITH LAND TRUSTS: A GUIDE FOR MILITARY INSTALLATIONS* 15–16 (2009).

4. Jeff Pidot, *Reinventing Conservation Easements*, LAND LINES, Apr. 2005, at 5, 5–6.

5. *See, e.g.*, *Conservation Easement Recreation Management*, N.Y. DEP'T ENV'T CONSERVATION, <https://www.dec.ny.gov/lands/36147.html> (last visited Mar. 27, 2023) (summarizing public recreational planning on conserved lands in New York and the state's role in promoting these activities); *see also* Majorie R. Liberati, Chadwick D. Rittenhouse, & Jason C. Vokoun, *Beyond Protection: Expanding "Conservation Opportunity" to Redefine Conservation Planning in the 21st Century*, J. ENV'T MGMT., Dec. 2016, at 33, 33–40 (examining the need to include more than simply protection in contemporary conservation projects).

6. An agency may acquire land subject to a conservation easement for a variety of reasons including improving public access and carrying out different land management objectives. *See, e.g.*, Isla S. Fishburn, Peter Kareiva, Kevin J. Gaston, & Paul R. Armsworth, *The Growth of Easements as a Conservation Tool*, PLOS ONE, Mar. 2009, at 1, 1.

to be purely private transactions between a landowner and nonprofit conservation organization (also known as a land trust).⁷

These layers of governmental involvement create specific issues that the entities involved in conservation transactions need to successfully navigate. While general governmental involvement in these transactions is at least somewhat understood, the differing roles and potential for conflict are less so, at least explicitly. On one level, there can be disagreement between government and nonprofit conservation partners on how to define their relationship—for example, as a true partnership with shared responsibilities or as a funding grant with the conservation partner taking the lead and government exiting once a funding award has been made. On another level, there can be friction between different governmental agencies involved in a single conservation easement transaction—which is often necessary given the complexity and size of a conservation transaction.⁸ Given their often very specific missions, each governmental agency involved is likely to have a different focus, unique funding requirements, its own easement template, and a general view of how the transaction should be carried out.⁹

To explore these tensions and how they are navigated, this Article will focus on working lands conservation easements, or easements that protect lands that are to have a continued economic function post-conservation outcome, and the work of the United States Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS)¹⁰ through the Agricultural Conservation Easement Program (ACEP)¹¹ and the Regional Conservation Partnership Program (RCPP).¹² Evaluating these programs provides a useful framework for considering the varied and potentially competing roles of government within conservation transactions and how to best allocate responsibilities between the public and private sector within land conservation efforts more generally.¹³

7. It has long been recognized that conservation easements, often described as private land conservation efforts, really are not wholly private and still involve meaningful government intervention. See FAIRFAX ET AL., *supra* note 1, at 8–9 (profiling the complex integration of public and private efforts across the conservation landscape).

8. See, e.g., *Acquisition More than Doubles the Size of Ocmulgee Mounds National Historical Park*, OPEN SPACE INST. (Feb. 9, 2022), <https://www.openspaceinstitute.org/news/acquisition-more-than-doubles-the-size-of-ocmulgee-mounds-national-historical-park> (profiling the various agencies and entities involved in the expansion of a national historic park in Bibb County, Georgia).

9. See, e.g., Adena R. Rissman & Nathan R. Sayre, *Conservation Outcomes and Social Relations: A Comparative Study of Private Ranchland Conservation Easements*, 25 SOC'Y & NAT. RES. 523, 534–36 (2012) (profiling dynamics involved in these transactions).

10. See generally *Natural Resources Conservation Service*, USDA, <https://www.nrcs.usda.gov/wps/portal/nrcs/site/national/home/> (last visited Mar. 27, 2023).

11. *Agricultural Conservation Easement Program*, USDA, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep/> (last visited Mar. 27, 2023).

12. *Regional Conservation Partnership Program*, USDA, <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/rcpp/> (last visited Mar. 27, 2023).

13. See, e.g., Karen Bradshaw Schulz & Dean Lueck, *Contracting for Control of Landscape-Level Resources*, 100 IOWA L. REV. 2507, 2509–11 (2015) (discussing the role of private/public approaches in environmental management generally).

To consider these issues, Part I provides a general overview of conservation easements with a focus on working lands conservation easements. Part II examines the six specific roles that government can play with regard to conservation easements. Part III explores the ACEP and RCPP programs. Part III also explores the various stakeholders involved in working lands protection, how their priorities help to shape the legislative design of the ACEP and RCPP programs, and how these programs operate on the ground with an eye to the upcoming 2023 Farm Bill. Last, Part IV provides some recommendations on how segmenting the various roles that government plays can help to mitigate conflict and evaluate how and what functions (and at what level) government should undertake versus private land trusts. As conservation easements continue to play an increasingly important role in land conservation efforts nationally, understanding the varied roles that government plays in these transactions can determine how this involvement should be structured to maximize the conservation benefits.

I. UNDERSTANDING CONSERVATION EASEMENTS AND WORKING LANDS CONSERVATION EASEMENTS

Before exploring the complex relationships between government and private conservation organizations, it is worth understanding what conservation easement transactions are and why they have emerged as a tool of choice for land conservation organizations. This Part will focus on defining working lands conservation easements as a specific type of conservation easement that seeks to balance economic and environmental objectives for certain conservation-related projects, such as farmland preservation.¹⁴

A. Providing a Working Definition

Conservation easements,¹⁵ at a base level, are simply protective agreements whereby a landowner¹⁶ gives up some of their property rights to a governmental agency or nonprofit actor, known as an easement

14. See, e.g., *Working Lands of Northeast Utah*, TR. PUB. LAND, <https://www.tpl.org/our-work/working-lands-northeast-utah> (last visited Mar. 27, 2023).

15. Jeffrey M. Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENV'T L. 257, 264–72 (2002) (exploring some of the debates regarding the nature of conservation easements).

16. The motivations behind a landowner's willingness to perpetually grant a conservation easement are complex and are driven by a variety of factors. See generally Kaylan M. Kemink, Vanessa M. Adams, Robert L. Pressey, & Johann A. Walker, *A Synthesis of Knowledge About Motives for Participation in Perpetual Conservation Easements*, CONSERVATION SCI. & PRAC. (Feb. 2021).

holder,¹⁷ typically in exchange for some financial benefit.¹⁸ Easement holders are generally governmental entities or land trusts.¹⁹ To summarize the nature of this transaction “[u]sing the traditional ‘bundle-of-sticks’ metaphor for property, we can describe the landowner as losing one of the sticks in [their] bundle. A conservation easement is in essence taking a stick out of the bundle and giving it to someone else.”²⁰ These agreements are unique in that they allow not only the protection of a property beyond the tenure of the current landowner but also generally have a perpetual term.²¹ This perpetual term allows the easement holder to secure a resource without having to actually acquire it in fee.²² This duration can also allow a landowner and a conservation organization to secure the future of a resource beyond the current landowner’s lifetime, imposing the agreed upon restrictions on future owners.²³ This can be appealing to easement holders in that the price of the conservation easement is generally less than the fee

17. A nonprofit holder of conservation easements is generally referred to as a land trust. *See What We Do*, LAND TR. ALL., <https://www.landtrustalliance.org/what-we-do> (last visited Mar. 27, 2023) (explaining the role of these entities). For a discussion of the early history of land trusts and their protective tools, see RUSSELL L. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* 3–19 (1967).

18. *See* James R. Farmer, Vicky Meretsky, Doug Knapp, Charles Chancellor, & Burney C. Fischer, *Why Agree to a Conservation Easement? Understanding the Decision of Conservation Easement Granting*, LANDSCAPE & URB. PLAN., June 2015, at 11, 12; *see also* ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 14 (2d ed. 2005). There are two types of conservation easements from a drafting perspective. First, and most common, is drafting the conservation easement and building in certain restrictions and permitted activities. If something is not specifically barred, it is likely going to be permissible. Conversely, in a reserved interest easement, the landowner conveys away all rights in the property other than those that it expressly reserves. This is the model used by the Agricultural Conservation Easement Program, Wetland Reserve Easement (ACEP-WRE) and is generally only used when the majority of the future land use rights will be vested in the easement holder. *See, e.g.*, James B. Snow, *Reserved Interest Deeds: An Alternative Approach to Drafting Conservation Easements*, in *THE BACK FORTY ANTHOLOGY: SELECTED ARTICLES FROM THE NEWSLETTER OF LAND CONSERVATION LAW* 3.20–21 (William T. Hutton, Darrin S. Brown, Lisa M. Burkdall, Ellen A. Fred, Audra M. Mai, Erika M. Muhl eds., 2d ed. 2003). For a recent overview of the values and benefits of conservation easements, see William J. Snape III, Laura Harris, & Theresa Geib, *Conservation Easements as a Tool for Nature Protection*, 171 *TAX NOTES FED.* 875, 876 (2021).

19. Fishburn et al., *supra* note 6, at 1–2 (exploring the rise in use of conservation easements and the entities holding these easements).

20. Jessica Owley Lippmann, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 *J. ENV'T L. & LITIG.* 293, 298 (2004); *see also* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 *DENV. UNIV. L. REV.* 1077, 1079–80 (1996) (explaining the history and evolution of this conservation mechanism).

21. Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 675–76 (2007) [hereinafter *Conservation Easements: Perpetuity and Beyond*] (exploring the concept of perpetual conservation easements and the reasons perpetual conservation easements gained predominance); *see also* Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . and Should It Be?*, 52 *UIC JOHN MARSHALL L. REV.* 677, 709–13 (2019) (exploring the challenges and varying interpretations of perpetuity).

22. *Private Lands Conservation*, THE NATURE CONSERVANCY, https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/?tab_q=tab_container-tab_element 670 (last visited Mar. 27, 2023).

23. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 *VA. L. REV.* 739, 741–42 (2002) (examining the promise and potential of this duration).

price, allowing lands to be protected at a lower cost—expanding the number of acres that can be protected.²⁴ Theoretically, this also reduces a conservation organization’s long-term costs associated with conserving the lands.²⁵

As far as what this tool intends to achieve, conservation easements are a fairly flexible mechanism that can be used to obtain a variety of conservation values or objectives.²⁶ These goals can include the protection of habitat, forest health, water quality, and at-risk species.²⁷ This Article will largely focus on a subset of conservation easements focused on working lands protection, which will be explored below.

Once a conservation easement is executed, larger changes to the property, such as subdivision or development, will be prohibited or limited.²⁸ Other modifications (as, and to the extent, defined in the conservation easement) will require approval of the conservation holder if not covered by a reserved right of the landowner.²⁹ For instance, this may require a landowner to obtain approval if they want to construct a new road or improvement, which may or may not be forthcoming.³⁰ Other changes or modifications, such as development, are prohibited outright and cannot be carried out by the landowner even with the consent of the holder.³¹ The conservation easement also provides that the easement holder has access to the property to monitor and enforce its restrictions.³²

“The real work with conservation easements begins after the signature ink is dry. Even the best written [conservation] easements are only as good as the holder’s resolve and capacity over the long term to monitor,

24. See, e.g., Vt. L. Sch., Ctr. for Agriculture & Food Sys., *Conservation Easements, FARMLAND ACCESS LEGAL TOOLKIT*, <https://farmlandaccess.org/conservation-easements/> (last visited Mar. 27, 2023).

25. See, e.g., WeConservePA, *Costs of Conservation Easement Stewardship*, PA. LAND TR. ASS’N (May 19, 2020), <https://conservationtools.org/guides/86-costs-of-conservation-easement-stewardship> [hereinafter *Costs of Conservation Easement Stewardship*].

26. BYERS & PONTE, *supra* note 18, at 22.

27. See, e.g., Snape III et al., *supra* note 18, at 876–77 (providing an overview of the various conservation priorities captured in baseline documentation); see also William J. Snape III, *Private Land and Water Conservation: Examining Conservation Easements*, 164 TAX NOTES FED. 1405, 1406 (2019).

28. SAMUEL N. STOKES, A. ELIZABETH WATSON, & SHELLEY S. MASTRAN, *SAVING AMERICA’S COUNTRYSIDE: A GUIDE TO RURAL CONSERVATION* 226 (2d ed. 1997).

29. Vt. L. Sch., Ctr. for Agriculture & Food Sys., *supra* note 24.

30. PATRICIA L. PREGMON & ANDREW M. LOZA, PA. LAND TRUST ASS’N, *HOLDERS, BENEFICIARIES AND BACKUP GRANTEES: DEFINING ROLES AND RELATIONSHIPS TO ACHIEVE CONSERVATION EASEMENT OBJECTIVES 2–3* (2015).

31. See Vt. L. Sch., Ctr. for Agriculture & Food Sys., *supra* note 24. In addition to the prohibited uses and limits on a landowner’s activities without holder approval, a conservation easement also enumerates which rights are expressly reserved to the landowner. These range from clarifying that a landowner still has the right to the enjoyment of the property to more impactful reserved rights, such as building a house on the property in the future. BYERS & PONTE, *supra* note 18, at 19–21. For more significant reserved rights, these can call into question the impacts on the values protected by the conservation easement and, depending on how structured, can challenge the tax deductibility of a tax-incentivized conservation easement. See Nancy A. McLaughlin & Ann Taylor Schwing, *Conservation Easements and Development Rights: Law and Policy*, 169 TAX NOTES FED. 531, 531 (2020) (profiling these issues).

32. BYERS & PONTE, *supra* note 18, at 143–44.

enforce, and defend them.”³³ Given the perpetual term of a conservation easement, developing systems to monitor and enforce the terms of the agreements is critical.³⁴ Easement-holding organizations in the nonprofit sector that fund this work typically require an endowment contribution to fund the ongoing costs associated with monitoring and enforcing the agreement, while a governmental body may assume the costs as an administrative obligation funded through annual budgets.³⁵ If a conservation easement is violated, the easement holder has a variety of remedies at their disposal and may have to litigate to achieve judicial intervention and restoration of the conserved tract.³⁶

Recognition of the positive attributes of conservation easements led to a pronounced shift in conservation strategies over the past several decades—from nonprofits acquiring fee ownership to create public lands, to using conservation easements to protect privately owned lands.³⁷ This shift has started to further skew toward working lands (protecting forests and farms as part of a landscape-level effort) rather than lands primarily significant for habitat values.³⁸

B. Examining the Shift Toward Conservation Easements

Over the past several decades,³⁹ the reach of the land conservation movement has expanded from conserving lands to be set aside in order to

33. JEFF PIDOT, LINCOLN INST. OF LAND POL’Y, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 18 (2005) [hereinafter *REINVENTING CONSERVATION EASEMENTS*].

34. See, e.g., Thomas J. Donovan & Terry M. Knowls, N.H. Mun. Ass’n, *The Roles and Responsibilities of Municipalities in Monitoring and Enforcing Conservation Easements*, TOWN & CITY MAGAZINE (Sept./Oct. 2015), <https://www.nhmunicipal.org/town-city-article/roles-and-responsibilities-municipalities-monitoring-and-enforcing-conservation> (exploring the degree of commitment required of a municipality taking on this work).

35. See, e.g., BRADFORD GENTRY, J. DANIEL OPPENHEIMER, & RANDAL A. STROBO, YALE SCH. OF FORESTRY & ENV’T STUD., *OPTIMIZING PRIVATE LAND CONSERVATION AND PUBLIC LAND USE PLANNING/REGULATION* 73–75 (2010) (profiling this dynamic). This can potentially result in shortcoming in an agency’s work in monitoring conservation easements as it can just be added to the day-to-day work of the agency and there are not specific funds available to defray this cost/obligation on staff time.

36. See, e.g., Ann Harris Smith, *Conservation Easement Violated: What Next—A Discussion of Remedies*, 20 FORDHAM ENV’T L. REV. 597, 599 (2017). To address the potential exposure associated with defense costs, the Land Trust Alliance, the national umbrella group for land trusts, formed an insurance entity, TerraFirma, in which 545 land trusts have pooled together in a collective defense fund covering over 10 million acres of land. See, e.g., *Safeguarding Conservation*, LAND TR. ALL., <https://landtrustalliance.org/what-we-do/our-programs/safeguarding-conservation> (last visited Mar. 27, 2023) (examining this charitable risk pool’s formation and work).

37. Daniel Moscovici, Mike Coll, & Keith Jones, *Paradigm Shifts in Land Preservation and Conservation: The Essential Modern Discourses*, EMPOWERING SUSTAINABILITY INT’L J., Feb. 2015, at 1, 4–5.

38. Steven A. Sader, Keith Ross, & Frank C. Reed, *Pingree Forest Partnership: Monitoring Easements at the Landscape Level*, J. FORESTRY, Apr./May 2002, at 20, 20–21, 24 (providing one example of a large landscape level conservation easement, protecting 750,000 acres in Maine).

39. See, e.g., LAURA A. JOHNSON, LINCOLN INST. LAND POL’Y, *AN OPEN FIELD: EMERGING OPPORTUNITIES FOR A GLOBAL PRIVATE LAND CONSERVATION MOVEMENT* 1–2 (2014) (profiling the early history of the U.S. land conservation movement); see also Lauren Gwin, Jessica Owley, & Sally K. Fairfax, *What Can the Apple Teach the Orange? Lessons U.S. Land Trusts Can Learn from the National Trust in the U.K.*, 30 DUKE ENV’T L. & POL’Y F. 89, 132–39 (2019) (same).

preserve a parcel's natural characteristics (lands with significant natural habitat that might be managed as a wildlife preserve) toward protecting working lands (lands that will continue to be farmed or used for forest products).⁴⁰ This shift in the types of land and projects that conservation entities seek to conserve is driven and shaped by the motivations of the parties involved in this work.⁴¹ A few of the factors driving this shift are worth examination.

1. The Changing Nature and Scale of Conservation Threats

First, the growing nature of conservation threats has led conservationists to seek to protect lands at a landscape scale to prevent habitat fragmentation and for other conservation-related goals.⁴² These efforts are intended to meet the perceived need to move quickly to address varied challenges, which go beyond the approaches of previous generations to designate lands already within the public domain for conservation-related use or to use acquisition-based strategies to achieve land conservation through public ownership.⁴³ As climate threats increasingly factor into the mix of land conservation-related objectives,⁴⁴ this shift will likely only continue.

40. Claire Kremen & A. M. Merenlender, *Landscapes That Work for Biodiversity and People*, SCI. 1, 1–3 (2018). This shift to focusing on private lands has also resulted in the changes in the land conservation community's techniques and use of its resources. See, e.g., Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 542 (2006) (exploring these trends).

41. See, e.g., Travis Brammer, *Using Land and Water Conservation Fund Money to Protect Western Migration Corridors*, 22 WYO. L. REV. 61, 83–86 (2022) (exploring one possible option/conservation priority).

42. Jeffrey A. Michael, *Efficient Habitat Protection with Diverse Landowners and Fragmented Landscapes*, 6 ENV'T SCI. & POL'Y 243, 243–44 (2003); but see Adena R. Rissman, Lynn Lozier, Tosha Comendant, Peter Kareiva, Joseph Kiesecker, M. Rebecca Shaw, & Adina M. Merenlender, *Conservation Easements: Biodiversity Protection and Private Use*, 21 CONSERVATION BIOLOGY 709, 709–18 (2007) (noting the potential of conservation easements to protect biodiversity, but identifying challenges in balancing conservation with landowner reserved rights).

43. See, e.g., Bill A. Thompson, *Planning for Implementation: Landscape-Level Restoration Planning in an Agricultural Setting*, RESTORATION ECOLOGY, Jan. 2011, at 5, 5–6. Relatedly, many earlier American conservation efforts focused on addressing lands in the public domain (i.e., lands owned by the General Land Office that were reserved to federal use rather than conveyed into public ownership). In the early twentieth century, these efforts expanded to the acquisition of submarginal lands to expand the National Forest system in the eastern United States under the funding provided by the Weeks Act. See, e.g., *The Weeks Act*, FOREST HIST. SOC'Y, <https://foresthistor.org/research-explore/us-forest-service-history/policy-and-law/the-weeks-act/> (last visited Mar. 27, 2023). There are certainly tradeoffs implicit in this shift as the types of benefits secured by fee purchase versus conservation easement acquisition vary, as do the types of public benefit (for example, the type and degree of public access).

44. JAMES N. LEVITT & CHANDNI NAVALKHA, LINCOLN INST. LAND POL'Y, FROM THE GROUND UP: HOW LAND TRUSTS AND CONSERVANCIES ARE PROVIDING SOLUTIONS TO CLIMATE CHANGE 3–7 (2022) (providing an overview of these efforts); see also Claire Wright, *Combating Climate Change Through Conservation Easements*, 23 MINN. J.L., SCI., & TECH. 175, 177–81, 187–88 (2022); *Managed Retreat Toolkit: Open Space Acquisitions*, GEORGETOWN CLIMATE CTR., <https://www.georgetownclimate.org/adaptation/toolkits/managed-retreat-toolkit/open-space-acquisitions.html> (last visited Mar. 27, 2023) (considering the potential for conservation easement to be used to address sea level rise); but see Jessica Owley, Federico Cheever, Adena R. Rissman, M. Rebecca Shaw, Barton H. Thompson, Jr., W. William Weeks, *Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies, and Tools*, 95 DENV. L. REV. 727, 727–28, 746–52 (2018) (arguing, in part, for the use of tools other than conservation easements to secure climate

Conservation entities will seek to move toward larger and more complex projects that can provide a multitude of environmental benefits, including habitat protection,⁴⁵ the restoration of tribal access to land,⁴⁶ carbon sequestration,⁴⁷ and other site-specific conservation priorities.⁴⁸

2. Emergence of Conservation Easements as a Conservation Tool

Second, the development of the conservation easement as a protective tool has expanded the potential for accomplishing collaborative conservation projects across multiple landowners and at scale.⁴⁹ The emergence of conservation easements as a tool in the second half of the twentieth century allowed land conservationists to move beyond fee acquisition to achieve conservation objectives on privately owned land.⁵⁰ The lands protected by the initial wave of conservation easements were not dissimilar to those lands protected through fee acquisition, and as agencies and conservation organizations gained experience with the tool, these actors began to protect different types of lands to achieve a wider array of conservation objectives.⁵¹ This has resulted in not only greater use of conservation easements but also greater complexity in the design of projects,

objectives, but also ensuring that conservation easement projects appropriately account for climate considerations and allow for more active land management to address climate-related objectives).

45. See, e.g., Spencer Miller, *Conservation Easement Enables Landowners to Restore Wetland, Help Protect Fish*, USDA (Feb. 21, 2017), <https://www.usda.gov/media/blog/2014/03/24/conservation-easement-enables-landowners-restore-wetland-help-protect-fish> (profiling work to protect the Oregon Chub).

46. See, e.g., *Restoring Tribal Access to Land: A Menu of Options to Reestablish Cultural Access Rights*, CONSERVATION PARTNERS LLP, <https://www.conservationpartners.com/restoring-tribal-access-to-land-a-menu-of-options-to-reestablish-cultural-access-rights/> (last visited Mar. 27, 2023); see also C. Noel Plemmons, *Linking Conservation & Environmental Justice: Exploring Relationship-Building Between a Land Trust and Four Pacific Northwest Tribes* (2022) (M.A. thesis, Portland State University) (on file with author) (considering options and way for the Columbia Land Trust to better build connection to four local tribes through its land conservation efforts).

47. See, e.g., *USDA Recognizes 5 Million Acres Enrolled in Conservation Easements*, USDA (Apr. 2, 2021), <https://www.usda.gov/media/press-releases/2021/04/02/usda-recognizes-5-million-acres-enrolled-conservation-easements#:~:text=Easements%20protect%20sensitive%20lands%20from,plant%20biomass%20across%20these%20landscapes> (summarizing the climate benefits of conserved lands).

48. Fishburn et al., *supra* note 6, at 3. One example of the role that climate is playing in the land conservation movement is within the farm policy arena and whether, for the next Farm Bill, to create a separate title focused on climate independent of the traditional conservation title. See Marc Heller, *New 'Climate' Title in the Farm Bill? No Way, Republicans Say*, E&E NEWS (Feb. 3, 2022, 6:26 AM), <https://www.eenews.net/articles/new-climate-title-in-farm-bill-no-way-republicans-say/> (examining this policy proposal and its prospect for being added to the 2023 Farm Bill).

49. FAIRFAX ET AL., *supra* note 1, at 7 (noting that as land conservation has evolved so have the tools deployed); see also RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 1–10* (2003) (providing overview of the expansion of these efforts over the past fifty years).

50. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RES. J. 373, 374–85 (2001) (exploring the growth of this conservation tool over time and some of the factors fueling this shift); see also Dana & Ramsey, *supra* note 2, at 3, 17 (examining the changes in the common law which propelled the use of conservation easements forward).

51. Federico Cheever & Nancy A. McLaughlin, *An Introduction to Conservation Easements in the United States: A Simple Concept and a Complicated Mosaic of Law*, 1 J.L., PROP., & SOC'Y 107, 115–19 (2015); Dominic P. Parker, *Conservation Easements: A Closer Look at Federal Tax Policy*,

both as far as the lands targeted for conservation and in the nature of the documents that secure these protections.⁵²

3. Expansion of the Types of Lands Targeted for Conservation

Relatedly, conservation easements have allowed some lands to be protected that would not otherwise be reachable, as some landowners are willing to convey a conservation easement but not actually sell their lands to a conservation-related entity.⁵³ For some types of lands, particularly working lands conservation easements, purchasing a property in fee may not work if the objective of the conservation easement is to keep the land in active management.⁵⁴ For example, protecting farmland through less than fee ownership theoretically enables more active landowner management than requiring the governmental body to serve as landlord to a farmer renting the land.⁵⁵ Traditionally, this has been the approach used in the farmland preservation arena—focusing on setting up farmers as landowners and avoiding becoming a landlord.⁵⁶ Other landscapes are heavily

PERC POL'Y SERIES PS-34, Oct. 2005, at 1, 1–8 (profiling land trust growth in both number of organizations involved in this work and the number of acres conserved); see also Jessica Owley, *Conservation Easements and the Climate Change Crossroads*, 74 L. & CONTEMP. PROBS. 199, 199–205 (2011) (profiling other changes that might need to occur within the use of conservation easements to address climate-related challenges).

52. See, e.g., Jessica Owley & Adena R. Rissman, *Trends in Private Land Conservation: Increasing Complexity, Shifting Conservation Purposes and Allowable Private Land Uses*, 51 LAND USE POL'Y 76, 76–84 (2016).

53. The value of a conservation easement is almost always determined by an appraisal. The appraisal will consider the before and after value of the land subject to this encumbrance. The more restrictive the terms of a conservation easement, the more value will be foregone by the landowner by either donating or selling this interest to the easement holder. See, e.g., RICHARD RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS 3–9 (2011). Landowners definitely have a role to play in shaping the terms of a conservation easement that impacts the terms of the agreement. See A. M. Merenlender, L. Huntsinger, G. Guthey, & S. K. Fairfax, *Land Trusts and Conservation Easements: Who is Conserving What for Whom?*, 18 CONSERVATION BIOLOGY 65, 69–72 (2004).

54. See, e.g., *Working Lands of Northeast Utah*, *supra* note 14.

55. *Agricultural Conservation Easements*, AMERICAN FARMLAND TRUST, FARMLAND INFO. CTR. (Jan. 2016), https://farmlandinfo.org/wp-content/uploads/sites/2/2019/09/Agricultural_Consevation_Easements_AFT_FIC_01-2016.pdf. There is some concern about the nature of a rental relationship as far as land tenure is concerned on the environment (with the assumption being that a landowner will utilize a better land ethic with regard to the land as they will have less of a short-term rent-seeking horizon to extract a profit from their rental arrangement). This may not be true with regard to all conservation practices. See B. James Deaton, Chad Lawley, & Karthik Nadella, *Renters, Landlords, and Farmland Stewardship*, 49 AGRIC. ECON. 521, 521–23 (2018). Additionally, there may be ways to incorporate conservation-oriented provisions in a lease to mitigate some of these motivations and to appropriately define the relationship (and costs/benefits) of a shorter land tenure. See Ed Cox, *Climate Extremes & Farm Leases*, SUSTAINABLE FARM LEASE (Dec. 2, 2014), <https://www.sustainable-farmlease.org/climate-extremes-farm-leases/>.

56. See, e.g., DANIEL HELLERSTEIN, CYNTHIA NICKERSON, JOSEPH COOPER, PETER FEATHER, DWIGHT GADSBY, DANIEL MULLARKEY, ABEYAYEHU TEGENE, & CHARLES BARNARD, USDA ECON. RSCH. SERV., *FARMLAND PROTECTION: THE ROLE OF PUBLIC PREFERENCES FOR RURAL AMENITIES* 10 (2002). A somewhat related dynamic plays out with regard to what is required in an agricultural conservation easement. Agricultural conservation easements generally require lands to remain available for agriculture, but do not actually require active farming, to avoid becoming too prescriptive or inflexible. There have been some efforts to better ensure that farming activities actually continue—such as giving the easement holder the right to farm the lands if the landowner fails to continue their agricultural activities. See, e.g., Kendra Johnson, *Conserving Farmland in California: For What and*

shaped or influenced by farming activities and may require this level of intervention to remain in their current desired state.⁵⁷ While there are some movements to broaden the types of land ownership vehicles used to protect working lands,⁵⁸ the conservation easement's value in conserving lands that are unlikely to enter public ownership remains valuable to conservation-oriented actors.⁵⁹

4. Increasing Project Cost and Expansion of Funding Streams

Last, acquiring the development rights and limiting subdivision through a conservation easement is often less expensive than purchasing the parcel in fee.⁶⁰ This has led agencies and nonprofits to focus their conservation funds on acquiring conservation easements, often at the potential expense of their fee acquisition programs.⁶¹ While conservation easements present a lower per acre cost of conservation (and ongoing maintenance) in many instances, the cost of conservation easement acquisition also entails monitoring and enforcing the terms of these agreements, which is not a costless exercise.⁶²

As a result, conservation entities are often less focused on obtaining fee ownership because they have gained comfort and experience in acquiring conservation easements as a method of establishing or protecting the conservation attributes of targeted lands without taking on the obligations and expense of owning the underlying land.⁶³ To understand how land

For Whom? How Agricultural Conservation Easements Can Keep Farmland Farmed, 9 SUSTAINABLE DEV. L. & POL'Y 45, 45 (2008) (examining potential options that land trusts are exploring to accomplish these goals).

57. See, e.g., *Farming and the Forever Business: Agricultural Landscape Management at the Martin Van Buren National Historic Site*, NAT'L PARK SERV., <https://www.nps.gov/articles/farming-forever.htm> (Mar. 27, 2023) (explaining the public-private partnerships involved in keeping the agricultural landscape associated with this historic site, based on blended ownership, in its agricultural context).

58. See, e.g., *Unpacking Land Policy and What Is Needed for a More Equitable Farming Future*, NAT'L SUSTAINABLE AGRIC. COAL. (Apr. 16, 2021), <https://sustainableagriculture.net/blog/nyfc-land-access-report-2021/> (noting the need for expanded land tenure option to ensure greater farmland access to historically marginalized populations).

59. *How We Work: Private Lands Conservation*, THE NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/who-we-are/how-we-work/private-lands-conservation/#:~:text=Conservation%20easements%20protect%20land%20for,providing%20them%20with%20tax%20benefits> (last visited Mar. 27, 2023) (explaining the value of this tool in the Nature Conservancy's work).

60. Parker, *supra* note 51, at 1–2, 6.

61. FAIRFAX ET AL., *supra* note 1, at 255–56.

62. Nancy A. McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 GEO. ENV'T L. REV. 167, 167–68, 170, 173 (exploring the implications of enforcing conservation easements).

63. See, e.g., Dominic P. Parker, *Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements*, 44 NAT. RES. J. 483, 483–85 (2004). Overall, these efforts have resulted in the protection, in some form, of a considerable amount of land (as of 2014, approximately 19.4% of Maine, 29% of New Hampshire, and 22.5% of Vermont). See Spencer Meyer, Christopher S. Cronan, Robert J. Lilieholm, Michelle Johnson, & David R. Foster, *Land Conservation in Northern New England: Historic Trends and Alternative Conservation Futures*, 174 BIOLOGICAL CONSERVATION 152, 154–55 (2014). The expansion of the use of this tool has led towards complexity and potentially less resource protection. See, e.g., Owley & Rissman, *supra* note 52, at 76–83 (charting

conservation advocates work, the next Section will briefly summarize conservation easements and working lands conservation easements before examining the roles that government specifically plays within these efforts.

C. Working Lands Conservation Easements

Working lands conservation easements are a subset of conservation easements that, as the term implies, focus on keeping land in an active form of land use.⁶⁴ This differs from other forms of conservation easements where the goal is to protect a wildlife habitat or a sensitive landscape feature by essentially setting it aside for protection.⁶⁵ Working lands conservation easements secure lands that have important conservation benefits or values but also are intended to perform and continue to perform an economic function (hence, the working component).⁶⁶ Working lands projects involve different functions and balances in their project design than traditional conservation projects because they must balance conservation and economic imperatives to persuade landowners to enter into these arrangements.⁶⁷ In short, as conservationists have expanded their efforts to include working lands and to work at a landscape-level scale,⁶⁸ there has been a logical shift and increase in the use of conservation easements to secure their targeted conservation objectives across different land uses.⁶⁹ The working attribute of this subset of conservation easement further implicates a different set of drafting and policy considerations than other, more restrictive conservation easement forms—chiefly, ensuring that there is an appropriate balance between the conservation and working attributes.⁷⁰ There are two primary types of working lands conservation

these trends). This shift is not without criticism. *See, e.g.,* Gwin et al., *supra* note 39, at 138–39 (arguing that conservation easements often advance elite interests and may not have most environmental benefits).

64. Paige Madeline Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 DUKE L.J. 1387, 1389 n.8 (2013). Working landscape efforts are often focused on addressing the needs of lands that are targeted for specific uses. For example, in Vermont, the working landscape is under threat from economic pressures challenging the viability of the dairy and forest products sectors. *See, e.g.,* VT. COUNCIL ON RURAL DEV., [://www.vtrural.org/sites/default/files/content/working%20landscape/WorkingLandscapeIndices.pdf](http://www.vtrural.org/sites/default/files/content/working%20landscape/WorkingLandscapeIndices.pdf) (last visited Mar. 27, 2023).

65. Federico Cheever, *Property Rights and the Maintenance of Wildlife Habitat: The Case for Conservation Land Transactions*, 38 IDAHO L. REV. 431, 431–33 (2002). Wildlife protection or other goals can be accommodated within the context of a working lands conservation easement (as, for example, an area called out for more substantial protection), but the distinction here is on the overall focus of the effort.

66. Dianne A. Stroman, Urs P. Kreuter, & Jianbang Gan, *Balancing Property Rights and Social Responsibilities: Perspectives of Conservation Easement Landowners*, 70 RANGELAND ECOLOGY & MGMT 255, 255 (2017); *see generally* Jamie Williams, *Large Landscape Conservation: A View From the Field* (Lincoln Inst. of Land Pol’y, Working Paper No. WP11JW1, 2011) (profiling working lands and large scale conservation objectives generally).

67. *See* Liberati et al., *supra* note 5, at 37.

68. Carolyn D. Loeb & Anthony W. D’Amato, *Large Landscape Conservation in a Mixed Ownership Region: Opportunities and Barriers for Putting the Pieces Together*, 243 BIOLOGICAL CONSERVATION, 2020, at 1, 9 (exploring the attention to this scale in Vermont).

69. *See, e.g.,* Lynn Scarlett, *America’s Working Lands: Farm Bill Programs and Landscape-Scale Conservation* 2–3, 18 (Lincoln Inst. of Land Pol’y, Working Paper No. WP11LS1, 2011); *see also* Gwin et al., *supra* note 39, at 133–34 (examining these shifting objectives).

70. L. Wes Burger, Jr., Kristine O. Evans, Mark D. McConnell, & Leslie M. Burger, *Private Lands Conservation: A Vision for the Future*, 43 WILDLIFE SOC’Y BULL. 398, 398–405 (2019).

easement projects: (1) agricultural conservation easements; and (2) working forest conservation easements.⁷¹

1. Agricultural Conservation Easements

The first type of working lands conservation easement is the agricultural conservation easement.⁷² This conservation easement form is designed to prevent farmland from being developed—it prevents urban sprawl, limits subdivision, and can solve other development concerns—while allowing the land to remain in active agricultural use.⁷³ Agricultural conservation easements can also secure additional environmental benefits by requiring farmers to use best management practices, set asides, and buffer strips to minimize chemical runoff and soil erosion into adjacent waterways.⁷⁴ The lands will continue to be used for farming, which will involve a degree of active land management with inputs depending on the type of farming operation on the land.⁷⁵

Designing an effective agricultural conservation easement that can effectively secure conservation or environmental objectives, as well as continued agricultural function and economic viability, can be a challenge and requires close attention from a drafting perspective to ensure that the goals are appropriately balanced.⁷⁶ Changing agricultural practices—in both conventional and more sustainability-focused production—challenge the idea of static preservation of these resources.⁷⁷ Additionally, conservation-oriented conservation easement holders are working to expand the types of protections included within these agreements, including addressing soil health.⁷⁸ Overall, despite challenges in ensuring that these conservation easements achieve their desired outcomes, agricultural conservation easements remain an important tool in the farmland preservation movement's efforts to limit farmland conversion.⁷⁹

71. See Jesse J. Richardson, Jr., *Conservation Easements and Adaptive Management*, 3 SEA GRANT L. & POL'Y J. 31, 37–44 (2010) (providing overview of these types of working forest conservation easements (WFCE)).

72. See, e.g., *Agricultural Conservation Easements*, *supra* note 55; see also BYERS & PONTE, *supra* note 18, at 199–200 (profiling the unique characteristics of agricultural conservation easements).

73. See Henry E. Rodegerdts, *Land Trusts and Agricultural Conservation Easements*, 13 NAT. RES. & ENV'T 336, 336–37 (1998).

74. See, e.g., Jane Ellen Hamilton, *Beyond Agricultural Conservation Easements: Ensuring the Future of Agricultural Production*, LAND TRUST ALLIANCE: SAVING LAND (Summer 2013) <https://www.landtrustalliance.org/news/beyond-agricultural-conservation-easements-ensuring-future-agricultural-production>.

75. See, e.g., Judy Anderson & Jerry Cosgrove, *Drafting Conservation Easements for Agriculture*, FARMLAND INFO. CTR. (Mar. 5, 2019), https://s30428.pcdn.co/wp-content/uploads/sites/2/2004/07/Drafting_Ag_Conservation_Easements_March2019.pdf.

76. Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 ECOLOGY L.Q. 627, 629–30 (2017) [hereinafter *Defining the Role of Conservation*].

77. See Johnson, *supra* note 56, at 46.

78. See *What Is a Soil Health Conservation Easement?*, WHITEROCK CONSERVANCY, <https://www.whiterockconservancy.org/easement> (last visited Mar. 28, 2023) (providing overview of Iowa's Whiterock Conservancy's efforts to use this tool to protect soil health, including addressing limits on soil erosion, soil disruption, and cover crops).

79. See THOMAS L. DANIELS & JOHN C. KEENE, *THE LAW OF AGRICULTURAL LAND PRESERVATION IN THE UNITED STATES* 24–30 (2018).

2. Working Forest Conservation Easements

The second primary form of working lands conservation easement is the working forest conservation easement.⁸⁰ A working forest conservation easement (WFCE) is similar to an agricultural conservation easement in that it is intended to stop land fragmentation, subdivision, and development (or an intensification of land use), as well as promote wildlife, habitat, and ecological diversity.⁸¹ At the same time, a working forest conservation easement allows land to still be actively managed for timber operations. Harvest activities are required to be sustainably managed under a forest management plan, which can, in turn, require third-party certification as a benchmark for ensuring the sustainability of the harvesting activities over time.⁸² The economics of a conservation easement can often be attractive to a large-scale forest owner, who may be willing to limit development and comply with management restrictions if sufficient financial consideration is available.⁸³ Additionally, WFCEs often allow for public

80. Peter Stein, *Conservation Easements*, SILVICULTURE MAG., Winter 2010, at 6, 7; *see also* BYERS & PONTE, *supra* note 18, at 206–07 (examining working forest conservation easements). Working forest conservation is also growing in interest for greater investment activity. *See, e.g.*, Andrew Baxter, Connor Cash, Josh Lerner, & Ratnika Prasad, *Two Case Studies on the Financing of Forest Conservation 2–4* (Harvard Bus. Sch., Working Paper No. 20–137, 2020) (profiling growing investor interest in this space). For an overview of some organizations focused on securing lands through this mechanism, *see* Jane A. Difley, *Standing Tall: Forestry Practices on Lands Conserved by Selected New England Land Trusts 1–15* (Lincoln Inst. of Land Pol’y, Working Paper No. WP21JD1, 2021) (providing a survey of forestry practices on fee-owned and conservation lands stewarded by forestry oriented New England land trusts).

81. *See generally* Dan Tesini, *Working Forest Conservation Easements*, 41 URBAN LAW 359 (2009) (profiling this conservation tool generally); *see also* *Working Forest Conservation Easements 101*, PAC. FOREST TR., [https://www.pacificforest.org/working-forest-conservation-easements/#:~:text=Working%20forest%20conservation%20easements%20\(WFCEs,private%20ownership%20and%20productive%20forestry](https://www.pacificforest.org/working-forest-conservation-easements/#:~:text=Working%20forest%20conservation%20easements%20(WFCEs,private%20ownership%20and%20productive%20forestry) (last visited Mar. 28, 2023) (providing an overview of this use of this tool within the Forest Trust’s work).

82. HARVEY M. JACOBS, LINCOLN INST. LAND POL’Y, CASE EXAMPLES OF CONSERVATION EASEMENTS IN USE 6 (2014); *see also* ROBERT T. PERSCHEL, ENSURING SUSTAINABLE FORESTRY THROUGH WORKING FOREST CONSERVATION EASEMENTS IN THE NORTHEAST 13–21 (2006) (providing various approaches to balancing harvesting activity and securing conservation within WFCEs).

83. BROOKE MASSA & RON SUTHERLAND, WILDLANDS NETWORK, THE BUSINESS RATIONALE BEHIND FOREST CONSERVATION EASEMENTS 17–18 (2012) (discussing these considerations); *see also* Annie, *Working Forests Kept Working: The Working Forest Fund*, THE FOREST SOC’Y ME. (Aug. 25, 2017), <https://www.fsmaine.org/working-forest-fund/> (explaining The Conservation Fund’s Working Forest Fund’s goals of acquiring forests, conserving these resources, selling the protected lands, and moving on to other projects). The size and ownership of forestland properties may require different considerations in executing conservation projects on these lands than other resources. *See, e.g.*, Baxter et al., *supra* note 80, at 2–4, 9–10, 20 (profiling conservation in this asset class).

access⁸⁴ and include some affirmative management obligations, such as exclusion areas and buffers, beyond their more passive protection.⁸⁵

A WFCE faces many of the same types of challenges as those encountered in the agricultural conservation context.⁸⁶ The primary challenge is balancing the conservation-related objectives with the economic considerations related to allowing continued commercial forestry activities.⁸⁷ Given the size of many protected parcels, this balance can often be achieved as the alternative of these lands being developed across a larger landscape.⁸⁸ Overall, WFCEs are an attempt to balance conservation considerations with keeping forestlands available for harvest activities.⁸⁹

D. Fee Versus Conservation Easement Acquisition

The working characteristic of conservation easements involves some form of active land management.⁹⁰ Protection of an agricultural landscape often requires certain management activities to preserve its current appearance.⁹¹ For example, taking away active management related to dairying activities in Vermont would result in the landscape shifting back to forest

84. Public access within WFCEs is a large benefit that governmental funders and their nongovernmental organization partners derive from these transactions, including access to trails, hunting, fishing, and other forms of recreation. Balancing the working aspect with the recreational attributes often works well within hardwood forests, which require less affirmative management than more plantation-based species. *See, e.g., Frequently Asked Questions—Land Conservation*, SOC'Y PROT. N.H. FORESTS, <https://forestsociety.org/faq/land-conservation-0#t49n1402> (last visited Mar. 28, 2023) (explaining that for purchased WFCEs public access is often required).

85. Brenda Lind, *Using Conservation Easements to Protect Working Forests*, LAND TR. ALL., Spring 2001, at 9, 11; *but see* Jessica Owley & Stephen J. Tulowiecki, *Who Should Protect the Forest?: Conservation Easements in the Forest Legacy Program*, 33 PUB. LAND & RES. L. REV. 47, 51, 86–92 (2012) (providing some critiques and challenges associated with this protective tool).

86. *See, e.g.,* Harvey M. Jacobs, *Conservation Easements in the U.S. and Abroad: Reflections and Views Toward the Future* 9–10 (Lincoln Inst. of Land Pol'y, Working Paper No. WP14HJ1, 2014).

87. *See* Stroman et al., *supra* note 66, at 255–56.

88. MASSA & SUTHERLAND, *supra* note 83, at 23–24; *see also* C. Edwin Meadows, Jr. & Donald J. Mansius, *Conservation Easements as a Forest Management Strategy*, 3 ME. POL'Y REV. 39, 39–46 (1994) (examining the use of this tool in protecting large landscapes in the Maine woods).

89. In this vein, WFCEs harken back to the original formulation of conservation, implying a use element that may not always be evident in contemporary conservation messaging. *See* Jessica Owley & Jess Phelps, *Federal Land Conservation in Rural Areas*, 86 BROOK. L. REV. 839, 842–45 (2021). Some of the flexibility within a WFCE is provided by the management plan, which allows active land management of the protected lands over time to meet forestry and conservation needs. *See* BYERS & PONTE, *supra* note 18, at 208–09. To date, this tool has been less successful at addressing family owned forests and more work is needed to expand protection efforts to this important subset of U.S. forests. *See, e.g.,* Paul Catanzaro & Marla Markowski-Lindsay, *Expanding Family Forest Options to Keep Their Land in Forest Use*, 120 J. FORESTRY 208, 208–11 (2022) (profiling this protective gap).

90. *See, e.g., Create a Debt for Working Lands Initiative*, AM. FARMLAND TR. (2021), https://farmland.org/wp-content/uploads/2020/11/AFT-Creating_a_Debt_for_Working_Lands_Initiative.pdf (explaining how conservation easements could be used for debt relief while allowing farmers to continue to work their lands subject to this restriction against development).

91. *See, e.g.,* Kyla Bedard, *The State of Dairy in Vermont*, NE. ORGANIC FARMERS ASS'N VT., <https://www.nofavt.org/node/11242> (last visited Mar. 28, 2023) (noting that dairy farms are “a predominant reason for the open meadows, fields of grain and agricultural infrastructure we see statewide” in Vermont).

cover.⁹² The scale at which a conservation easement of this form operates often lends itself to private landownership, such as active farm or forestry operations on a conserved tract.⁹³ While land owned by a conservation organization in fee could provide some of the same operational functions, this option generally has not been utilized at scale.⁹⁴ The degree of active management—the actual farming or timber operations—also requires a different layer of involvement with the land.⁹⁵

Additionally, the relative or comparative value of these lands versus the cost to secure their conservation status (to the degree desired) may be more efficiently acquired through a less than fee purchase of development rights rather than through fee acquisition and the correlated management costs over time.⁹⁶ The benefits of conservation easements versus fee ownership may also have distributive benefit concerns from an environmental justice perspective, which are being explored.⁹⁷

The preference for conservation easements over fee ownership⁹⁸ may be beginning to change slightly as land trusts and conservation organizations consider how to best facilitate access to land for new and beginning farmers and farmers from underserved communities.⁹⁹ This expanded focus may lead a land trust to consider owning a property, at least for a period of time, or to set up some other form of entity to let more farmers share an acquired farm.¹⁰⁰ Exploring alternative forms of ownership and

92. See, e.g., Bob Parsons, *Vermont's Dairy Sector: Is There a Sustainable Future for the 800 lb. Gorilla?* 5 (Food Sys. Rsch. Collaborative, Univ. of Vt. Ctr. For Rural Stud., Working Paper No. 201256, 2010) (explaining the challenges this sector faces and what it might mean for the future of Vermont's landscape).

93. See, e.g., LEIGH WHELPTON & ANDREA FERRI, PRIVATE CAPITAL FOR WORKING LANDS CONSERVATION: A MARKET DEVELOPMENT FRAMEWORK 3–6 (2017) (profiling the scale of working lands conservation issues in the conservation funding arena).

94. There is, however, increasing interest in exploring options for alternative land tenure—particularly in the farmland protection context. See, e.g., VT. FARM TO PLATE, VERMONT FOOD SYSTEM PLAN ISSUE BRIEF, ISSUE: ALTERNATIVE LAND OWNERSHIP AND ACCESS MODELS (examining the barriers and opportunities for deploying alternative land tenure models in Vermont).

95. See HANNAH DOWNEY, PERC, THE ROLE OF WORKING LANDS IN PROVIDING PUBLIC CONSERVATION BENEFITS: PART I: A COLLECTION OF CASE STUDIES 4–13 (2017).

96. Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENV'T. L.J. 121, 127 (2011); see also Peter R. Stein, *Trends in Forestland: Ownership and Conservation*, FOREST HIST. TODAY 83, 85 (2011) (providing overview of private investment's role in a large-scale conservation easement in northern New Hampshire).

97. See, e.g., Levi Van Sant, Dean Hardy, & Bryan Nuse, *Conserving What? Conservation Easements and Environmental Justice in the Coastal US South*, 14 HUM. GEOGRAPHY 31, 32–42 (2021).

98. A good example of this is Maine's conservation experience. Maine's conservation efforts are relatively recent and conservation easements played a transformative role in protecting over 20% of the state in a three-decade period. See Lloyd C. Irland, *Maine's Public Estate and Conservation Lands: Brief History and Assessment*, 27 ME. POL'Y REV. 11, 11–14 (2018) (charting this growth).

99. Samuel Ethan Plotkin & Neva Hassanein, *Cultivating Opportunity: Do Land Transfer Tools Improve Land Access for Beginning Farmers?*, 34 RENEWABLE AGRIC. & FOOD SYS. 271, 276–77 (2017) (examining the impact of conservation as a land transfer mechanism and considering how to best facilitate transfers to minimize legal and financial risks).

100. See, e.g., Chelsea Gazillo, *Active Efforts to Address the History of BIPOC Land Theft in America*, AM. FARMLAND TR. (Feb. 25, 2021), <https://farmland.org/active-policy-efforts-to-address-the-history-of-bipoc-land-theft-in-america/>; see also *Building Equitable Farmland Tenure Models for*

tenure may lead some land trusts to reconsider their approaches and ultimate goals.¹⁰¹ Working lands conservation easements, however, are likely to remain an important component of land trusts' efforts to conserve important open space and other priorities at scale.

II. EXPLORING GOVERNMENTAL ROLES

As noted in the introduction, government plays several critical roles in efforts to protect working lands through conservation easements as the: (1) authorizing party, (2) funder, (3) holder of the interests, (4) land manager, and (5) landowner. Most of these roles can be played by government at all levels and can be fulfilled by land trusts (with notable exceptions).¹⁰² This Part will consider these various functions and how and where governmental involvement is essential versus optional in carrying out these conservation transactions on privately owned working lands.¹⁰³

A. Authorizer

At a base level, government first has to allow for this form of property interest to exist and then has to define the contours upon which it functions as a matter of state property law.¹⁰⁴ Conservation easements are a relatively recent legal development.¹⁰⁵ Prior to the second half of the last century, conservation easements were barred at common law by both the rule against perpetuities¹⁰⁶ and other principles disfavoring negative easements¹⁰⁷ and easements in gross.¹⁰⁸ As motivations evolved in the late twentieth century, and the benefit of allowing first governmental bodies¹⁰⁹

Northeast Farmers, SUSTAINABLE AGRIC. RSCH. & EDUC., https://projects.sare.org/sare_project/ene21-169/ (last visited Mar. 28, 2023) (profiling initial work by the Agrarian Trust and Northeast Farmers of Color Land Trust to explore alternative tenure models to support more BIPOC access to farmland).

101. See, e.g., Nick Richardson, *The Land Sovereignty Fund*, VT. LAND TR. (Apr. 7, 2022), <https://vlt.org/2022/04/07/the-land-sovereignty-fund/>; *Reparations*, SOUL FIRE FARM, <https://www.soulfirefarm.org/get-involved/reparations/> (last visited Mar. 28, 2023) (providing a summary of reparations-related projects to increase BIPOC farmland access).

102. See *supra* text accompanying notes 2–6.

103. For a discussion regarding some of the efficiencies gained by having governmental involvement with conservation easements, see Gerald Korngold, *Governmental Conservation Easements: A Means to Advance Efficiency, Freedom from Coercion, Flexibility, and Democracy*, 78 BROOK. L. REV. 467, 468 (2013).

104. See, e.g., Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NAT. RES. J. 65, 71–73 (2006).

105. Thompson Mayes, *Preservation Law and Public Policy: Balancing Priorities and Building an Ethic*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 157, 180–81 (Robert E. Stipe ed., 2003) (explaining the legal origins of this conservation tool); see also Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DENV. L.J. 167, 181 (1968) (charting the early use of conservation easements by federal agencies for various purposes).

106. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T L. REV. 119, 126–27 (2010).

107. Cheever, *supra* note 20, at 1080–81.

108. Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540, 543–44 (1979) (examining this common law concern).

109. See Bray, *supra* note 106, at 126–28 (exploring the history of early enabling legislation for conservation easements).

and then nonprofit organizations to secure conservation easements became clear¹¹⁰ (or to protect lands without taking fee ownership),¹¹¹ states began to amend their enabling statutes to allow for these property interests.¹¹² Currently, all fifty states allow for conservation easements, while all but one, North Dakota,¹¹³ allow these conservation easements to be perpetual.¹¹⁴

Despite widespread adoption,¹¹⁵ enabling legislation varies from state to state in fairly significant ways.¹¹⁶ States define what interests the conservation easement can secure somewhat differently and provide other limitations or requirements on conserved land. For example, in Maine, there is an annual reporting requirement,¹¹⁷ and in Massachusetts, approval from both the town or city and the state is required in order for the conservation easement to be perpetual.¹¹⁸ The ability of state enabling law to set both the parameters on what is conserved and the process for approving these property interests allows the state to dictate the function of conservation interests.¹¹⁹

States also impact conservation easements in other ways. For instance, enabling legislation varies in how conservation easements are to

110. Lippmann, *supra* note 20, at 305–06; King & Fairfax, *supra* note 104, at 71–72.

111. The benefits ideally realized from this expansion are that it reduced the cost of conservation, expanded the types of lands able to be conserved, and allowed broader landscapes to be protected. *See, e.g.,* Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 90–92 (1997) (charting these potential benefits).

112. Cheever & McLaughlin, *supra* note 51, at 116.

113. North Dakota's experience with conservation easements is somewhat atypical and is a reaction to early and substantial efforts to protect waterfowl nesting habitat in the state's prairie pothole region. The work of the Fish and Wildlife Service and larger nongovernmental organizations, principally Ducks Unlimited, has apparently angered the farm community who feel that these interests have negatively impacted the state's agricultural economy. *See* Jon J. Jensen, *Limitations on Easements in North Dakota May Have Unintended Consequences for Qualified Conservation Easement Charitable Contributions*, 87 N.D. L. REV. 343, 343–45 (2011) (profiling this historic dispute).

114. C. Timothy Lindstrom, *Changes in Law Regarding Conservation Easements: An Update*, 5 WYO. L. REV. 557, 557 n.5 (2005). While almost all states allow for perpetual conservation easements, only a few require that these interests be perpetual (allowing term easements). *See Conservation Easements: Perpetuity and Beyond*, *supra* note 21, at 675 n.9.

115. The work of the Uniform Laws Commission in the 1980s to develop the Uniform Conservation Easement Act (UCEA) helped to facilitate this development. Many states (currently twenty-one) have adopted UCEA and other states' legislation was influenced by this legislation. *See* Owley & Phelps, *supra* note 89, at 844–45, 844 n.30 (discussing UCEA and its influence on enabling legislation generally). In recent years, there have been periodic efforts to revise the UCEA, but the UCEA has remained largely unchanged. *See* NANCY A. MCLAUGHLIN, UNIFORM CONSERVATION EASEMENT ACT STUDY COMMITTEE BACKGROUND REPORT 7 (2017).

116. *See* McLaughlin & Pidot, *supra* note 2, at 127.

117. Maine law requires annual reporting on the status and monitoring of conservation easements held in the state. *See Conservation Lands Registry*, ME. DEP'T AGRIC., CONSERVATION & FORESTRY, https://www.maine.gov/dacf/about/commissioners/conservation_easement_registry/index.shtml#:~:text=All%20holders%20of%20conservation%20easements,reporting%20deadline%20is%20March%2030 (last visited Mar. 28, 2023).

118. MASS. GEN. LAWS ch. 184, § 32 (2009); *see also Conservation Restriction Review Program*, MASS.GOV, <https://www.mass.gov/service-details/conservation-restriction-review-program> (last visited Mar. 28, 2023). In a different vein, Virginia requires that the terms of a conservation easement comply with the comprehensive plan in which it is located to be enforceable. *See* VA CODE ANN. § 10.1-1010(E) (2004).

119. Jeff Pidot, *Conservation Easement Reform: As Maine Goes, Should the Nation Follow?*, 74 L. & CONTEMP. PROBS. 1, 6–7 (2011) (providing an overview of Maine's reform process).

be interpreted by the courts.¹²⁰ In some states, such as Virginia, conservation easements are interpreted under common law principles that generally apply to easements, which typically are to be interpreted in favor of the free alienability of land.¹²¹ In other states, conservation easements are to be expressly interpreted to facilitate their conservation purposes.¹²² Another distinction is how states address complicated decisions, such as when and how to allow amendment of perpetual conservation easements. Some states, such as New Hampshire, have set up formal processes to involve public oversight of amendment requests.¹²³ Other states have adopted less clear standards with regard to amendment or termination of perpetual conservation easements.¹²⁴

Finally, some states have pushed back against conservation easements or aspects of their use.¹²⁵ North Dakota, for example, has limited the duration of conservation easements within the state to ninety-nine years.¹²⁶ Similarly, recently proposed legislation in Nebraska is seeking to limit the duration of conservation easements and give more authority to local governments over these land use agreements.¹²⁷

120. Nancy A. McLaughlin, *Interpreting Conservation Easements*, 29 PROB. & PROP. 30, 32–35 (2015) [hereinafter *Interpreting Conservation Easements*] (examining interpretational differences from state to state).

121. See, e.g., VA. CONSERVATION NETWORK, OUR COMMON AGENDA: 2021 ENVIRONMENTAL BRIEFING BOOK 100 (2021) (charting how courts have interpreted conservation easements in the state and legislative efforts to address).

122. *Interpreting Conservation Easements*, supra note 120, at 30. There is a risk that states may wish to remove conservation easements as well, although examples of this type of action have been rare. See, e.g., Richard Brewer, *Conservation Easements and Perpetuity: Till Legislation Do Us Part*, 74 L. & CONTEMP. PROBS. 249, 249–64 (2011) (profiling a Michigan effort to remove a conservation servitude).

123. SOC'Y FOR THE PROTECTION OF N.H. FORESTS, AMENDING OR TERMINATING CONSERVATION EASEMENTS: CONFORMING TO STATE CHARITABLE TRUST REQUIREMENTS 3–11.

124. Anne Galloway, *In Perpetuity, or Not?*, VT DIGGER (Mar. 9, 2014), <https://vtdigger.org/2014/03/09/conservation-groups-push-new-law-allow-changes-land-protections/> (explaining the debate and Vermont's experience with attempting to modify its conservation easement enabling legislation which led to no changes to the law).

125. Jennifer Yachnin, *Opponents of 30x30 Seize on Conservation Law to Block Easements*, GREENWIRE (May 2, 2022, 1:15 PM), <https://www.eenews.net/articles/opponents-of-30x30-seize-on-conservation-law-to-block-easements/>.

126. N.D. CENT. CODE § 47-05-02.1(2) (2017); Jensen, supra note 113, at 344–45 (summarizing the background behind this legislative change).

127. Molly Ashford, *Ricketts Supports Legislative Effort to End Perpetual Conservation Easements in Nebraska*, OMAHA WORLD-HERALD (Feb. 29, 2022), https://omaha.com/news/state-and-regional/govt-and-politics/ricketts-supports-legislative-effort-to-end-perpetual-conservation-easements-in-nebraska/article_e694d974-8c66-11ec-a9f9-e3ce7ca066ab.html (explaining the politics of this legislation in Nebraska—in part as pushback to President Biden's 30 by 30 land preservation goals); see also Alex Brown, *Private Lands Are the Next Battleground in State Conservation Policy*, PEW CHARITABLE TRS. (Apr. 26, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state/2022/04/26/private-lands-are-the-next-battleground-in-state-conservation-policy> (providing national perspective on these trends). Notably, these efforts are also gaining some support on Capitol Hill. See, e.g., Sens. Cramer, Rounds, Hoeven Introduce the Landowner Easement Rights Act, LANDOWNER EASEMENT RTS. ACT (Apr. 4, 2022), <https://www.cramer.senate.gov/news/press-releases/sens-cramer-rounds-hoeven-introduce-the-landowner-easement-rights-act> (proposing to limit conservation easements to fifty years and to provide owners of eased lands to buy out or renegotiate the conservation easement's terms).

Overall, states play a significant role in shaping the contours of what these property interests look like by virtue of authorizing their existence in the first instance—by dictating what process is required to create these instruments, what they can protect, how they operate or function, and how the courts will interpret these agreements in the case of interpretational disputes.

B. Funder

Federal, state, and local governments play a significant role in providing funding for conservation easement transactions.¹²⁸ This happens in three primary ways, through: (1) the tax code;¹²⁹ (2) acquisition funding;¹³⁰ and (3) exacted conservation easements.¹³¹ The government acts as funder not only in regard to conservation easements directly acquired, but also as to conservation easements acquired by nonprofit or state agencies secured with government-provided grant funding.¹³²

1. Tax Incentivized Conservation Easements

One of the most powerful tools for promoting the acquisition of conservation easements is the federal tax code.¹³³ Since the late 1970s, landowners have been able to claim a tax deduction for the value of qualifying conservation easements as a charitable deduction of a partial interest in

128. See, e.g., *Gaining Ground*, LAND TR. ALL., <https://landtrustalliance.org/land-trusts/gaining-ground/united-states> (last visited Mar. 29, 2023) (profiling the efforts of the land trust community in conserving land and in providing environmental benefits in the Land Trust Alliance's most recent census).

129. See, e.g., Nancy A. McLaughlin, *Tax-Deductible Conservation Easements and the Essential Perpetuity Requirements*, 37 VA. TAX REV. 1, 3 (2017) (summarizing perpetuity rules related to conservation easements generally).

130. See, e.g., *Conservation Grant Program*, N.H. DEP'T AGRIC., MARKETS & FOOD, <https://www.agriculture.nh.gov/divisions/scc/grant-program.htm> (last visited Mar. 29, 2023) (profiling sources available for funding of land conservation efforts in New Hampshire).

131. In the funding universe for working lands conservation easements, it is not atypical for a program to rely on both the tax code and governmental funding to facilitate conservation transactions. For example, under the Agricultural Conservation Easement Program, Agricultural Land Easements (ACEP-ALE), a project might involve 50% funding from NRCS, 25% from the holder (such as a state agricultural agency), and a 25% donation through bargain sale by the landowner (which can be claimed as a charitable deduction). See, e.g., *Conservation Easements: Farmland Access Legal Toolkit*, VT. L. SCH., CTR. FOR AGRIC. & FOOD SYS., <https://farmlandaccess.org/conservation-easements/#toolsforrevenue> (last visited Mar. 28, 2023) (explaining funding mixes generally).

132. King & Fairfax, *supra* note 104, at 76–78.

133. 26 U.S.C. § 170(h) (2022); see also Cheever & McLaughlin, *supra* note 51, at 116–17 (exploring the origins of the federal tax incentive). For a history of the development of this section of the tax code, see STEPHEN J. SMALL, *THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 1–1 (4th ed. 1997).

real estate.¹³⁴ To qualify, the easement has to be perpetual in term,¹³⁵ advance a permissible purpose (or conservation value),¹³⁶ and be made exclusively for conservation purposes.¹³⁷ Permitted conservation purposes include:

(i) [T]he preservation of land areas for outdoor recreation by, or the education of, the general public, (ii) the protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,¹³⁸ (iii) the preservation of open space (including farmland and forest land) where such preservation is—(I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local government conservation policy, and will yield a significant public benefit, or (iv) the preservation of an historically important land area or a certified historic structure.¹³⁹

Over the past several decades, millions of acres of land across the nation have been conserved by virtue of this tool, and hundreds of non-profit land trusts have formed to use conservation easements to protect their desired resource—in large measure funded by the availability of this protective mechanism.¹⁴⁰ As the tax incentive has gained in popularity, there have been periodic abuses by donors that have been targeted by the Internal Revenue Service (IRS).¹⁴¹ Most recently, the IRS has targeted (in conjunction with the Land Trust Alliance, the national advocacy group

134. The rise of the tax deduction has been credited as one of the principal factors in the rise of the land trust movement that began during this same period. *See, e.g.*, BREWER, *supra* note 49, at 8–9; Marc Campopiano, *The Land Trust Alliance's New Accreditation Program*, 33 *ECOLOGY L.Q.* 897, 899 (2006) (explaining that the “successful preservation of land through conservation easements has been aided, at least in part, by the enactment of myriad federal and state tax incentives to encourage conservation easement donations.”).

135. It is not as simple as stating that the term of the conservation easement is perpetual. The instrument must ensure that the conservation values being secured by the instrument are appropriately protected. In recent years, the tax court decisions evaluating conservation easement donations have increasingly muddled what is required to meet this requirement, which is increasingly daunting. *See* Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 *UTAH L. REV.* 687, 708–715 (2013).

136. Nancy A. McLaughlin, *Conservation Easements and the Proceeds Regulation*, 56 *REAL PROP., TR. & EST. L.J.* 111, 118–19 (2021); *see also* Roger Colinvau, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 *COLUM. J. ENV'T L.* 1, 23–29 (2012) (profiling this tool and critiquing its delivery of conservation on the ground).

137. 26 U.S.C. § 170(h) (2022); Nancy A. McLaughlin, *Internal Revenue Code Section 170(H): National Perpetuity Standards for Federally Subsidized Conservation Easements Part I: The Standards*, 45 *REAL PROP., TR. & EST. L.J.* 473, 475 (2010).

138. For more information about this specific category, *see generally* Bradford W. Wyche, *The Meaning and Application of the “Relatively Natural Habitat” Conservation Purpose of the Internal Revenue Code*, 6 *J.L. PROP. & SOC'Y* 144 (2021).

139. 26 U.S.C. § 170(h)(4)(A) (2022).

140. *See generally* Snape III et al., *supra* note 18, at 876 (profiling the extent and role of conservation easements as a land protection tool).

141. *See, e.g.*, Nancy A. McLaughlin, *Questionable Conservation Easement Donations*, 18–*OCT PROB. & PROP.* 40, 41 (2004); *see* W. William Weeks, Turney Berry, Jonathan Blattmachr, Jason Havens, Nancy A. McLaughlin, James Slaton, Steve Swartz, & Philip Tabas, *ABA RPTE Conservation Easement Tax Force Report: Recommendations Regarding Conservation Easements and Federal Tax Law*, 53 *REAL PROP., TR. & EST. L.J.* 245, 257–331 (2019) (proposing reforms to address concerns while providing some safe harbors for qualifying donative easements).

representing most land trusts)¹⁴² syndicated conservation easements where a promoter has essentially sold the value of the tax deduction to investors in a specific project. This is typically done using an appraisal that shows a substantial difference in the before and after valuation of the purchased property, which varies significantly from the recent purchase price.¹⁴³ In recognition of the fact that a landowner may be giving up significant economic value through this donation, despite challenges,¹⁴⁴ the federal tax incentive continues to be a significant tool for securing land conservation objectives nationally.¹⁴⁵

Beyond the federal tax incentives, many states also offer tax credits or a charitable deduction for easements against state tax liabilities.¹⁴⁶ To date, fourteen states offer tax benefits;¹⁴⁷ the most prominent are Virginia¹⁴⁸ and Colorado.¹⁴⁹ Some state tax programs are broader than the federal tax code.¹⁵⁰ For example, Virginia's program allows landowners who convey a conservation easement to claim a tax credit, rather than a deduction, which is transferrable.¹⁵¹ This allows a landowner to receive a tax credit that they can monetize by selling to an individual or entity who has tax liability to offset even if the landowner does not have sufficient tax

142. *About Us*, LAND TR. ALL., <https://www.landtrustalliance.org/about> (last visited Mar. 29, 2023).

143. *See, e.g.*, Peter Elkind, *The IRS Tried to Crack Down on Rich People Using an "Abusive" Tax Deduction. It Hasn't Gone So Well*, PROPUBLICA (Jan. 3, 2020, 5:00 AM), <https://www.propublica.org/article/the-irs-tried-to-crack-down-on-rich-people-using-an-abusive-tax-deduction-it-hasnt-gone-so-well> (exploring efforts to blunt syndicated conservation easement transactions); Jimmy Godin, *A Sand County Tax Shelter: Syndicated Conservation Easements and Their Toll on the American Taxpayer*, 2022 UTAH L. REV. 213, 224–28 (2022) (same). There are other challenges and controversies associated with tax-incentivized conservation easement project designs, including those involving golf courses. *See, e.g.*, Davis D. Lackey, *Fore! Are Private Golf Clubs Destroying the Purpose of Conservation?*, 72 MERCER L. REV. 597, 603–21 (2021) (discussing this issue generally).

144. *See, e.g.*, Kelly Kay, "Performing Developability:" *Generating Threat and Value in Private Land Conservation*, 128 GEOFORUM 37, 39 (2022) (discussing the challenges embedded in the appraisal process for conservation easement projects).

145. *Income Tax Incentives for Land Conservation*, LAND TR. ALL. (Sep. 27, 2022), <https://landtrustalliance.org/resources/learn/explore/income-tax-incentives-for-land-conservation>.

146. Jeffrey O. Sundberg, *State Income Tax Credits for Conservation Easements: Do Additional Credits Create Additional Value?* 2–3 (Lincoln Inst. of Land Pol'y, Working Paper No. WP11JS1, 2011).

147. Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. POCKET PART 218, 219 (2008); *see also State Land Conservation Tax Incentives as of April, 2019*, LAND TR. ALL., <http://s3.amazonaws.com/landtrustalliance.org/State-Land-Conservation-Tax-Incentives-April-2019.pdf> (last visited Mar. 29, 2023); *Income Tax Incentives*, *supra* note 145.

148. *Land Preservation Tax Credit*, VA. DEP'T CONSERVATION & RECREATION, <https://www.dcr.virginia.gov/land-conservation/lp-taxcredit> (last visited Mar. 29, 2023).

149. *The Conservation Easement Tax Credit: 20 Years of Conservation Success in Colorado*, KEEP IT COLO., <https://www.keepitco.org/conservation-easement-tax-credits> (last visited Mar. 29, 2023). In the face of issues with early tax credits, Colorado has developed a more robust state process for reviewing and issuing tax credits. *See, e.g.*, *Tax Credit Certificates*, COLO. DEP'T REGUL. AGENCIES, <https://conservation.colorado.gov/tax-credit-certificates> (last visited Mar. 29, 2023).

150. Philip M. Hocker, *Transferable State Tax Credits as a Land Conservation Incentive*, in FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 124, 126–28 (James N. Levitt ed., 2005).

151. W. Eugene Seago, *The Effects of the Virginia Land Preservation Credit on Federal Taxable Income: Should the Right Hand Take from What the Left Hand Gave?*, 32 WM. & MARY ENV'T L. & POL'Y REV. 1, 1–5 (2007) (providing overview of this Act).

exposure to use the deduction on their own.¹⁵² Other states provide tax exemptions for protected lands. For example, Minnesota has a Native Prairie Tax Exemption, which provides tax exemptions for landowners granting conservation easements on native prairie segments.¹⁵³

2. Purchased Conservation Easements

There are a broad mix of programs designed to facilitate the purchase of conservation easements from landowners for a variety of reasons at the federal, state, and local levels.¹⁵⁴

At the federal level, the USDA, through the Farm Bill's Conservation Title¹⁵⁵ and the Forest Legacy Program,¹⁵⁶ provides millions of dollars in funding to directly purchase conservation easements from landowners and to provide matching funds to nongovernmental organizations or state and local agencies to support their projects related to working lands.¹⁵⁷ The federal Land and Water Conservation Fund also supports the acquisition of conservation easements.¹⁵⁸ Additionally, other federal departments and agencies devote significant resources to these efforts, including notably, the Department of Defense, through the Readiness and Environmental Protection Integration (REPI) and Sentinel Landscapes programs.¹⁵⁹ Federal purchase program goals range from the protection of the lands around

152. *Using the Conservation Tax Incentive*, LAND TR. ALL., <https://a.storyblok.com/f/120093/x/c6bceaccd/conservationeasementtaxincentivebrochure2016.pdf> (last visited Mar. 28, 2023); but see Leslie Ratley-Beach, *Insight: Land Conservation Erodes from State Tax Credit Treasury Regulations*, BLOOMBERG TAX (Jan. 16, 2020, 7:00 AM), <https://news.bloombergtax.com/daily-tax-report/insight-land-conservation-erodes-from-state-tax-credit-treasury-regulations> (profiling the impact of the June 2019 state and local tax (SALT) regulations on conservation easement deductions at the state level on donative activity); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 98–99 (2004) (charting potential inefficiencies resulting from coupling federal and state tax incentives).

153. Miranda Holeton & David Takacs, *U.S. State-Based Wilderness Law: An Evaluation*, 28 *HASTINGS ENV'T L.J.* 25, 45–46 (2022) (summarizing this program).

154. *See Our Programs: Supporting Land Trusts*, LAND TR. ALL., <https://landtrustalliance.org/what-we-do/our-programs/supporting-land-trusts> (last visited Mar. 29, 2023) (providing high-level overview of the public funds available to facilitate conservation transactions).

155. *Farm Bill*, LAND TR. ALL., <https://landtrustalliance.org/resources/advocate/issues/farm-bill> (last visited Mar. 29, 2023).

156. Owley & Tulowiecki, *supra* note 85, at 55–59 (providing overview of the program and its benefits); Laura S. Beliveau, *The Forest Legacy Program: Using Conservation Easements to Preserve the Northern Forest*, 20 *B.C. ENV'T AFF. L. REV.* 507, 513–15 (1993) (same).

157. USDA, *Wildlife*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/conservation-basics/natural-resource-concerns/animals/wildlife> (last visited Mar. 29, 2023) (exploring the agency's role as a source of funding for conservation on working lands).

158. *Land and Water Conservation Fund*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/lwcf> (last visited Mar. 29, 2023).

159. The Department of Defense (DOD) may not, at first blush, be a logical funder of conservation initiatives. The DOD, however, devotes substantial funding through various initiatives to create buffers around military bases (to avoid land-use conflicts) and to avoid Endangered Species Act concerns. *See, e.g., Readiness and Environmental Protection Integration Program*, U.S. DEP'T DEF, <https://www.repi.mil/> (last visited Mar. 29, 2023).

military bases,¹⁶⁰ to securing historic sites,¹⁶¹ to conserving habitat related to endangered species,¹⁶² to protecting scenic viewsheds.¹⁶³ Often, multiple conservation objectives are encapsulated within a single project.¹⁶⁴

At the state level, many states also dedicate resources to purchasing conservation easements from landowners. Some mid-Atlantic states, for instance, dedicate substantial funding to farmland preservation easements.¹⁶⁵ Similarly, Massachusetts has a variety of tools to fund the purchase of a variety of types of conservation easements, including using funds from Massachusetts's Community Preservation Act, which uses a portion of real estate transfer taxes to fund a variety of conservation-related projects in local communities annually.¹⁶⁶

Local governments also play a role in funding the purchase of conservation easements;¹⁶⁷ one example is Ann Arbor, Michigan.¹⁶⁸ The Ann

160. See, e.g., Adrian Hedden, *Ted Turner Land in New Mexico Conserved in US Military Deal*, ASSOCIATED PRESS (Apr. 10, 2022), <https://www.usnews.com/news/best-states/new-mexico/articles/2022-04-10/ted-turner-land-in-new-mexico-conserved-in-us-military-deal> (summarizing conservation easement protecting Ted Turner's Armendaris Ranch as a buffer for White Sands Missile Range).

161. In the historic preservation context, preservation easements are often acquired as a condition of a grant. For example, the National Park Service, under the Save America's Treasures program, provides grants to fund restoration work. These grants typically require at least a term preservation easement to ensure that the historic property being restored is not insensitively altered or demolished (and thereby securing the value of the public's investment). See, e.g., Jess R. Phelps, *Preserving National Historic Landmarks?*, 24 N.Y.U. ENV'T L.J. 137, 185–88 (2016) (exploring the grant program and its impacts).

162. See, e.g., *Conservation Effort Completed at Florida's Big Bend*, THE CONSERVATION FUND (Dec. 16, 2021), <https://www.conservationfund.org/impact/press-releases/2620-conservation-effort-completed-at-florida-s-big-bend> (profiling a 13,000-plus acre conservation easement designed to protect freshwater flows to the Gulf of Mexico, benefitting multiple species of conservation concern).

163. Nathan J. Baker & James A. Fraser, *Tall Firs, Zip-Lines, and Reserved Interest Deeds: An Assessment of the Effectiveness of Federal Conservation Easements in the Columbia River Gorge National Scenic Area*, 46 ENV'T L. 759, 804 (2017) (examining conservation easements used to protect the viewshed in this area). Scenic conservation easements are one of the earliest forms of conservation easements utilized by the federal government, having been used in the 1930s to protect areas around the Blue Ridge Parkway. See George T. Davis, *Protecting Scenic Views: Seventy Years of Managing and Enforcing Scenic Easements Along the Blue Ridge Parkway* (May 5, 2009) (M.A. thesis, Virginia Polytechnic Institute and State University).

164. See, e.g., *Diverse Partners Save and Revive Daniel Webster's Farm*, PRESERVATION LEADERSHIP F. (Dec. 9, 2015), <https://forum.savingplaces.org/viewdocument/diverse-partners-save-and-revive-da> (reviewing the motivations and parties involved in this significant conservation project).

165. See, e.g., Thomas L. Daniels, *Assessing the Performance of Farmland Preservation in American's Farmland Preservation Heartland: A Policy Review*, 33 SOC'Y & NAT. RES. 758, 758–63 (2020); see also Lori Sallet, *State Purchase of Agricultural Conservation Easement Programs Permanently Protect 3.1 Million Acres As of January 2020*, AM. FARMLAND TR. (Nov. 19, 2020), <https://farmland.org/state-purchase-of-agricultural-conservation-easement-programs-permanently-protect-3-1-million-acres-as-of-january-2020/> (summarizing PACE programs nationally).

166. See, e.g., *CPA: An Overview*, CMTY. PRESERVATION COAL., <https://www.communitypreservation.org/about> (last visited Mar. 20, 2023) (discussing MASS. GEN. LAWS ch. 44B, §§ 1–17).

167. See, e.g., Jessica Owley, *Use of Conservation Easements by Local Governments*, in GREENING LOCAL GOVERNMENT 237 (Keith H. Hirokawa & Patricia E. Salkin eds., 2012) (summarizing the various roles local government can play with regard to conservation easements).

168. Ryan Stanton, *Ann Arbor Greenbelt Program Helping Protect Another 334 Acres Surrounding City*, MICH. LIVE (Dec. 21, 2021), <https://www.mlive.com/news/ann-arbor/2021/12/ann-arbor-greenbelt-program-helping-protect-another-334-acres-surrounding-city.html> (profiling a purchase using this dedicated fund).

Arbor Greenbelt program uses a voter approved property tax surcharge to target prime agricultural lands for conservation.¹⁶⁹ Many other towns have conservation funds that allow the community to purchase desired tracts or conservation easements over priority lands.¹⁷⁰

To summarize, purchase programs are particularly well suited for land protection efforts where a landowner may lack taxable income to efficiently utilize tax benefits accruing from a donative transaction, and have certain safeguards embedded within that limit challenges associated with deductible conservation easements.¹⁷¹ Many of these sources of funding work together to accomplish larger transactions and to match federal, state, local, and private resources to achieve desired conservation objectives.¹⁷²

3. Exacted Conservation Easements

Some conservation easements are secured through the land use development process as exactions.¹⁷³ These easements are typically secured as a condition of receiving land use approval to proceed with a project or to mitigate harms.¹⁷⁴ For instance, consider a farm that a developer wants to convert to housing. As a condition of receiving site plan approval, the developer may agree to convey a conservation easement protecting a certain portion of the site or a sensitive environmental habitat.¹⁷⁵ Although exacted conservation easements are less common than purchased or donated conservation easements, they can play a role in some areas in conserving important lands.¹⁷⁶

4. Mitigation Banking

A final pathway that results in conservation easements being conveyed is through mitigation banking.¹⁷⁷ In mitigation banking, developers

169. *Greenbelt: Partners*, CITY OF ANN ARBOR MICH., <https://www.a2gov.org/greenbelt/Pages/Partners.aspx> (last visited Mar. 29, 2023).

170. *See, e.g., Management of the Conservation Fund*, TOWN OF HANOVER N.H., <https://www.hanovernh.org/open-space-priorities-plan/pages/management-conservation-fund> (last visited Mar. 29, 2023).

171. King Burnett, John D. Leshy, & Nancy A. McLaughlin, *Building Better Conservation Easements for America the Beautiful*, HARV. ENV'T L. REV. ONLINE, Sept. 15, 2021, 1–2.

172. *See, e.g., Andrews Community Forest (Richmond, VT)*, VT. URB. & CMTY. FORESTRY, <https://vtcommunityforestry.org/node/4293/town-forest-stories-pod/richmond> (last visited Mar. 29, 2023) (summarizing a northern Vermont town's acquisition of a 428-acre parcel for use as a community forest and the funding streams needed to complete the project).

173. *See, e.g., Lippmann, supra* note 20, 293–95. Exacted conservation easements are more common in areas with high development pressure where the governmental body can use its leverage to secure the conservation benefit, such as in California or certain areas of Florida. *Id.*

174. *See, e.g., NRCS Wetlands Mitigation Banking Program*, USDA, <https://www.nrcs.usda.gov/wetland-mitigation-banking-program> (last visited Mar. 29, 2023).

175. *See, e.g., Naser v. Deering Zoning Bd. of Adjustment*, 157 N.H. 322, 323–24 (2008) (exploring issues around a conservation easement granted in connection with a cluster development approval).

176. *See* Jessica Owley, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1045 (2006).

177. *Mitigation Banks*, CA COUNCIL LAND TRS., <https://www.calandtrusts.org/conservation-basics/conservation-tools/mitigationbanks/> (last visited Mar. 29, 2023).

who permanently impact wetlands can use compensatory mitigation methods to create new wetlands to offset those being lost.¹⁷⁸ The wetlands that are created through this regulatory process are generally secured by a conservation easement to ensure that the wetlands remain intact and protected.¹⁷⁹ A related form of mitigation project is a habitat bank, which creates habitats for various endangered, threatened, or candidate species to allow parties impacting habitats to account for these losses off-site (ideally, in a more targeted and successful manner).¹⁸⁰ Generally, these habitat-focused banks are also permanently protected by a conservation easement.¹⁸¹ All forms of banks are directly shaped by the regulatory requirements that provide structure for the bank and set the protective parameters for the conservation easements.¹⁸²

The role of government as a funder for the acquisition of conservation easements from landowners introduces a governmental involvement, or public layer, into these lands—whether these easements are secured directly by the governmental body or through a nonprofit organization that receives grant support to carry out the project.¹⁸³

C. Holder

Another role that government plays is as the holder of conservation easements.¹⁸⁴ NRCS, for example, holds conservation easements secured through the Agricultural Conservation Easement Program, Wetland Reserve Easement Program (ACEP-WRE).¹⁸⁵ Many state agencies, such as

178. See Sherry Teresa, *Perpetual Stewardship Considerations for Compensatory Mitigation and Mitigation Banks*, 38 STETSON L. REV. 337, 340–42 (2009).

179. *Id.* Carbon projects, while not requiring a conservation easement in all, or even most cases, have a similar effect. Through the carbon transaction, the carbon benefits that are being protected are secured for the term of the agreement as required under the specific protocol or program (typically forty years in the voluntary market and one hundred years under the California Air Resources Board's regulatory market). See Jess R. Phelps & David P. Hoffer, *California Carbon Offsets and Working Forest Conservation Easements*, 38 UCLA J. ENV'T L. & POL'Y 61, 66–67 (2020).

180. U.S. Fish & Wildlife Service, *Conservation Banking: Incentives for Stewardship*, U.S. DEP'T OF THE INTERIOR, <https://www.fws.gov/sites/default/files/documents/conservation-banking.pdf> (last visited Mar. 28, 2023); *Habitat Banking*, MINN. OFF. SCH. TR. LANDS, <https://mn.gov/school-trust-lands/projects/eco-services/habitat-banking.jsp> (last visited Mar. 29, 2023) (providing a high-level summary of how these banks work and are used by market participants).

181. Amanda Zhang & Katie Allen, *Species and Habitat Conservation Banking*, CONSERVATION FIN. NETWORK (Sept. 30, 2020), <https://www.conservationfinancenetwork.org/2020/09/30/species-and-habitat-conservation-banking> (examining this tool and the use of conservation easements to secure the lasting protection of species-related habitat).

182. See, e.g., *Section 404 of the Clean Water Act: Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, EPA, <https://www.epa.gov/cwa-404/federal-guidance-establishment-use-and-operation-mitigation-banks> (last visited Mar. 29, 2023).

183. See, e.g., *Agricultural Conservation Easement Program—Agricultural Land Easements Program Toolkit*, LAND TR. ALL., <https://landtrustalliance.org/resources/learn/explore/ale-toolkit/> (last visited Mar. 29, 2023).

184. See, e.g., Ian Firth, *Historical Significance of the Blue Ridge Parkway*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/online_books/sero/appalachian/sec2.htm (last visited Mar. 29, 2023) (explaining the National Park Service was one of the first holders of conservation easements—having used this tool back to the 1930s to secure scenic vistas around the Blue Ridge Parkway).

185. NRCS, through its predecessor program, the Wetlands Reserve Program, entered into 14,500 agreements covering 2.7 million acres, a number which continues to expand since this program

the Maryland Agricultural Land Preservation Foundation (MALPF), hold hundreds of conservation easements as an instrumentality of the state.¹⁸⁶ Local governments also serve as holder for important local properties and resource concerns.¹⁸⁷ In short, at all levels, government serves as a holder of conservation easements.¹⁸⁸

The holder of a conservation easement commits to monitor and enforce the terms of the easement over its typically perpetual term.¹⁸⁹ This is not an insignificant commitment.¹⁹⁰ Even as technology facilitates the greater use of remote sensing technology to reduce the need for field visits to verify compliance,¹⁹¹ monitoring still requires holders to spend time and resources on these stewarded lands.¹⁹² If there are violations, working to resolve the violation will depend on the significance of the infraction, the response of the landowner, and the sensitivity of the impacted lands.¹⁹³ Many violations, which result from a minor misstep or a technical foot fault, are resolved through voluntary agreement with the landowner on how to address the violation.¹⁹⁴ There are, however, larger violations that

was merged into the Agricultural Conservation Easement Program in the 2014 Farm Bill. *See* USDA, NAT. RES. CONSERVATION SERV., SAVING THE NATION'S WETLANDS: AGRICULTURAL CONSERVATION EASEMENT PROGRAM WETLAND RESERVE EASEMENTS 1, 3.

186. *Welcome to MALPF*, MD. DEP'T OF AGRIC., <https://mda.maryland.gov/malpf/pages/default.aspx> (last visited Mar. 29, 2023).

187. *See, e.g.*, Samuel J. Robinson, *\$1.1-million Conservation Easement Purchase Finalized in Ann Arbor Township*, MICH. LIVE (Jan. 13, 2021, 12:08 PM), <https://www.mlive.com/news/ann-arbor/2021/01/11-million-conservation-easement-purchase-finalized-in-ann-arbor-township.html> (profiling conservation easement acquired by Ann Arbor Township protecting more than one hundred acres of land).

188. Governmental bodies also serve as co-holders of conservation easements. Co-holders are noted on the deed as holding the conservation easement with another party (typically a non-profit organization). Having a governmental body as a sort of back-up holder provides some additional assurance that a party will remain in place to enforce its terms over a longer term horizon. There may also be some benefit to having a governmental body as a party, creating a governmentally owned property interest, which makes the property more resistant to condemnation claims. *See LTA Fact-sheet: Co-Holding Conservation Easements*, LAND TR. ALL., https://conservationtools.org/library_items/204-LTA-Fact-Sheet-Co-holding-Conservation-Easement (last visited Mar. 29, 2023).

189. *See, e.g.*, Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 DENV. L. REV. 373, 399–409 (2001).

190. *Costs of Conservation Easement Stewardship*, *supra* note 25 (providing data on the costs of stewardship). To lessen some of this cost, the land trust community has formed Terrafirma in recent years as a captive insurance company to defend and defray the costs of enforcing conservation easements held by participating land trusts. The costs of defending governmental-held conservation easements are covered by the governmental body (a sort of self-insurance) which can be beneficial, but as noted, can create prioritization challenges for governmental holders. *See, e.g.*, *About Terrafirma Risk Retention Group*, TERRAFIRMA RRG LLC, <https://terrafirma.org/about> (last visited Mar. 22, 2023).

191. NANCY THOMAS, THE NAT. CONSERVANCY 1–2, <https://ca-science.s3-us-west-1.amazonaws.com/Report+on+Remote+Monitoring+of+Conservation+Easements+FINAL+2020-06-24.pdf> (discussing recent trends in technology in easement monitoring generally).

192. Adena R. Rissman & Van Butsic, *Land Trust Defense and Enforcement of Conserved Areas*, 4 CONSERVATION LETTERS 31, 31 (2010).

193. *See* Putting It into Practice: Easement Enforcement Policy Guidelines, LAND TR. ALL., <http://conservationlaw.org/publications/12-EnforcementPolicy.pdf> (last visited Mar. 29, 2023); *Land Trust: Standards and Practices*, LAND TR. ALL. (2017), <https://landtrustalliance.org/resources/learn/topics/land-trust-standards-and-practices/>.

194. *See, e.g.*, Conservation Easement Holding and Stewardship Policy, VT. HOUS. & CONSERVATION BD. (April 20, 2017), <https://vhcb.org/sites/default/files/programs/conservation/conservation%20policies/easeholdstew.pdf>.

require litigation to resolve, as well as significant resources and efforts to address the issue.¹⁹⁵

Governmental holders' role in the monitoring and enforcement arena is mixed.¹⁹⁶ Governmental holders often face challenges in monitoring the easements under their jurisdiction; this is generally just one of the agencies' extensive responsibilities and there typically are not dedicated funds set up or appropriated specifically for easement monitoring.¹⁹⁷ Depending on the level of government, there may also be geographical challenges regarding the coverage of a large area.¹⁹⁸ The use of governmental agencies as holders generally allows conservation easements to proceed at a reduced cost to the landowner, as the cost of monitoring and enforcement may not be passed along to the them.

D. Backup Holder

It should also be noted that governmental bodies may serve as a backup holder, even if this is not expressly stated in the terms of the easement.¹⁹⁹ If the initial holder of the easement fails in their responsibilities or ceases to function, government may be compelled to step in to safeguard the public's investment in the conserved lands.²⁰⁰ Some states also provide that the state attorney general has standing to intervene to enforce conservation easements against violators, again in recognition of the public's investment and interest in seeing that these agreements are enforced.²⁰¹

On the enforcement side, governmental holders are in a better position to enforce their easements as they typically can rely upon the Department of Justice (DOJ),²⁰² state attorneys general, or the county or local

195. *Why TerraFirma*, TERRAFIRMA RRG LLC, https://terrafirma.org/why_terrafirma (last visited Mar. 29, 2023) (providing litigation cost data for defense work—including two cases costing over \$1,000,000 each to litigate).

196. *See* Pidot, *supra* note 119, at 12 (charting these issues); *see also* Jessica Owley, *The Increasing Privatization of Environmental Permitting*, 46 AKRON L. REV. 1091, 1128–30 (2013) (discussing the challenges and experience of agencies in monitoring conservation easements generally).

197. *See, e.g.*, Amy W. Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, WISC. L. REV. 1237, 1240 n.8 (2009) (profiling these challenges, specifically regarding mitigation banks).

198. *See id.* at 1241 n.10 (exploring capacity issues generally).

199. *See, e.g.*, *Easements*, NEW LONDON CONSERVATION COMM'N, <http://www.nl-nhcc.com/easements/easements.htm> (last visited Mar. 29, 2023) (profiling the role of a holder and back-up holder).

200. REINVENTING CONSERVATION EASEMENTS, *supra* note 33, at 20–21.

201. *See* WeConservePa, *Who Has Standing? Conservation Easements in Pennsylvania Courts*, PA. LAND TR. ASS'N (Apr. 27, 2016), <https://conservationtools.org/guides/121-who-has-standing> (explaining the role of the state's attorney general's office in enforcing conservation easements); *see also* Jessica E. Jay, *Third-Party Enforcement of Conservation Easements*, 29 Vt. L. Rev. 757, 771–73 (2005) (exploring both attorney general standing and neighbor or citizen standing related to conservation easements).

202. *See, e.g.*, Press Release, U.S. Attorney's Office W. Dist. of Missouri, DOJ, Carrollton Property Owner Pays Settlement for Logging in Wetlands Easement (Nov. 4, 2013), <https://www.justice.gov/usao-wdmo/pr/carrollton-property-owner-pays-settlement-logging-wetlands-easement>. Although federal departments, such as U.S. Department of Agriculture and the Department of Interior, have their own internal offices of general counsel, litigation on behalf of the U.S. government remains

attorney for assistance in addressing the violation,²⁰³ potentially without having to incur additional costs or expenses.²⁰⁴

E. Land Manager

In addition to its role as holder—responsible for monitoring and enforcing these agreements—government takes on an expanded role based on the goals of a specific project.²⁰⁵ For example, for many working forest conservation easement projects, one of the desired outputs is allowing the public access to the lands.²⁰⁶ As a result, the governmental entity responsible for the easement often works with the landowner to develop a recreational use plan designated to facilitate and direct the public's use of the private lands.²⁰⁷ This may also include handling the construction and maintenance of road and trail networks on private lands.²⁰⁸

Similarly, the governmental body may take on additional responsibilities related to critical species habitat, such as taking on species habitat restoration and monitoring beyond what is normally contemplated.²⁰⁹

F. Landowner

Government can also play a role as a landowner.²¹⁰ Generally, this involves a governmental body acquiring lands that are already subject to a conservation easement²¹¹ or potentially encumbering their own lands to

the purview of the Department of Justice. See OFFICE OF THE GENERAL COUNSEL, 2021 USDA EXPLANATORY NOTES—EXECUTIVE OPERATIONS: OFFICE OF GENERAL COUNSEL 12-3 (2021), <https://www.usda.gov/sites/default/files/documents/15ogc2021notes.pdf>.

203. EL PASO CNTY., COLO., CONSERVATION EASEMENT PROGRAM POLICIES AND PROCEDURES 12–13 (Nov. 17, 2020), <https://assets-communityservices.elpasoco.com/wp-content/uploads/Conservation-Easement-Program-Policies-and-Procedures-2020.pdf> (explaining how El Paso County Attorneys assist in enforcing conservation easements).

204. See Cheever & McLaughlin, *supra* note 51, at 150.

205. Rissman & Sayre, *supra* note 9, at 525 (exploring the complexity of roles easement holders play post-protection).

206. Andrew M. Loza, *Working Forest Conservation Easements: A Property Rights-Based Tool for Conservation*, WECONSERVEPA (Oct. 11, 2021), <https://conservationtools.org/guides/195-working-forest-conservation-easement>.

207. Andrew M. Loza, *Conservation Easements: An Introduction for Private Landowners*, WECONSERVEPA, <https://conservationtools.org/guides/149-conservation-easements> (last visited Mar. 31, 2023).

208. See, e.g., N.Y. STATE DEP'T OF ENV'T CONSERVATION, CEDARLANDS CONSERVATION EASEMENT RECREATION MANAGEMENT PLAN TOWN OF LONG LAKE, HAMILTON COUNTY, NEW YORK 13–14, 19–20 (2019), https://www.dec.ny.gov/docs/lands_forests_pdf/cedarlandsfinalrmp.pdf.

209. See, e.g., Spencer Miller, *supra* note 45; see also *Private Lands Restoration*, MINN. LAND TR. (Nov. 26, 2018), <https://mnland.org/protect-land/restoration-options/> (explaining that the conservation easement may include specific restoration goals and objectives, which can involve a continuing land trust role).

210. Obviously, within the land conservation arena, one of the principal roles that the federal government can play is through the management of its own lands – which are principally managed by four action agencies: the Bureau of Land Management, the National Park Service, the Fish and Wildlife Service (all within the Department of Interior) and the U.S. Forest Service (within the Department of Agriculture). For a summary of these agencies, see Owley & Phelps, *supra* note 89, at 850–60.

211. See, e.g., TR. PUBLIC LAND & HAWAIIAN ISLANDS LAND TR., COMMUNITY GUIDE TO HAWAI'I LAND CONSERVATION 8–9 (summarizing the Hakipu'u Lo'I Kalo project and the layered ownership and protections).

protect a specific use in perpetuity over time.²¹² Both of these phenomena are more commonly experienced by state and local governments than by the federal government.²¹³ In some instances, acquisition of the conservation easement over lands where the governmental body already holds a conservation easement may result in the merger of this interest, leading to the elimination of the easement in favor of the fee interest.²¹⁴

III. EVALUATING POTENTIAL CONFLICTS

To put the above identified governmental roles into context, it is instructive to examine how these varied roles are navigated within a specific conservation context. To this end, this Part focuses on the working lands conservation easement programs administered by NRCS. Over the past two decades, the development of NRCS's conservation easement authorities and portfolio has transformed an agency historically focused on providing technical assistance to farmers in carrying out conservation measures on private lands into a significant conservation easement funder and holder.²¹⁵ NRCS's conservation easement programs have multiple purposes and differ significantly in structure from program to program, which further makes their roles worth understanding.²¹⁶

The decisions that policymakers have made in implementing Farm Bill conservation priorities demonstrate some of the available options and the nature of the relationship between government and its nonprofit partners. The Farm Bill is omnibus legislation, enacted approximately every five years, that provides funding for the USDA's program in rural America.²¹⁷ The Farm Bill is the largest source of funding for working lands conservation and dedicates significant resources to conservation easement acquisition.²¹⁸ These programs have elected, in some instances, to have the

212. This can also take the form of government granting an easement to a non-profit organization to add a layer of perpetual protection upon future decisionmakers. *See, e.g.*, Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements Over Public Land*, 77 U. CHI. L. REV. 341, 343–48 (2010) (profiling the town of Marlboro, Vermont's decision to grant a permanent conservation easement over town-owned lands to the Vermont Land Trust).

213. For some federal agencies, such as the Forest Service, they may view a preexisting conservation easement as an unacceptable encumbrance on title, leading the agency to not purchase or accept a donation of the property. *See* USDA, TITLE 440—CONSERVATION PROGRAMS MANUAL: PART 528—ACEP § 528.34(A)(4) (March 2015) (explaining when an existing restriction or conservation easement would render the land ineligible for ACEP).

214. Merger of conservation easements is a complicated issue in light of the perpetual nature of these interests. Some states have anti-merger language in their state enabling legislation and some conservation easements expressly address this potential future outcome by providing a process for addressing the unification of the fee or easement interests in a single party (often involving a new holder to enforce the terms of the restriction). *See, e.g.*, Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 L. & CONTEMP. PROBS. 279, 280 (2011).

215. *See, e.g.*, Robert E. Bonnie, *Financing Private Lands: Conservation and Management Through Conservation Incentives in the Farm Bill*, in FROM WALDEN TO WALL STREET: FRONTIERS OF CONSERVATION FINANCE 183, 185–86 (James N. Levitt ed., 2005).

216. *Easements: Protecting and Enhancing our Natural Resources*, USDA, <https://www.nrcs.usda.gov/programs-initiatives/easements> (last visited Mar. 31, 2023).

217. *What Is the Farm Bill?*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/> (last visited Mar. 31, 2023).

218. *See, e.g.*, *Farm Bill*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Our-Lands/Farm-Bill> (last visited Mar. 31, 2023).

conservation easements held by NRCS; in others, the conservation easements are held by a nonprofit holder, despite significant agency involvement and funding.²¹⁹ In the latter category, further decisions may be needed involving whether these programs are simply grant programs, where the federal government provides its funding with minimal post-acquisition oversight, or whether they involve more of a shared partnership, where the various actors work together over the long-haul—such as jointly monitoring the property for violations and more evenly sharing the responsibilities of enforcement. Over the past few Farm Bills, policymakers have been seeking something different—a more flexible relationship with evolving characteristics given organizational learning, experience, and the varying policy priorities that reflect each parties' comparative strengths and weaknesses.²²⁰

To consider these issues, this Part provides a summary of NRCS's conservation easement programs—the Agricultural Conservation Easement Program (ACEP) and the Regional Conservation Partnership Program (RCPP)—before examining the priorities of both NRCS and its land trust and state agency partners in acquiring conservation easements on working lands.

A. NRCS and Its Conservation Easement Programs

This Section profiles the history of NRCS's conservation programs, discusses ACEP and RCPP, and examines how these conservation easement programs have changed over the last two Farm Bills and may continue to evolve in the future.

1. A Brief History of NRCS and Conservation Easements

Born out of the environmental calamity of the Dust Bowl,²²¹ the NRCS was established as the Soil Conservation Service (SCS) in 1935.²²² The SCS was established to assist farmers in the technical design and implementation of conservation practices on working lands in order to limit soil erosion.²²³ SCS's early projects focused on demonstrating favorable

219. See, e.g., USDA, FISCAL YEAR 2022 REGIONAL CONSERVATION PARTNERSHIP PROGRAM NOTICE OF FUNDING OPPORTUNITY 11, 31–34 (2022), https://www.nrcs.usda.gov/sites/default/files/2022-08/Full%20Announcement_USDA-NRCS-NHQ-RCPP-22-NFO0001136_Classic_1.pdf (discussing options for structuring a RCPP conservation easement and who holds these interests in land).

220. *Digging Into the 2023 Farm Bill: Senate Hearings Kick-Off the Long Road to the 2023 Farm Bill*, NAT'L SUSTAINABLE AGRIC. COAL. (July 22, 2022), <https://sustainableagriculture.net/blog/digging-into-the-2023-farm-bill-senate-hearings-kick-off-the-long-road-to-the-2023-farm-bill/>.

221. Although the SCS was formed in response to the Dust Bowl and Great Depression, efforts to promote soil conservation efforts have a longer history. See Douglas Helms, *Two Centuries of Soil Conservation*, OAH MAG. HIST., Winter 1991, at 24, 24–26.

222. *A Brief History of NRCS*, USDA, <https://www.nrcs.usda.gov/about/history/brief-history-nrcs> (last visited Mar. 31, 2023).

223. See, e.g., DOUGLAS HELMS, USDA, HUGH HAMMOND BENNETT AND THE CREATION OF THE SOIL CONSERVATION SERVICE, SEPTEMBER 19, 1933–APRIL 27, 1935 (2010),

conservation farming practices, such as contour plowing and terracing, and creating a professional staff able to assist farmers in implementing these measures.²²⁴ SCS's role would gradually expand to include set-aside programs, or programs where farmers were paid to not farm lands for a variety of economic and conservation motivations, and cost-share programs, which were designed to have government pay for the implementation, in part, of conservation practices in recognition of the societal benefits provided by the improvement of farming practices.²²⁵ In 1994, in recognition that the agency's work had expanded beyond addressing soil erosion and needed to continue to evolve, SCS was renamed as the NRCS.²²⁶

Conservation easements would play an important part in the expanded mission of the agency.²²⁷ In 1990, a pilot program was created to allow NRCS to acquire conservation easements on working farmlands.²²⁸ The Wetland Reserve Program (WRP) was also created as a standalone program in the early 1990s to restore wetlands in areas that had been converted to croplands.²²⁹ This pilot program would expand, until the consolidation under the 2014 Farm Bill, into a broad mix of conservation easement acquisition programs including standalone programs focused on wetlands,²³⁰ grasslands,²³¹ forestlands,²³² and farmlands.²³³

NRCS currently has two primary funding mechanisms for conservation easement acquisitions: ACEP and RCPP.

https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/stelprdb1044444.pdf (profiling the agency's early work and the role of its founder, Hugh Hammond Bennett).

224. Laurie Ristino & Gabriela Steier, *Losing Ground: A Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENV'T L. 59, 82 (2016).

225. Sandra S. Batic, *Soil Conservation in the 1980s: A Historical Perspective*, 59 AGRIC. HIST. 107, 116–17 (1985) (profiling the expansion of the agency's work over time to meet evolving policy concerns).

226. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. 103-354 § 246, 108 Stat. 3178, 3223–25; 7 U.S.C. § 6936.

227. See Jess R. Phelps, *Conservation, Regionality, and the Farm Bill*, 71 ME. L. REV. 294, 312–324 (2019) [hereinafter *Conservation, Regionality, and the Farm Bill*] for an overview of NRCS's programs.

228. TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 80–83 (1997).

229. Brian J. Oakey, *The Wetland Reserve Program: Charting a Course Through the WRP*, 8 DRAKE J. AGRIC. L. 631, 632–33 (2003) (profiling the early history of this program).

230. See Ralph E. Heimlich, *Costs of an Agricultural Wetland Reserve*, 70 LAND ECON. 234, 234 (1994) (summarizing the creation of the Wetland Reserve Program in the 1990 Farm Bill).

231. ADENA RISSMAN, ERIN GREEN, & CLAIRE WIDMANN, GRASSLAND 2.0, MANAGED GRAZING AND GRASSLAND: POLICY TRENDS AND OPPORTUNITIES FOR RENEWAL IN WISCONSIN 4, https://grasslandag.org/files/2021/09/GL2.0-Policy-Brief_FINAL.pdf (discussing the Grassland Reserve Program's introduction in the 2002 Farm Bill).

232. See, e.g., Healthy Forest Reserve Program, 75 FED. REG. 6539 (Feb. 10, 2010) (providing the regulatory authority for NRCS's administration of the Healthy Forest Reserve Program and profiling its adoption in the Healthy Forest Restoration Act of 2003, Pub. L. 108-148, 117 Stat. 1887 (codified at 16 U.S.C. §§ 6571–6578)).

233. Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Non-Agricultural Uses*, 28 ENV'T L. 113, 115–18 (1998) (explaining the early roots, in the 1996 Farm Bill, of farmland preservation easement programs within USDA).

2. Agricultural Conservation Easement Program

The Farm Bill is the largest federal program designed to secure the protection and conservation of working lands.²³⁴ Conservation easements have played a significant role in carrying out Congress's conservation priorities over the last few Farm Bills.²³⁵ The 2018 Farm Bill allocates \$450 million annually over the legislation's five-year authorizing period for the acquisition of property interests.²³⁶ There are two primary strands of ACEP activity: (1) the Agricultural Conservation Easement Program, Wetland Reserve Easement (ACEP-WRE),²³⁷ and (2) the Agriculture Land Easement Program (ACEP-ALE).²³⁸ These programs, although both under the ACEP umbrella, operate very differently and reflect the decisions NRCS has made in how to work with its partners and to achieve the specific land management objectives each program is designed to secure.

a. ACEP-WRE

As its name indicates, ACEP-WRE easements are designed to advance wetland-related habitat goals.²³⁹ This program is not designed to protect existing wetlands, but instead to restore, recreate, or reestablish wetland habitats on lands that have wetland characteristics but have been converted to agricultural use—often improvidently.²⁴⁰ This program encourages farmers to restore lands that are often ill-suited for farming to wetland use, which may also make economic sense if the lands are flood-prone.²⁴¹ In addition to entering into a conservation easement to secure these lands, these projects generally involve a restoration plan—the

234. *Farm Bill*, *supra* note 155; *see also* Am. Farmland Tr., *ACEP-ALE for Landowners*, FARMLAND INFO. CTR., <https://farmlandinfo.org/acep-ale-for-landowners/> (last visited Mar. 31, 2023) (providing background and resources regarding the ACEP-ALE program overall).

235. *See* MEGAN STUBBS, CONG. RSCH. SERV., IF11199, 2018 FARM BILL PRIMER: TITLE II CONSERVATION PROGRAMS (2019).

236. *Maximizing the Economic and Environmental Benefits of ACEP-ALE*, AM. FARMLAND TR., https://farmland.org/wp-content/uploads/2020/11/AFT-Maximizing_the_Economic_and_Environmental_Benefits_of_ACEP-ALE.pdf [hereinafter *Benefits of ACEP-ALE*] (last visited Mar. 31, 2023) (providing summaries of continuing federal investment in working lands conservation).

237. ACEP-WRE is the successor program to the Wetland Reserve Program, which was originally established in the 1990 Farm Bill. *Agricultural Conservation Easement Program*, *supra* note 11.

238. *Agricultural Conservation Easement Program*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/> (last visited Mar. 31, 2023) [hereinafter *ACEP*]. NRCS administers two other easement programs through ACEP.

239. *See, e.g.*, Scott Yaich, *Wetlands and the Farm Bill*, DUCKS UNLIMITED, <https://www.ducks.org/conservation/public-policy/farm-bill/wetlands-and-the-farm-bill> (last visited Mar. 31, 2023) (profiling the intent and objectives of this program).

240. *See* NRCS Mass., *How NRCS Wetland Reserve Easements Work*, USDA (Mar. 21, 2016), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcseprd888660.pdf.

241. R.A. Bishop, J. Joens, & J. Zohrer, *Iowa's Wetlands, Present and Future with a Focus on Prairie Potholes*, 105 J. IOWA ACAD. SCI. 89, 91 (1998) (examining the role of this program in Iowa's wetland restoration efforts).

series of steps or activities that the NRCS will carry out to bring the wetland back—and the NRCS will take fiscal responsibility for funding and executing these restoration activities.²⁴²

Given the purpose of the ACEP-WRE easements, they are comparatively restrictive,²⁴³ the type of conservation easement used is known as a reserved interest deed.²⁴⁴ Under ACEP-WRE's reserved interest deeds, the landowner is conveying their property rights to the USDA while reserving certain rights to its continued use (chiefly, quiet enjoyment and recreational use of the land).²⁴⁵ Any rights that are not specifically reserved go to the NRCS, which helps to ensure that the conservation values are secured.²⁴⁶ Given that these conservation easements are restoring wetlands, and the significant investment that NRCS is making in acquiring and implementing a restoration plan on the property, this degree of agency control over the conserved lands makes sense.²⁴⁷

As far as the payment to the landowner, compensation is typically not based on an appraisal²⁴⁸ but instead on the results of an Area-Wide Market Analysis (AWMA), which determines land prices in a geographic area.²⁴⁹ Based on the AWMA, NRCS then sets Geographic Area Rate Caps (GARCs) which preestablish the specific rate that the agency will pay to purchase the protection of these lands.²⁵⁰ The GARC rate is generally used

242. Restoration of wetlands is often complex. The agency has learned from several decades of administering this program how to design restoration projects that will stand the test of time and will not impose significant management obligations on the new landowner. Some of the earlier restorations under this program were often complex construction projects designed to bring about a type of wetland that might be valued by the landowner for recreational activities (such as duck hunting). The agency now has more discretion to determine what type of wetlands to bring about through the project, which may or may not align with these recreational goals. Gregory Sonnier, Patrick J. Bohlen, Hillary M. Swain, Steve L. Orzell, Edwin L. Bridges, & Elizabeth H. Boughton, *Assessing the Success of Hydrological Restoration in Two Conservation Easements Within Central Florida Ranchland*, PLOS ONE (July 3, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0199333> (examining the restoration methodology utilized by the agency).

243. See *Wetland Reserve Easements*, USDA, <https://www.nrcs.usda.gov/programs-initiatives/wre-wetland-reserve-easements/kentucky/wetland-reserve-easements> (last visited Mar. 31, 2023).

244. *Id.*; Lauri DeBrie Thanheiser, *The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of a Contaminated Property*, 24 B.C. ENV'T AFF. L. REV. 271, 300 (1997) (exploring this type of conservation easement in practice).

245. See *Wetland Reserve Easements*, *supra* note 243.

246. *But see* Baker & Fraser, *supra* note 163, at 760–62 (exploring the conservation outcomes that this conservation easement type secured as well as some of the challenges).

247. See REINVENTING CONSERVATION EASEMENTS, *supra* note 33, at 4 (explaining what a reserved interest deed does, the merits of this approach from an agency perspective, and why land trusts have largely avoided its use—for liability reasons and to avoid potentially adverse tax implications).

248. See 7 C.F.R. § 1468.34 (explaining payment for an ACEP-WRE conservation easement is the lowest of the following three values: (1) the fair market value; (2) the geographic rate cap; and (3) a written offer by the landowner (agreeing to accept a lower price)).

249. NB-440-21-19 PGM – *Areawide Market Analysis (AWMA) Statement of Work (SOW) and Specifications for the Wetland Reserve Easements Component of the Agricultural Conservation Easement Program Guidance for Fiscal Year 2022*, USDA, <https://directives.sc.gov.usda.gov/viewerFS.aspx?hid=46713> (last visited Mar. 23, 2023).

250. ANDREW SEIDL, RYAN SWARTZENTRUBER, & REBECCA HILL, PUBLIC BENEFITS OF PRIVATE LANDS CONSERVATION: EXPLORING ALTERNATIVE COMPENSATION MECHANISMS 7, 15–16 (2018) (explaining GARCs generally).

in these transactions given the fact that compensation is set early in the process, is transparent to the landowner, and avoids the cost and delay of an appraisal.²⁵¹

Given the very specific goals of the WRE program, the federal government sets the parameters and funding levels for this program through the Farm Bill and its authorizing legislation.²⁵² NRCS then is responsible for negotiating the purchase of this interest as an agency.²⁵³ ACEP-WRE easements are directly acquired from landowners by NRCS.²⁵⁴ NRCS will serve as the easement holder, taking responsibility for both monitoring and enforcing its terms.²⁵⁵ NRCS also takes lead responsibility for restoring wetlands under this program, which is an integral part of making the program work—designing wetlands that, with minimal maintenance, can provide the wetland characteristics that the program is intended to create.²⁵⁶

b. ACEP-ALE

In contrast to ACEP-WRE's role, ACEP-ALE's programmatic objective is to protect farmland that is threatened with potential conversion to nonagricultural use.²⁵⁷ Although the motivations for this work are more complicated and diverse,²⁵⁸ this goal results in funding for conservation easement acquisitions across the country that focus on restricting these lands to being farmed and not lost to development pressure, which results

251. See, e.g., *Use Federal Funds to Protect Agricultural Lands and Aid Landowners with Conservation Stewardship*, USDA (May 16, 2019), <https://dnr.maryland.gov/met/Documents/MLCC2019/FundsProtectAGLands.pdf> (noting that the GARC is generally used).

252. See 7 C.F.R. § 1468.34(a). Although NRCS sets the policy parameters for this program, state government, given its ability to control property law, plays a role. To address this, the Farm Bill takes into account state limits on perpetuity for conservation easements and, in ACEP-WRE, allows for non-permanent conservation easements to be acquired by NRCS at a lower compensation rate. The alternative would be for NRCS to not acquire interests in lands in certain states that Congress and the agency have sought to avoid.

253. Jimmy Bramblett, Deputy Chief for Programs, NRCS, USDA, Testimony before the Agriculture, Nutrition & Forestry Committee of the United States Senate (June 29, 2017), https://www.agriculture.senate.gov/imo/media/doc/Testimony_Bramblett.pdf (profiling the various issues that NRCS must address as easement holder).

254. 7 C.F.R. § 1468.37.

255. See, e.g., *Agricultural Conservation Easement Program*, *supra* note 11.

256. See, e.g., Katherine E. Lewis, Christopher T. Rota, & James T. Anderson, *A Comparison of Wetland Characteristics Between Agricultural Conservation Easement Program and Public Lands Wetlands in West Virginia, USA*, 10 *ECOLOGY & EVOLUTION* 3017, 3017–23, 3027–28 (2020). This is a change from past projects NRCS often sought to carry out through the Wetlands Reserve Program, the predecessor easement program focused on wetlands restoration. In the early days of WRE, NRCS would occasionally design a restored wetland that would require significant ongoing maintenance and attention to retain the desired wetland characteristics that the agency was seeking to reintroduce on the landscape. These projects were expensive to operate and maintain and were dependent on a specific landowner being willing to commit to the level of engagement, which sometimes worked, but not always. Based on early learning, NRCS has moved away from more complex wetland design and has begun to evaluate restoration costs as part of its filter for evaluating potential ACEP-WRE projects. NRCS, USDA, *CONSERVATION PRACTICE STANDARD, WETLAND RESTORATION: CODE 657* (2011).

257. *Agricultural Conservation Easement Program*, *supra* note 11 (explaining the purposes of the program).

258. See, e.g., *Defining the Role of Conservation*, *supra* note 76, at 631–42 (exploring the various motivations for farmland preservation generally).

in a materially different type of easement.²⁵⁹ ACEP-ALE easements are more permissive than ACEP-WRE easements and typically allow for a variety of activities to occur on the land and focus on restricting the degree of commercial use of the property,²⁶⁰ the level of impervious surfaces,²⁶¹ and the number of subdivisions that can occur on the property.²⁶²

ACEP-ALE also operates fundamentally differently than its wetland-focused counterpart in that the easements funded by this program are not held by the federal government but instead by qualified entities through either a cooperative or grant agreement.²⁶³ Under ACEP-ALE, the NRCS will provide matching funds to the entities, up to fifty percent of the cost of acquisition, who in turn must bring the additional fifty percent to the table.²⁶⁴ This requires the land trust or state agency to raise or appropriate funds for this purpose, although up to twenty-five percent of the project cost can be donated by the landowner as match through a bargain sale.²⁶⁵

For ACEP-ALE, the federal government sets the policy parameters through the Farm Bill.²⁶⁶ The federal government also funds these transactions but does not contract directly with the landowner.²⁶⁷ Instead,

259. See *Benefits of ACEP-ALE*, *supra* note 236 (profiling the goals and objectives of the program).

260. *ACEP-ALE for Landowners*, *supra* note 234 (providing information on the restrictions contained in a typical ACEP-ALE conservation easement).

261. 7 C.F.R. § 1468.25. Impervious surface limits are generally set at no greater than 2% of the conserved area. This can be waived by the state conservationist and for some types of farms this may be too low (although no waiver can go beyond 7% of the conserved area). See USDA, TITLE 440—CONSERVATION PROGRAMS MANUAL: PART 528—ACEP § 528(F)(2) (March 2015).

262. Jess R. Phelps, *Subdivision and Conserved Farmland*, 86 TENN. L. REV. 735, 761–65 (2019) [hereinafter *Subdivision and Conserved Farmland*] (profiling the options and policy decisions that can be made as far as permitting subdivision in an ACEP-ALE conservation easement).

263. See, e.g., JEROME FAULKNER & LISA MCCAULEY, NRCS USDA, ACEP ALE 101 (2019) https://alliancerally.org/wp-content/uploads/2019/05/Rally2019_A15.pdf; see also *ACEP-ALE for Entities*, AM. FARMLAND TR., <https://farmlandinfo.org/acep-ale-for-entities/> (last visited Mar. 31, 2023).

264. USDA, NRCS, *ACEP-ALE Cost-Share Assistance and Match Requirements* (2018 Farm Bill Enrollments Only) (on file with author). This match requirement allows the federal government to leverage its investment towards getting more conservation ground. The drawback to this perhaps is that it does provide a material advantage to those states who allocate funding to farmland preservation efforts and have this funding available as a dedicated match. For example, in Vermont, the Vermont Housing and Conservation Board (VHCB) provides matching funds for the Vermont Land Trust's acquisition of conservation easements across the state and currently matches dollar for dollar the federal investment (as the complete match). See VT. HOUS. & CONSERVATION BD., POLICY: FUNDING CONSERVATION OF AGRICULTURAL LAND 1–5 (2023) (explaining the role of VHCB and priorities of project selection).

265. John Piotti, *Opinion: Farm Bill ACEP-ALE Will Stem Farmland Loss*, AGRI-PULSE (July 23, 2018, 10:00 AM), <https://www.agri-pulse.com/articles/11250-opinion-farm-bill-acep-ale-will-stem-farmland-loss> (summarizing the potential impacts of the investments made in this program in the 2018 Farm Bill).

266. See, e.g., Jennifer Dempsey, *New Resources Help Landowners Participate in the Federal Farmland Protection Program, ACEP-ALE*, AM. FARMLAND TR. (Feb. 3, 2021), <https://farmland.org/new-resources-help-landowners-participate-in-the-federal-farmland-protection-program-acep-ale/> (explaining this program structure and providing resources to help landowners connect with participating entities).

267. See, e.g., *ACEP*, *supra* note 238.

NRCS provides funds to its partners to fund conservation easement transactions, who will also serve to monitor and enforce these agreements.²⁶⁸

3. The Regional Conservation Partnership Program (RCPP)

The other major conservation easement program administered by NRCS is the RCPP.²⁶⁹ RCPP is a comparatively new program for advancing working lands protection.²⁷⁰ First created in the 2014 Farm Bill, RCPP was intended to increase the agency's ability to partner with a wide variety of potentially aligned actors and to leverage federal funding to increase NRCS's ability to work on bigger and more diverse projects.²⁷¹

Under the 2014 Farm Bill, RCPP was created to insert flexibility into the NRCS's conventional conservation programs.²⁷² RCPP was specifically designed to allow USDA, through NRCS, and the funding authorities of the Commodity Credit Corporation, to leverage partnerships to accomplish conservation at scale.²⁷³ The original RCPP had two mechanisms for funding. First, \$100 million was allocated to the RCPP.²⁷⁴ Second, an additional seven percent of funding, for what were referred to as covered programs, was also devoted to this new program.²⁷⁵ The thinking behind this structure was that the 2014 RCPP was to use NRCS's existing conservation programs, referred to as the covered programs, to meet regional objectives.²⁷⁶ These covered programs were (1) the Conservation Stewardship Program (CSP), (2) the Environmental Quality Incentives Program (EQIP), (3) the Healthy Forests Reserve Program (HFRP), and (4) the ACEP program.²⁷⁷ Instead of using these specific covered programs as they traditionally operated, NRCS proposed to work with partners and deployed these programs to meet specific conservation objectives through partner projects.²⁷⁸ Additionally, the Farm Bill gave NRCS the authority to waive regulatory—not statutory—requirements related to the covered

268. USDA, TITLE 440—CONSERVATION PROGRAMS MANUAL: PART 528—ACEP § 528.91(A) (March 2015) (providing monitoring and enforcement and recordkeeping standards in Subpart J).

269. *Regional Conservation Partnership Program*, *supra* note 12.

270. *See, e.g., id.* (summarizing the initial RCPP's operations and impacts).

271. Jonathan Coppess & Todd Kuethe, *The Regional Conservation Partnership Program in the Farm Bill*, FARM DOC DAILY (May 29, 2014), <https://farmdocdaily.illinois.edu/2014/05/the-regional-conservation-partnership-program-in-the-farm-bill.html> (examining the original RCPP).

272. Callie Eidenberg, *The Next Farm Bill Can Jump-Start Agricultural Conservation: Here's How.*, ENV'T DEF. FUND (Oct. 24, 2017), <https://blogs.edf.org/growingreturns/2017/10/24/farm-bill-rcpp-conservation-innovation/>.

273. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014); *see also* Jonathan Coppess, *A Return to the Crossroads: Farming, Nutrient Loss, and Conservation*, 39 U. ARK. L. REV. 351, 377 (2017) (explaining that “[u]nlike previous conservation programs, RCPP is unique in that it requires matching assistance from non-federal-entity partners to leverage private funding for region-wide conservation outcomes.”).

274. MEGAN STUBBS, CONG. RSCH. SERV., P.L. 113-79, CONSERVATION PROVISIONS IN THE 2014 FARM BILL 12 (2014).

275. *Id.* at 12–13.

276. *See id.* at 12.

277. *Id.* at 12–13. Part of the motivation behind this program's enactment was, similar to the motivation that led to the ACEP consolidation, to combine a variety of NRCS's existing regional initiatives, such as the Great Lake Basin Program, into a single effort.

278. *Conservation, Regionality, and the Farm Bill*, *supra* note 227, at 333–34.

programs if the waiver was reasonably necessary to achieve the underlying conservation objective.²⁷⁹ This enhanced the program's ability to tailor its objectives to a specific regional need.²⁸⁰ For conservation easements, this meant that some regulatory requirements could be waived for specific projects, but mostly it meant that there was additional funding available for the applicable funding cycle.²⁸¹

In 2018, RCPP was further modified to build upon the lessons learned from the first program cycle to foster even more flexibility (moving away from working through the existing covered program model to RCPP-specific projects) and the potential for expanded public and private partnerships.²⁸² Instead of working through the covered programs, RCPP now operates as a standalone program.²⁸³ On the conservation easement side, this means that NRCS is no longer restricted to working through the ACEP easement programs but has more flexibility in designing its conservation easement offerings for a specific RCPP project.²⁸⁴ Specifically, to utilize this flexibility, NRCS designed two forms of conservation easements. The first category, U.S.-held conservation easements, applies to conservation easements that are held by the federal government, which by regulation cover "any agriculturally linked use, such as cropland, grasslands, or riparian areas buffering agricultural lands."²⁸⁵ This allows NRCS to fund and secure a broader variety of lands through its conservation easement acquisition activities but complicates its otherwise clearly defined role.²⁸⁶ The second category is entity-held conservation easements.²⁸⁷ Entity-held conservation easements, "in addition to . . . protect[ing] working agricultural lands (as allowed under ALE), . . . may be enrolled on other eligible land, including forest land, wetlands, and riparian areas."²⁸⁸ This new flexibility also allows NRCS, through its partners, to protect additional types of lands that previously could not be protected under its prior authorities. Conservation easements held by partner entities will receive a fifty percent match (similar to the ACEP-ALE), easements resembling the level of protection in the HFRP will receive a seventy-five percent match,

279. *Id.* at 334.

280. *Id.*

281. *2018 Farm Bill Breakdown: RCPP*, NAT'L ASS'N CONSERVATION DIST. (Jan. 10, 2019), <https://www.nacdnet.org/2019/01/10/2018-farm-bill-breakdown-rcpp/>.

282. *Regional Conservation Partnership Program: Natural Resources Conservation Service*, USDA, https://www.nrcs.usda.gov/sites/default/files/2022-06/NRCS-RCPP_FarmBill2018_Factsheet.pdf (last visited Mar. 31, 2023).

283. *Regional Conservation Partnership Program*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/cooperative-conservation-partnership-initiative/> (last visited Mar. 31, 2023).

284. *See, e.g., Regional Conservation Partnership Program 2022 Projects*, USDA, <https://www.nrcs.usda.gov/programs-initiatives/rcpp-regional-conservation-partnership-program/regional-conservation-partnership-program-2022-projects> (last visited Mar. 23, 2023) (providing project-level summaries of the projects funded under the 2022 RCPP application round).

285. *Regional Conservation Partnership Program*, 85 Fed. Reg. 8131 (Feb. 13, 2020) (to be codified at 7 C.F.R. pt. 1464).

286. *See id.*

287. *Id.*

288. *Id.*

and easements approximating the restrictive protection of ACEP-WRE easements will receive one-hundred percent program funding.²⁸⁹ In thinking about the roles that NRCS and its partners play, RCPP provides flexibility to design projects to meet specific needs on the ground and to design a conservation easement approach that best fits these needs.²⁹⁰

Overall, the most recently enacted Farm Bills, the Agricultural Act of 2014²⁹¹ and the Agricultural Improvement Act of 2018,²⁹² redefined the balance of responsibilities between NRCS and its partners, which can provide important information about the competing priorities and goals of the stakeholders in working lands conservation moving forward.²⁹³ More recently, RCPP has added another layer to this complicated mosaic of protection, addressing how these programs should be designed to allow for flexibility, funding, and certainty that the targeted conservation objectives are achieved in concert with the agency's partnering entities.²⁹⁴

Structurally, ACEP and RCPP are interesting programs because they involve a complex integration of public and private partnerships to foster the collective protection of working lands across the nation.²⁹⁵ To function, both programs rely on state and nonprofit actors working in concert with their federal partners;²⁹⁶ this requires dividing the labor between the various stakeholders.

289. ACEP, *supra* note 238.

290. See, e.g., U.S. Dep. Agric., *RCPP 2022 Applicant Webinar*, YOUTUBE (Mar. 3, 2022), https://www.youtube.com/watch?v=Y9gq_ePClhY.

291. Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 (2014).

292. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018). The 2018 Farm Bill was the most recent iteration of this critical legislation that funds a suite of important initiatives. See *Farm Bill Home*, USDA, <https://fsa.usda.gov/programs-and-services/farm-bill/index> (last visited Mar. 31, 2023). This legislation is revisited every four to five years, with the next Farm Bill slated for 2023. See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018). The Conservation Title, which funds conservation easement acquisition by the USDA, consists of approximately 7% of all Farm Bill spending in this legislation. MEGAN STUBBS, CONG. RSCH. SERV., *FARM BILL PRIMER: CONSERVATION TITLE* (2022). Generally, funds devoted to conservation can be roughly placed in three buckets: (1) working lands programs (funds to help farmers manage their land through cost-sharing improvements, through the Environmental Quality Incentives Program (EQIP)), (2) land retirement programs (paying farmers not to farm land through the Conservation Reserve Program (CRP)), and (3) conservation easement acquisition (which is the primary governmental funding prong explored in this Article). See MEGAN STUBBS, CONG. RSCH. SERV., R40763, *AGRICULTURAL CONSERVATION: A GUIDE TO THE PROGRAMS 3* (2022). The balance between these three buckets ebbs and flows over time depending on congressional priorities, but conservation easements have been successful in retaining their funding. See *id.* at 2.

293. See, e.g., *Overview of 2018 Farm Bill Changes to ACEP-ALE and RCPP*, AM. FARMLAND TR., <https://s30428.pcdn.co/wp-content/uploads/sites/2/2019/09/ACEP-and-RCPP-Overviews-FINAL.pdf> (last visited Mar. 31, 2023).

294. See *A Deeper Dive: The Regional Conservation Partnership Program Rule*, NAT'L SUSTAINABLE AGRIC. COAL. (May 6, 2020), <https://sustainableagriculture.net/blog/deeper-dive-rcpp-rule/>.

295. See, e.g., *Partner With Us*, USDA, <https://www.nrcs.usda.gov/about/partner-with-us> (last visited Mar. 31, 2023) (profiling the role of partnership in NRCS's work).

296. *Agricultural Conservation Easement Program-Agricultural Land Easements Program Toolkit*, LAND TR. ALL., <https://landtrustalliance.org/resources/learn/explore/ale-toolkit/> (last visited Mar. 31, 2023) (profiling the operation of ACEP-ALE and the interplay between non-profit land trusts and NRCS in delivering this critical conservation program).

B. Understanding Potential Conflicts

Given the varying types of conservation projects that exist and the potential overlap in entities performing this work, there can be tension in determining how to best design the optimal programmatic structure for securing the desired conservation outcome.²⁹⁷ The parties to these transactions generally have aligned objectives but may place a different emphasis on which attributes of a project to focus on and what roles each of the parties should play. This Section, again using NRCS's conservation easement programs, considers the goals of both NRCS and its partners in carrying out conservation easement transactions.²⁹⁸

1. Goals of Federal Government

The goals of NRCS in program delivery are laid out by Congress through the Farm Bill but are also shaped by the national perspective of the agency in carrying out its conservation easement program. Given the amount of resources that the agency is tasked with deploying, the agency's priorities focus on protecting the federal investment in land conservation and programmatic efficiency.

a. Protecting the Federal Investment

Unsurprisingly, NRCS takes its role as steward of public resources very seriously.²⁹⁹ Significant public funds are invested each year in these transactions, and failing to appropriately capture conservation values through the transactions is not only a waste of public funds but also potentially harms the program's reputation and ability to secure additional funding in future program years.³⁰⁰ As far as the agency's priorities in structuring its programs, its likely objective is ensuring that the transaction is actually providing conservation value.

Other considerations outside of the agency's purview also influence this prioritization. The DOJ has delegated to the USDA's Office of General Counsel responsibilities related to acquiring these interests in lands,

297. The distinctions drawn in this Section have been identified for illustrative purposes and are necessarily simplified and overlapping. Many of the goals, such as efficiency, are shared between NRCS and its partners, the parties just differ on what efficiency should look like and how it should be achieved. See discussion *infra* Parts III.B.1.c, III.B.2.c.

298. For example, the balance of funding to devote to ACEP-WRE (which are held by the agency) versus the funding dedicated to ACEP-ALE (which are held by partners) may also factor into how the appropriated funds are allocated.

299. See, e.g., U. S. DEP'T AGRIC. OFF. INSPECTOR GEN., AUDIT REPORT NO. 10099-0001-31, NATURAL RESOURCES CONSERVATION SERVICE'S ADMINISTRATION OF EASEMENT PROGRAMS IN WYOMING 8, 24–26, (2013) (noting issues with NRCS's program delivery, the agency tasked a remediation team to address these issues and to strengthen oversight and program delivery).

300. See, e.g., U. S. DEP'T AGRIC. OFF. INSPECTOR GEN., AUDIT REPORT NO. 10601-001-23, NRCS CONTROLS OVER LAND VALUATIONS FOR CONSERVATION EASEMENTS 2 (2015) (examining issues with documentation and supporting detail for conservation easement acquisition and the agency's response to this Office of Inspector General audit).

subject to certain standards.³⁰¹ DOJ's title standards are designed to ensure that the property being acquired meets minimum title requirements; again, there is a focus on protecting taxpayer resources.³⁰² The Office of Inspector General also plays a role in auditing the agency's programmatic delivery to track the flow of funds and how the resources are being spent.³⁰³

In short, ensuring that the public investment is protected leads NRCS to make certain decisions in the design of its conservation easement programs, and it may place a higher premium on this objective or view this protective role differently than its partners.

b. Standardization

Standardization and uniformity of program delivery is also a priority of NRCS.³⁰⁴ This makes sense given the amount of funding the agency is allocated towards secure conservation easements and the correlated number of transactions these funds support over a given year.³⁰⁵ Having the same deed terms and the same general easement documents to review helps to streamline the agency's review and minimize the amount of staff time and expertise needed on a transaction-to-transaction basis.³⁰⁶ It also helps establish a body of precedent around the meaning of specific conservation easement language, as interpreted by the agency and potentially the courts.³⁰⁷ Overall, having standardized processes to minimize the layers of review can assist meaningfully in expediting projects.³⁰⁸

There is also the potential benefit that the language of these conservation easements will evolve and the types of problems that the agency, or its partners, face in administering the conservation easement will be

301. See U.S. DEP'T JUST., ENV'T & NAT. RES. DIV., LAND ACQUISITION SECTION, REGULATIONS OF THE ATTORNEY GENERAL GOVERNING THE REVIEW AND APPROVAL OF TITLE FOR FEDERAL LAND ACQUISITIONS (2016).

302. See, e.g., *Title Exception Guide for NRCS Conservation Easement Programs*, USDA, <https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=41055.wba> (last visited Mar. 20, 2023) (detailing which title exceptions need to be addressed and which are influenced by the title standards).

303. See *About USDA OIG*, USDA OFF. INSPECTOR GEN., <https://usdaoig.oversight.gov/about/ig> (last visited Mar. 31, 2023).

304. This has been something that has been a critique of conservation easements generally—the variability of these agreements from organization to organization and from transaction to transaction. Massachusetts addresses this somewhat through its requirement that a conservation easement be approved by both the local community and state in order to be perpetual. See REINVENTING CONSERVATION EASEMENTS, *supra* note 33, at 11. Others have proposed additional work to add standardization to easement boilerplate to bring additional structure to this area. *Id.* at 10 (discussing this need).

305. MEGAN STUBBS, CONG. RSCH. SERV., R45698, AGRICULTURAL CONSERVATION IN THE 2018 FARM BILL 8–9 (2019).

306. Burnett et al., *supra* note 171, at 9. This also may reduce the amount of overhead expense associated with the overall program that has to be devoted to program delivery.

307. REINVENTING CONSERVATION EASEMENTS, *supra* note 33, at 9–10 (discussing this benefit of standardized conservation easement language).

308. Under the current ACEP rule, NRCS prioritizes applications from entities that use the ACEP-ALE minimum deed terms. See Agricultural Conservation Easement Program, 86 Fed. Reg. 8113, 8122 (to be codified at 7 C.F.R. pt. 1468) (responding to comments regarding NRCS's decision to prioritize these applications for efficiency and ease of implementation).

fleshed out at some point.³⁰⁹ Being able to isolate the specific language of a conservation easement over time, based upon when it was acquired, allows the party interpreting its terms to develop familiarity with drafting issues, which can help to improve template language and allow for the quick assessment of risk by the easement holder.³¹⁰ The standardization of processes, given the volume of transactions that the agency is funding, is an important policy objective in shaping how these agencies design their programs to fit within the discretionary parameters provided by Congress.

c. Efficiency

Last, and directly related to standardization, NRCS has a goal of being as efficient as possible with its review and with moving conservation projects forward.³¹¹ Having standardized forms and processes, with minimal deviations, directly advances this efficiency goal. If the agency has to review different forms of easements for each project, this adds to organizational complexity, causes delay, and creates a great potential for error or a disconnect between the participants' expectations. It also influences which components of the agency, state versus national offices, are carrying out the various attributes of a given program.³¹²

Overall, NRCS's principal goals are: (1) to ensure that the federal government is getting conservation value for its investment in the conservation project; (2) to standardize its processes; and (3) to administer its conservation easement projects as efficiently as possible to minimize delay and the potential issues associated with customization.³¹³ In a way, these goals are all related to the primary objective of efficiently deploying capital while protecting the public investment.

2. Goals of Land Trusts and Partner Agencies

Although many of the goals of the NRCS are very similar to those of land trusts and partner agencies, there are some differences in how the entities view their priorities and how they believe these transactions should be accomplished.³¹⁴

309. McLaughlin & Pidot, *supra* note 2, at 814–15.

310. *Id.* at 814 (explaining the benefits of standardization in Massachusetts and Maine).

311. See NB 440-21-30 PGM – Fiscal Year (FY) 2022 Program Roll Out Guidance, USDA (Aug. 31, 2021), <https://directives.sc.egov.usda.gov/viewerFS.aspx?hid=47112>.

312. See Bramblett, *supra* note 253, at 3–4 (exploring the formation of the Easement Support Services Program within NRCS's Easement Programs Division to centralize certain functions); see also *Easement Support Services (ESS) Implementation Plan Executive Summary*, USDA (July 2017), <https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=41255.wba> (providing overview of the steps in this effort).

313. See discussion *supra* Subsection III.B.1.

314. This Section does not expressly consider as a policy objective securing the value of the federal investment for the reason that a land trust/partner agency views their work as already doing this. These entities, however, do recognize the importance of conscientiously using public funds (whether federal funds through NRCS or the value of the tax incentive) and realize that the wise use of these resources is critical to maintaining public support for their work. See, e.g., Adam Looney,

a. Programmatic Flexibility

One of the goals of a land trust is to be able to use federal funds to carry out the specific type of project it views as advancing its mission and work.³¹⁵ For example, a land trust focused on providing farmland access may wish to have greater flexibility to first purchase land and then own it while identifying a farmer who can purchase the conserved land. Similarly, a land trust may desire the flexibility to avoid using a pre-identified farmer that was given to NRCS and its partners in the 2018 Farm Bill.³¹⁶

Every conservation project is different and needs to be addressed to ensure the land is being appropriately protected. Each landowner is also different. Conservation easements are almost always voluntary transactions that require a willing landowner to engage in these efforts, which gives them influence over the design of the project.³¹⁷ This need sometimes requires a land trust to consider how to balance protection against simply completing a conservation transaction.³¹⁸ In other words, the land trust must not let the perfect get in the way of good conservation outcomes. Although these transactions involve less balancing than some other more protective types of conservation easements, this need for flexibility to get projects across the finish line remains.³¹⁹

b. Project Flexibility

Beyond flexibility for a specific project, each land trust also has its own goals and objectives, and works in a different context, which means they will likely have a specific view of how a conservation easement should be structured and how the program should work.³²⁰ Conservation easements are, by necessity, fit to the context in which the land trust is

Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement, BROOKINGS (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/> (discussing syndicated conservation easements and the need to address these troubled transactions to maintain public support).

315. *Land Trusts and Wildlife Conservation*, LAND TR. ALL., <https://defenders.org/sites/default/files/2021-02/Fact%20Sheet%201%20Land%20Trusts%20and%20Wildlife%20Conservation%202020.pdf> (last visited Mar. 31, 2023).

316. See TITLE – 300 NATIONAL INSTRUCTION: PART 308, AGRICULTURAL CONSERVATION EASEMENT PROGRAM - AGRICULTURAL LAND EASEMENT (ACEP-ALE) BUY-PROTECT-SELL TRANSACTIONS § 308.0 (2021) (explaining this type of conservation easement transaction and the parameters for using ACEP-ALE funding for these projects).

317. Merenlender et al., *supra* note 53, at 71–72.

318. Stroman et al., *supra* note 66, at 255–57.

319. See, e.g., Owley & Rissman, *supra* note 52, at 77–78, 83 (profiling a rise in complexity in conservation easements to meet landowner needs).

320. BYERS & PONTE, *supra* note 18, at 14 (explaining that “[e]ach easement’s restrictions are tailored to the particular property, to the interests of the individual owner, and to the policies and purposes of the easement holder.”).

working.³²¹ If the land trust is focused on Vermont farmland,³²² the conservation easement will operate differently than an easement designed to secure a western ranch.³²³ Similarly, the type of farm that is being protected (for example, a row crop or livestock production) will influence the design of the easement and its delivery.³²⁴ Even if a conservation easement is designed with sufficient flexibility to allow transitions from one farming type to another, the regional farming baseline and land trust's experience will still inform the conservation easement's language.

c. Efficiency

Land trusts have a strong sense of urgency and desire to close matters and accomplish their objectives on the ground. For example, a particularly prized piece of conservation land may come on the market once a generation, or the window to prevent a problematic development project may be narrow.³²⁵ This is not to say that the federal government lacks this goal of efficiency, as discussed above, but given the myriad other priorities that the agencies are balancing and the procedural requirements that often apply to governmental funding, land trusts typically are far closer to the projects and have a more direct stake in specific transactions.³²⁶ The need to move quickly places the land trust in tension with NRCS in trying to navigate that agency's requirements.

Related to the flexibility interests discussed above, each land trust also has its own conservation easement document with which it has developed comfort and expertise in attempting to tailor its work to the types of lands, farming activities, and goals that the particular land trust is working to protect.³²⁷ Although conservation easements change over time based on experience and legal trends, land trusts are loathe to introduce too much change or variation into their conservation easement templates to avoid administrative complexity and long-term confusion over the stewardship

321. See, e.g., *Vermont Agricultural Conservation Easement Program*, USDA, <https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program/vermont/vermont-agricultural#agricultural> (last visited Mar. 31, 2023).

322. See, e.g., *Help Vermont Farms and Local Food*, VT. LAND TR., <https://vlt.org/support-us/help-vermont-farms/> (last visited Mar. 31, 2023).

323. See, e.g., *Help Local Families: Protect Colorado One Ranch at a Time*, COLO. CATTLEMAN'S AGRIC. LAND TR., <https://ccalt.org/> (last visited Mar 31, 2023); see also ANTHONY ANELLA & JOHN B. WRIGHT, *SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST* 64–65, 67–68 (2d ed. 2004) (discussing the design of conservation easements to protect western ranchlands).

324. See, e.g., BYERS & PONTE, *supra* note 18, at 199–200 (profiling factors that shape project design by region).

325. See, e.g., *Franklin Land Trust, Save North Pond!*, FRANKLIN LAND TR., <https://www.franklinlandtrust.org/save-north-pond/> (last visited May 18, 2023) (profiling a conservation project as a “once-in-a-lifetime” chance to secure conservation land).

326. See, e.g., *Land Trust Advantages*, HARWICH CONSERVATION TR., <https://harwichconservationtrust.org/save-land/land-trust-advantages/> (last visited Mar. 31, 2023).

327. See, e.g., *Placer County, California, Sample Conservation Easements*, <https://www.placer.ca.gov/DocumentCenter/View/9510/Appendix-I---Sample-Conservation-Easements-PDF> (last visited Mar. 31, 2023).

of the resources they protect.³²⁸ To the extent that NRCS requires or encourages the use of federal minimum deed terms, this introduces change into their operating program, potentially increases their staff review time, and raises institutional complexity. In short, there is tension over who should bear the burden of deviation from their norm—the NRCS or the land trusts and agency partners.

d. Leveraging Governmental Role

Finally, notwithstanding the desire to minimize the governmental role in these transactions, there are some attributes of governmental involvement that a land trust may wish to maximize.

For example, government-owned lands or interests in lands are often more difficult to condemn, which may lead to a desire to insert a governmental ownership role in the mix.³²⁹ Additionally, a governmental holder may be a desirable backstop against orphan conservation easements in the future, either by virtue of the specific conservation easement or as a function of state enabling law.³³⁰ Having an agency as a co-party is often helpful in enforcement actions as a landowner may view dealing with a U.S. Attorney's office quite differently than outside counsel for a land trust.³³¹ In considering programmatic design, it is important to remember that these interests often cut both ways—with the federal government and land trusts seeking to maximize certain attributes of their relationship to their specific advantage.

Overall, there are several points where the mission of these varying entities materially diverges based upon the goals of each respective party. While this Section primarily focused on the tensions between the USDA and NRCS as funder and steward for these federally funded transactions, and the land trusts and state partners that hold these conservation easements, there are a whole host of other organizations outside of the transaction who also play important roles in shaping policies in this area. The

328. See, e.g., *Model Conservation Easement*, WECONSERVEPA, <https://conservation-tools.org/guides/13-model-conservation-easement> (last visited Mar. 31, 2023) (explaining the reasons for using its template and minimizing change).

329. See, e.g., Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897, 1931 (2008); see also *Protecting the Investment: Conservation Easements and Condemnation*, TEX. LAND TR. COUNCIL, https://texaslandtrustcouncil.org/wp-content/uploads/2019/03/protecting_the_investment.pdf (last visited Mar. 31, 2023) (profiling land trust concerns over condemnation and that governmental bodies may condemn against conserved lands because it may present the low cost option).

330. See *HOLDERS, BENEFICIARIES AND BACKUP GRANTEEES: DEFINING ROLES AND RELATIONSHIPS TO ACHIEVE CONSERVATION EASEMENT OBJECTIVES*, WECONSERVA PA, <https://conservation-tools.org/guides/122-holders-beneficiaries-and-backup-grantees> (last visited Mar. 31, 2023).

331. See, e.g., *Rogers v. Vilsack*, No. 2:14-CV-81 NAB (E.D. Mo. July 23, 2015); see, e.g., *Transwest Express LLC v. Vilsack*, No. 19-CV-3603-WJM-STV (D. Colo. Mar. 19, 2021) (providing two examples of defensive litigation involving U.S. Attorney's offices defending NRCS conservation easements). In response to concerns that an individual land trust may not have sufficient resources to defend its conservation easements in extensive litigation, the Land Trust Alliance created a captive pool insurance program to collectively defend enrolled lands owned by participating land trusts. See *Safeguarding Conservation*, *supra* note 36.

other entities primarily include conservation organizations outside of the easement-holding arena and farm organizations advocating for the objectives of their constituents. Understanding these relationships, including how the various stakeholders view the relationship and how the conservation easements should function, gives insight into how to better structure conservation programs to minimize these tensions and ensure better alignment and project delivery.

C. Evolutions in ACEP-ALE and Defining the Working Relationship

Given the priorities and perspectives of both NRCS and its partners, the structure of the Farm Bill conservation easement programs has evolved in response to the concerns and perspectives of both the agency and the partnering entities. The majority of the changes have been tailored to address partner concerns, with the 2018 Farm Bill primarily serving to “reduce the rol[e] of USDA in the administration of ALE, including amendments to the certification of eligible entities, the right of easement enforcement, and planning requirements.”³³² This Section will examine those changes to ACEP-ALE as a case study, analyzing how they addressed partner concerns and impacted the delivery of this conservation easement program.³³³

1. Deed Terms

As examined above, deed terms are one primary source of potential conflict between the federal government and the land trusts involved in implementing ACEP-ALE.³³⁴ NRCS’s priority is in uniformity of deed terms, or the provisions that will be included in the conservation easements it is funding across the nation.³³⁵ This uniformity allows for streamlining the review process, developing a body of case law regarding the interpretation of the deed language, and simply avoiding complications in the agency’s administration of its portfolio.³³⁶ The land trusts have different considerations focused on consistency with their other conservation easements and flexibility to meet their specific needs and priorities for their desired projects. In the 2018 Farm Bill, ACEP-ALE was amended to allow land trusts to use their own templates, provided that the regulatory deed requirements were addressed.³³⁷ This essentially allowed flexibility as

332. STUBBS, *supra* note 305, at 8.

333. RCPP has only existed since the 2014 Farm Bill. The program has, as explored above, had its own evolution from working through existing programs to adding more flexibility for different types of structures in the 2018 Farm Bill.

334. *See, e.g.*, Agricultural Conservation Easement Program, 86 FED. REG. 8113, 8117 (Feb. 4, 2021) (responding to comments about the minimum deed term language and review process).

335. *See ACEP-ALE Minimum Deed Terms for the Protection of Agricultural Use*, USDA (Feb. 2020), <https://www.nrcs.usda.gov/sites/default/files/2022-10/ACEP%20ALE%20Minimum%20Deed%20Terms.pdf> [hereinafter *ACEP-ALE*].

336. *Id.*

337. 7 C.F.R. § 1468.25(d) (providing minimum deed requirements); *see also* TITLE 440—CONSERVATION PROGRAMS MANUAL: PART 528—ACEP § 528.70(A) (March 2015) (discussing the minimum deed terms provisions for certified entities).

long as a floor was met.³³⁸ This amendment is one of several that prioritizes the land trust's operational concerns over NRCS's standardization and efficiency objectives.

2. ALE Farm Plan

Another example of this tension involves programmatic requirements to ensure that conservation value is occurring on the ground. The 2014 Farm Bill imposed a new requirement on land trusts and landowners seeking to enroll in this program—the development of an agricultural land easement plan (ALE plan).³³⁹ The idea behind the ALE plan was to ensure that some degree of comprehensive land use planning was being implemented and to tailor the plan to the specific lands protected in the program.³⁴⁰ In NRCS's view, this plan was designed to encourage more thorough land use planning as a condition of enrolling lands in the program and to add conservation benefits to enrolled agricultural lands.³⁴¹

Many land trusts and partner organizations adopted a very different view, arguing that this requirement was overly burdensome, imposed too many requirements on the farmers participating in the program, and required too much from the holder, who was already subject to a multitude of process steps to enroll lands in the ACEP-ALE program.³⁴² As a result, removal of the ALE plan requirement became one of the top legislative priorities of the Land Trust Alliance during the lead-up to the 2018 Farm Bill.³⁴³ This effort ultimately succeeded, and land trusts are no longer required to develop these plans but still may if desired.³⁴⁴

3. Easement Monitoring

Monitoring and inspection have also been issues of contention. In a land trust's view, NRCS's right to monitor or inspect conserved properties should be limited to events where NRCS has reason to believe that a vio-

338. Kayla Donovan, Jennifer Dempsey, & Darlene Monds, *ACEP-ALE Options for Integrating Minimum Deed Terms*, FARMLAND INFO. CTR. (June 6, 2022), <https://farmlandinfo.org/publications/acep-ale-options-for-integrating-minimum-deed-terms/>.

339. *2014 Farm Bill Rules*, USDA, <https://www.nrcs.usda.gov/2014-farm-bill-rules> (last visited Mar. 23, 2023).

340. NRCS, *Agricultural Conservation Easement Program Agricultural Land Easement Plans* (U.S.D.A. Dec. 2015) (on file with author) (providing overview of plan requirements and the motivations for this requirement under the 2014 Farm Bill).

341. *Id.*

342. See, e.g., *2018 Farm Bill Policy Recommendations*, WASH. ASS'N LAND TR., <https://walandtrusts.org/wordpress/wp-content/uploads/2017/12/WALT-2018-Farm-Bill-Priorities.pdf> (last visited Mar. 31, 2023); *Report and Recommendations of the Vermont Milk Commission*, VT. AGENCY AGRIC., FOOD & MKTS (Jan. 2018), <https://agriculture.vermont.gov/sites/agriculture/files/documents/Report%20and%20Recommendations%20of%20the%20Vermont%20Milk%20Commission%20for%20the%202018%20Federal%20Farm%20Bill.pdf>.

343. *Farm Bill Recommendations*, LAND TR. ALL., <http://s3.amazonaws.com/landtrustalliance.org/LandTrustAlliance-2018-FarmBillRecs.pdf> (last visited Mar. 31, 2023) (arguing that the ALE plan “is much more onerous than a traditional conservation plan and could include both required and recommended practices.”).

344. STUBBS, *supra* note 305, at 8, 35–36.

lation has occurred or the land trust has failed to fulfill its monitoring obligations, such as when the land trust has failed to provide a required inspection report.³⁴⁵ NRCS has generally believed its role should also include periodic spot-checking to ensure programmatic integrity.³⁴⁶ The 2018 Farm Bill amended the ACEP-ALE to clarify that NRCS has a secondary role—limiting on-site, in-person inspections to those situations where the government has good faith concerns regarding an entity’s monitoring or where a violation has occurred.³⁴⁷

4. Right of Enforcement

Last, on enforcement, there can be tension over who should be able to enforce the terms of the ACEP-ALE conservation easements.³⁴⁸ Historically, one of the requirements for inclusion in the ACEP-ALE conservation easement is that the federal government has a right of enforcement.³⁴⁹ This right allowed NRCS to enforce the terms of a conservation easement held by a nongovernmental organization if it disagreed with that entity’s enforcement or if that entity failed to perform its role.³⁵⁰ This right of enforcement has been concerning for land trusts as it potentially complicates enforcement and undercuts a land trust’s position. From an agency perspective, having broad discretion to use this right to protect its investment has pragmatic appeal. As of the 2018 Farm Bill, statutory language was added to clarify that the federal right of enforcement is a secondary, or backstop, right and that the ability of the NRCS to monitor or enforce is predicated upon either a land trust’s failure to provide monitoring reports or USDA’s good faith concerns regarding the land trust’s work in stewarding lands within its conservation portfolio.³⁵¹

Overall, the net effect of the 2018 amendments to the Farm Bill was to shift ACEP-ALE further in the direction of a grant program—where NRCS will transfer funds but then largely exit a project—and to lessen but not eliminate NRCS’s ongoing involvement in these projects.³⁵² While these changes may be calculated to maximize the relative strengths of the parties in these projects, it is important to understand the evolution of the

345. *Farm Bill Recommendations*, *supra* note 343.

346. *See 2014 Farm Bill Rules*, *supra* note 339.

347. *See Updates to Conservation Easements Strengthens Protection for Farmlands, Grasslands and Wetlands*, THE FENCE POST (Feb. 9, 2021), <https://www.thefencepost.com/news/updates-to-conservation-easements-strengthens-protection-for-farmlands-grasslands-and-wetlands/>.

348. *See, e.g.*, Agricultural Conservation Easement Program, 81 Fed. Reg. 71818, 71824–5 (Oct. 18, 2016) (to be codified at 7 C.F.R. pt. 1468) (providing NRCS response to public comment on the 2016 Final Rule for the ACEP).

349. *See, e.g.*, USDA, IMPLEMENTATION GUIDANCE FOR THE AGRICULTURAL CONSERVATION EASEMENT PROGRAM (ACEP) IN FISCAL YEAR 2022 (FY22) FOR WEST VIRGINIA (on file with author) (explaining the enforcement rights and structures of historic conservation easements under this program and its predecessors).

350. 7 C.F.R. § 1468.25.

351. *See ACEP-ALE*, *supra* note 335; Agricultural Conservation Easement Program, 86 Fed. Reg. 8113, 8118 (Feb. 4, 2021) (explaining the scope of this right).

352. *See supra* notes 332–51 and accompanying text.

roles of the involved parties and ensure that the federal and land trust roles are appropriately balanced.

IV. RECOMMENDATIONS FOR ADDRESSING PROGRAMMATIC DELIVERY

As charted above, examining the varied roles that government plays help one to understand: (1) the interaction between governmental units in conservation transactions; and (2) the dynamic between governmental units and land trusts working in partnership on conservation easement transactions.³⁵³ Understanding these dynamics and relationships leads to some recommendations and suggestions to avoid conflict and to align interests, which will hopefully help in programmatic design and execution. This Part explores a few pathways for additional policy improvement in the efficiency of these transactions.

A. Understand Roles and Goals

First, simply understanding the varied roles that entities ask a governmental body to play in private land conservation has benefits, as does understanding the specific objectives each entity wishes to achieve. In thinking through the specific types of obligations and responsibilities it is being tasked with, this may assist a governmental agency involved in a conservation transaction to define more clearly what work it wants to do and what work it wants to transfer to third parties. Being clear—through regulation, guidance documents, and educational programming—regarding what the programmatic objectives are and what flexibility exists will also help improve execution. This allocative exercise can help in both program design and operation and can minimize tensions both between agencies and between the conservation partners involved in these important projects.

B. Identify Roles

Related to the first recommendation, some roles are best played at differing levels. A land trust, for example, may already have field staff with the training and skills needed to interact with landowners.³⁵⁴ The type and location of this staff may lend itself well to annual monitoring, which some governmental holders often struggle to address based on a wider jurisdiction and less dispersed staffing.³⁵⁵ A government agency may have staff well suited for setting up and working through grant processes, and

353. See discussion *supra* Parts II, III.

354. See Korngold, *supra* note 103, at 478; see also *Wetlands Protection: Partnering with Land Trusts*, EPA, https://www.epa.gov/sites/default/files/2021-01/documents/wetlands_protection_partnering_with_land_trusts.pdf (last visited Mar. 31, 2023) (explaining this relationship).

355. See, e.g., ETHAN INLANDER, KATIE ANDREWS, THE NATURE CONSERVANCY, *REMOTE PROPERTY MONITORING AT THE NATURE CONSERVANCY IN CALIFORNIA 3* (2020) (demonstrating how technology is transforming monitoring and enforcement of conservation easements through change detection software and more sophisticated tools for special analysis, allowing remote monitoring to play a greater role in fulfilling these responsibilities).

for providing technical expertise in implementing certain types of restoration plans associated with a project.³⁵⁶ An agency may be less suited to monitor and enforce conservation easements.³⁵⁷ Additionally, governmental involvement can also provide a holistic approach to prioritizing conservation efforts nationally or regionally and allow the highest priority conservation projects to be advanced.³⁵⁸ The ideal form of relationship may vary based on the unique institutional designs of a program and the partners involved in the work; these must be weighed to determine how to best leverage each entity's respective attributes.

Determining which of the varied responsibilities, and what checks and balances to use, could also assist in improving program delivery and long-term efficacy of conservation easement transactions. While this may seem straightforward, direct discussion of which skillsets of various actors to utilize is often overlooked, and more could be done to use this lens to impact programmatic design.

C. Design Programs to Avoid Conflict

Last, understanding the shared interests and the overall division of work could help to eliminate or at least reduce conflict. Having shared expectations at the outset about who will do what and when can facilitate partnerships and avoid misalignment of expectations and results.³⁵⁹ There can also be meaningful benefits to cooperation as far as determining which lands to target and how to integrate work across the landscape.³⁶⁰ To avoid setting up competing regimes, which do not allow funding sources to be mixed and used together to carry out larger scale conservation transactions, care must be given in advance to examine what the likely interplay is between the governmental bodies involved and proactively address the interests. For example, current conflicts between IRS requirements and NRCS conservation authorities can complicate transactions owing to divergent requirements and authorities.³⁶¹ Avoiding programmatic conflict can help leverage funds and facilitate larger scale landscape conservation.

CONCLUSION

At the end of the day, the role of government at various levels is critical in facilitating conservation easement transactions—ranging from its role in authorizing the interests in the first instance to its potential role as

356. See, e.g., *Vermont Agricultural Conservation Easement Program*, *supra* note 321 (providing an overview of Vermont's process for ACEP-ALE easements).

357. Nelson Bills, Charles Geisler, Al Sokolow, & David Kay, *Conservation Easements as Encumbered Ownership: Issues at Hand* 9–10 (The Ne. Reg'l Ctr. for Rural Dev., Rural Development Paper No. 25, 2004).

358. See discussion *supra* Subsection III.B.1.

359. See, e.g., *Collaborative Opportunities for Land Trusts*, WECONSERVEPA, <https://conservationtools.org/guides/101-collaborative-opportunities-for-land-trusts> (last visited Mar. 31, 2023).

360. GENTRY ET AL., *supra* note 35, at 73–75.

361. See, e.g., *Subdivision and Conserved Farmland*, *supra* note 262, at 684–94.

funder, holder, or both.³⁶² Understanding the diversity of these roles and their motivations is critical and can influence policy-level decisions in how to direct or allocate funds across the conservation funding landscape. Likewise, understanding how these governmental entities interact with land trusts and partner agencies who are also involved in these transactions is vital, as one's perspective on the appropriate relationship between these entities will necessarily shape the policy direction, explicitly or implicitly, in designing conservation easement programs. While this often happens implicitly, more direct analysis and consideration of these roles could help improve the efficiency and quality of conservation easement programs and subsequent transactions.

There will always be an inherent but not necessarily detrimental tension between the federal government as funder and the various land trusts receiving matching funding to protect working lands. To a degree, this tension is healthy because it requires both sides of the divide, who are generally working to achieve the same objective, to evaluate the nature of their shared relationship, to define the roles that each will play in these important land conservation projects, and to ensure that the public's investment is being allocated appropriately. There are roles that are perhaps best played by government and roles that are better played by dedicated private land trusts. To ensure the value and benefit of the significant funding allocated to working lands protection, careful attention should be paid to how to best define this relationship and reconcile these competing interests in a way that ensures both flexibility and accountability across the board.

362. This is not to say that there are not improvements that could be made to further improve conservation easement performance. *See, e.g.*, Burnett et al., *supra* note 171, at 1, 8–12 (providing policy recommendations for strengthening this tool for easements to be funded by federally deductible conservation easement as part of the 30 by 30 goal articulated by the Biden Administration).