Denver Law Review

Volume 83
Issue 4 *Symposium - Borrowing the Land: Cultures of Ownership in the Western Landscape*

Article 9

December 2020

Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources

Lawrence R. Kueter

Christopher S. Jensen

CONSERVATION EASEMENTS: AN UNDERDEVELOPED TOOL TO PROTECT CULTURAL RESOURCES

LAWRENCE R. KUETER[†]
CHRISTOPHER S. JENSEN[††]

INTRODUCTION

Conservation easements have become a very successful tool for the protection of open space, scenic views, and wildlife habitat. Private land trusts and government agencies hold conservation easements over thousands of square miles across the West, protecting sensitive lands from such physical invasions as extractive resource development and subdivision for housing development. The federal government has recognized the importance of protecting environmentally sensitive lands, and as a result, federal tax policy provides a significant financial incentive for private landowners to grant conservation easements over their property via income tax deductions for donated easements. This tax incentive has proved to be a powerful lever, used to achieve conservation results that otherwise may not have been possible.

Relatively little activity has occurred, however, utilizing conservation easements to protect culturally important lands. As a result, some uncertainty remains regarding the proper use of conservation easements as a tool to protect cultural land resources, as well as the interplay between the state laws that govern their legal enforceability and the federal tax laws that govern their tax treatment. Just as invasive land uses are incompatible with some ecological or aesthetic land values, certain land uses may also be incompatible with the preservation of cultural resources. For the purposes of this article, we will define "cultural resources" as those sites or land areas, with or without structures that are connected to people, places or events of cultural or historical importance to Native American tribes, or to settlement and development of the American West. State laws generally allow for the use of conservation easements to protect these cultural resources. Such "cultural conservation easements," however, must be carefully crafted with some of their legal uncertainties in mind.

In this article, we will examine the laws of six western states and the Internal Revenue Code (the "Code," or the "I.R.C.") in order to high-

---

† Shareholder and member of the Conservation Law practice group of Isaacson Rosenbaum, P.C., Denver, Colorado. The following is an adaptation of Mr. Kueter's remarks made on February 17, 2006 at the Denver University Law Review Symposium, "Borrowing the Land: Cultures of Ownership in the Western Landscape."

†† J.D. Candidate, 2007, University of Denver Sturm College of Law.

light and explain these uncertainties. First, though, we will provide some necessary background in Part I on the basic legal characteristics and statutory requirements of conservation easements. Next, in Part II we will discuss the Code's treatment of historical and cultural resources, specifically its different treatments of "historically important land areas" with or without "historic structures." In Part III, we will examine the state statutes that define the scope of the valid uses of conservation easements and make them legally enforceable. In Part IV, we will describe the relationship between conservation easements' enforceability and deductibility. Finally, we conclude with a brief note about the uncertainty surrounding the ability of Native American tribes to hold conservation easements.

I. SOME BACKGROUND ON CONSERVATION EASEMENTS

The Uniform Conservation Easement Act (the "Uniform Act") defines a conservation easement as:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[1]

As will be discussed in further detail in Part III below, every state has adopted a conservation easement enabling statute, employing either some form of the Uniform Act's language or language drafted specifically by the state legislature.[2] The statutory language covering the protection of historical and cultural resources varies from state to state.

For federal tax purposes, the Treasury Regulations consider a conservation easement to be a "qualified conservation restriction," which is further defined as "a restriction granted in perpetuity on the use which may be made of real property – including, an easement or other interest in real property that under state law has attributes similar to an easement."[3] In order to qualify for a federal income tax deduction, the I.R.C. requires a "qualified conservation contribution," which must consist of the contribution of a "*qualified real property interest* . . . to a *qualified organization* . . . exclusively for *conservation purposes*."[4] As we will

1. UNIF. CONSERVATION EASEMENT ACT § 1(1) (1982) (noting that the Uniform Conservation Easement Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981).

2. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34A.01 (Michael Allan Wolf, ed.) (Supp. Rel. 114-3/2006 2006).

3. Treas. Reg. § 1.170A-14(b)(2) (as amended in 1999).

4. I.R.C. § 170(h)(1) (2006) (emphasis added).

show below, a "cultural conservation easement" faces unique challenges in satisfying this standard.

II. FEDERAL TAX DEDUCTIBILITY OF CULTURAL CONSERVATION EASEMENTS

In order to meet the I.R.C.'s conservation purposes test under section 170(h)(4), a conservation easement must satisfy one of the following purposes:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
>
> (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
>
> (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 governmental conservation policy, and will yield a significant public benefit, or
>
> (iv) the preservation of an historically important land area or a certified historic structure.[5]

This section of the Code, together with its corresponding Treasury Regulations, allows income tax deductions for donations of conservation easements that exclusively protect historically significant land areas or structures, subject to some conditions.[6] Federal regulations very specifically address the protection of properties containing historic structures, but do not provide equally clear guidance regarding historically important properties without such structures. Whether or not a conservation easement protecting culturally important land or structures satisfies the Code's conservation purposes test is directly tied to the property's listing, or eligibility for listing, on the National Register for Historic Places (the "National Register") or within a registered historic district.[7] As we will discuss below, the criteria for evaluating land areas for inclusion on

---

5. I.R.C. § 170(h)(4)(a) (2006).

6. I.R.C. § 170(h)(4)(a)(iv); Treas. Reg. § 1.170A-14(d)(5); *see* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations – A Responsible Approach*, 31 ECOLOGY L.Q. 1, 24-25 (2004) (discussing conservation easement valuation, and of the federal tax benefits of easements in general). If a donated conservation easement satisfies the Internal Revenue Code's requirements, the landowner may claim a tax deduction equal to the amount by which the easement decreases the underlying servient estate's fair market value. *Id.* at 4. This value is typically calculated by comparing the underlying estate's fair market value before and after the easement becomes effective and assigning the difference between the two as the easement's value. *Id.* at 24.

7. I.R.C. § 170(h)(4)(B).

the National Register are quite vague and contribute to the uncertainty as to whether conservation easements protecting such areas are deductible.

The Code includes "the preservation of historically important land areas or certified historic structures" in its definition of conservation purposes.[8] The Code further defines "certified historic structure" to include:

> [A]ny building, structure, or *land area* which (i) is listed in the National Register, or (ii) is located in a registered historic district (as defined in section 47(c)(3)(B) [26 U.S.C. §47(c)(3)(B)]) and is certified by the Secretary of the Interior to the Secretary [of the Treasury] as being of historic significance to the district.[9]

For specific treatment of historically important land areas (as opposed to historic structures), we must look to the Treasury Regulations.

The Treasury Regulations define the term "historically important land area" to include:

> (A) An independently significant land area including any related historic resources (for example, an archaeological site or a Civil War battlefield with related monuments, bridges, cannons, or houses) that meets the National Register Criteria for Evaluation in 36 CFR 60.4;
>
> (B) Any land area within a registered historic district including any buildings on the land area that can reasonably be considered as contributing to the significance of the district; and
>
> (C) Any land area (including related historic resources) adjacent to a property listed individually in the National Register of Historic Places (but not within a registered historic district) in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.[10]

Two issues become apparent upon reading the I.R.C. and the Treasury Regulations. First, both place considerable weight upon a property's satisfaction of the National Register criteria. Second, whether a specific property would be considered a historically important land area is largely a matter of statutory interpretation. Both of these issues engender uncertainty about historically important land areas that should sound a cautionary note for the landowner motivated to protect such lands by tax deductibility.

The National Register criteria referenced in the Treasury Regulations are intentionally vague, in that they are "worded in a manner to provide for a wide diversity of resources."[11] The National Register is

8. § 170(h)(4)(a)(iv).
9. § 170(h)(4)(b) (emphasis added).
10. Treas. Reg. § 1.170A-14(d)(5)(ii) (as amended in 1999).
11. 36 C.F.R. § 60.4 (2006) (listing the National Register criteria).

intended to protect "[t]he quality of significance in American history, architecture, archaeology, engineering, and culture [which] is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association."[12] In addition to this general quality of historical significance, an eligible property must also be associated with persons or events with a "significant contribution to the broad patterns of our history," or "have yielded, or may be likely to yield, information important in prehistory or history."[13] These are quite clearly subjective criteria, designed to encompass as wide a range of properties as possible, but also requiring further analysis and interpretation before a property can be listed on the National Register.

The National Register regulations provide that the National Park Service ("NPS") is the agency responsible for administering and evaluating properties for the National Register.[14] The Treasury Regulations, however, do not require that the NPS evaluate and recommend historically important land areas in order for conservation contributions to qualify for federal deductibility.[15] The problem for landowners thus becomes one of interpretation: who is to judge whether their property sufficiently embodies the National Register criteria, and therefore qualifies for federal deductibility if protected by a conservation easement? While the Treasury Regulations direct landowners to the National Register criteria for insight into what might qualify as an historically important land area, they provide little predictability or guidance as to how the Internal Revenue Service ("IRS") might enforce those criteria.

Just as the National Register criteria leave much to be desired, the Treasury Regulations are also subject to uncertainty of interpretation. Subsection A of the relevant regulation refers to "[a]n *independently significant* land area including any related *historic resources* (for example, an archaeological site . . .) that meets the National Register Criteria."[16] No standards are included to clarify what makes a land area independently significant. An archaeological site would clearly be a historical resource, but what other features would qualify? Subsection C includes "[a]ny land area (*including related historic resources*) adjacent to a property listed individually in the National Register . . . (but not within a registered historic district) *in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property*."[17] Again, who determines when a property's features contribute to a neighboring property's historic or cultural integ-

12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Treas. Reg. § 1.170A-14(d)(5) (as amended in 1999).
16. *Id.* § 1.170A-14(d)(5)(ii)(A) (emphasis added).
17. *Id.* § 1.170A-14(d)(5)(ii)(C) (emphasis added).

rity? Landowners can take little comfort in knowing that the IRS will make such determinations only upon reviewing their individual claims for deductibility.

Ultimately, landowners wishing to protect cultural resources must make the strongest possible argument that their property contains as many of the above culturally significant features as possible. The IRS has recognized the use of conservation easements as a tool to protect environmental values for over forty years.[18] To the extent that conservation easements protecting cultural resource values also protect environmental values, the certainty of their tax deductibility may be strengthened by the long-recognized validity of environmental conservation purposes. Where conservation easements are used to protect cultural resources exclusively, however, their deductibility is much more susceptible to the uncertainties described above. Many of these uncertainties could be addressed with clarifying legislation, additional regulatory guidance, or through additional private rulings by the IRS. Until such clarifications are issued, however, the deductibility of cultural conservation easements may remain uncertain and unpredictable.

III. ENFORCEABILITY OF CULTURAL CONSERVATION EASEMENTS UNDER STATE LAW

As noted above, to be eligible for deductibility under the I.R.C., a conservation easement (as a "qualified real property interest") must be a "restriction (granted in perpetuity) on the use which may be made of the real property."[19] Conservation easements are largely statutory creations, since they are granted "in gross" (i.e., to a person or entity, rather than to the land they encumber, as easements appurtenant are granted), and common law restrictions in gross were not assignable and did not run with the land.[20] States created statutes to provide for the assignability and appurtenance of conservation easements, while preserving their in gross characteristics.[21] Since these statutory creations are intended to perform a unique role, they must be narrowly tailored to satisfy the conservation purposes delineated by each state, and may only be owned, or held, by statutorily authorized qualified holders.[22] Only by satisfying state statutory requirements can a conservation easement become a legally enforceable restriction on the use of the underlying property.[23]

---

18. The IRS first recognized the tax deductibility of qualified conservation easements in a 1964 revenue ruling. Rev. Rul. 64-205, 1964-2 C.B. 62.

19. I.R.C. § 170(h)(2)(C) (2006).

20. 4 POWELL, *supra* note 2, § 34A.01. Colorado's conservation easement statute, for example, declares that "it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary." COLO. REV. STAT. ANN. § 38-30.5-101 (West 2006).

21. 4 POWELL, *supra* note 2, § 34A.01.

22. *See id.* § 34A.03[2].

23. *Id.* § 34A.03[1].

In order to determine the viability of conservation easements as legally enforceable tools for the protection of cultural resources in the West, we will briefly examine a sample of conservation easement statutes from six western states: Arizona, Colorado, New Mexico, South Dakota, Utah and Wyoming.[24] Five of the states (all except New Mexico) allow for the protection of cultural or historical resources in their conservation easement statutes. New Mexico excludes cultural and historic resources from its conservation easement statute, and instead provides for their protection in a separate Cultural Properties Preservation Easement Act.[25]

Each of the six states includes some combination of "cultural, historical, archaeological, architectural, paleontological or scientific" aspects of real property in their definitions of conservation (or, in New Mexico, cultural) easements or conservation purposes.[26] Arizona, South Dakota and Wyoming have all adopted the Uniform Act, and thus share its language defining a conservation easement as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations for conservation purposes *or to preserve the historical, architectural, archaeological or cultural aspects of real property.*"[27] (emphasis added) South Dakota has added "paleontological" aspects to its statutory definition.[28] Utah's statute provides merely for the protection of a "cultural . . . use or condition consistent with the protection of open land," without any reference to historical, archaeological or other uses.[29]

Colorado law includes "the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value" as an acceptable conservation purpose.[30] New Mexico's Cultural Properties Preservation Easements Act describes a "cultural property" as "a structure, place, site or object having historical, archaeological, scientific, architectural or other cultural significance."[31] Mirror-

24. We selected these states in order to address the Symposium's western theme. This article is not intended to be a comprehensive review of state laws nationwide.

25. New Mexico Land Use Easement Act, N.M. STAT. ANN. § 47-12-2 (West 2006); New Mexico Cultural Properties Preservation Easement Act, N.M. STAT. ANN. § 47-12A-1, -2 (West 2006). The requirements of the Cultural Properties Preservation Easement Act closely mirror those of the Conservation Easement Act. Thus, a properly created cultural property preservation easement would appear to satisfy the deductibility requirements of I.R.C. § 170(h).

26. *See* ARIZ. REV. STAT. ANN. § 33-271(1) (2006); COLO. REV. STAT. § 38-30.5-102 (2005); N. M. STAT. ANN. § 47-12A-2 (West 2006); S.D. CODIFIED LAWS § 1-19B-56 (2006); UTAH CODE ANN. § 57-18-2 (2005); WYO. STAT. ANN. § 34-1-201(b)(i) (2006).

27. ARIZ. REV. STAT. ANN. § 33-271(1) (2006); S.D. CODIFIED LAWS § 1-19B-56(1) (2006); WYO. STAT. ANN. § 34-1-201(b)(i) (2006).

28. S.D. CODIFIED LAWS § 1-19B-56(1) (2006).

29. UTAH CODE ANN. § 57-18-2 (2005). One reason that Utah's statute is limited to "cultural" uses only may be that it has a distinct "Historical Preservation Act" to address historical uses through historic preservation agreements, rather than through conservation easements. *Id.* § 9-8-501(2005). For a discussion of historic preservation agreements, *see generally* Marcia E. Hepford, *Affirmative Obligations in Historic-Preservation Agreements*, 51 GEO. WASH. L. REV. 746 (1983).

30. COLO. REV. STAT. § 38-30.5-102 (2005).

31. N. M. STAT. ANN. § 47-12A-2 (West 2006).

ing the requirements for federal tax deductibility, both Colorado and New Mexico limit the use of easements to protecting only those cultural resources (again, primarily historic structures) that satisfy the National Register criteria, or those that are already listed on the National Register or similar registries.[32] Colorado law provides a more objective standard, since it restricts the application of conservation easements to those buildings, sites or structures which have already been listed on some registry.[33] New Mexico merely requires that the cultural resource be "*deemed potentially eligible* for inclusion" on the National Register, but is notably silent as to which agencies or individuals are allowed to "deem" the property potentially eligible for inclusion.[34]

In addition to protecting appropriate resources, a conservation easement must also be held by a statutorily-authorized grantee in order to be legally enforceable. State laws vary slightly, but generally permit two categories of entities to hold conservation easements – nonprofit entities organized under I.R.C. Section 501(c)(3), and governmental agencies.[35] New Mexico only allows private nonprofit entities, and not government agencies, to hold cultural resource preservation easements.[36] Arizona's Uniform Act language exemplifies a common requirement that restricts qualified nonprofit holders to those organized for the protection of the property features covered by the conservation easement:

> "Holder" means . . . [a] charitable corporation . . . , the purposes or powers of which include retaining or protecting the natural, scenic or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use, protecting natural resources, maintaining or enhancing air or water quality or preserving the historical, architectural, archaeological or cultural aspects of real property.[37]

Colorado and Utah, on the other hand, place no restriction on the purpose or mission of a grantee nonprofit organization.[38]

---

32. COLO. REV. STAT. § 38-30.5-104(4) (2005); N. M. STAT. ANN. § 47-12A-2(A) (2006).

33. COLO. REV. STAT. § 38-30.5-104(4) (2005).

34. N. M. STAT. ANN. § 47-12A-2 (2006) (emphasis added).

35. ARIZ. REV. STAT. ANN. § 33-271(3) (2005); COLO. REV. STAT. § 38-30.5-104(2) (2005); N. M. STAT. ANN. § 47-12A-2 (2006); S.D. CODIFIED LAWS § 1-19B-56(2) (2006); UTAH CODE ANN. § 57-18-3 (2005); WYO. STAT. ANN. § 34-1-201(b)(ii) (2005).

36. N. M. STAT. ANN. § 47-12A-2 (2006).

37. ARIZ. REV. STAT. ANN. § 33-271(3) (2005); *see also* S.D. CODIFIED LAWS § 1-19B-56(2) (2006); WYO. STAT. ANN. § 34-1-201(b)(ii) (2005).

38. *See* COLO. REV. STAT. § 38-30.5-104(2) (2005); UTAH CODE ANN. § 57-18-3 (2005). It is important to note that for federal deductibility purposes, the Treasury Regulations require that "an eligible donee . . . must . . . have a commitment to protect the conservation purposes of the donation," and that "[a] conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required." Treas. Reg. § 1.170A-14(c)(1) (2006). Interestingly, this regulation allows donees organized for the protection of wildlife habitat or open space to hold cultural conservation easements.

Ultimately, each state's law allows for the protection of cultural resources with conservation easements, although with some of the same ambiguity that marks the federal tax regulations' treatment of cultural resources. Some states – New Mexico and Colorado, for example – have clearly contemplated and support the use of conservation easements to protect culturally important land and structures. Utah, however, gives cultural resources only passing mention in its conservation easement statute.[39] The presence of historic structures and a property's landmark or historic district designation may strengthen the enforceability of a cultural conservation easement, or the absence of such features may preclude enforceability.

Thus, while cultural conservation easements must be carefully tailored to address both the resources at issue and the law of the governing state, they can be used as an effective tool to protect cultural resources in each of these six western states.

IV. THE RELATIONSHIP BETWEEN ENFORCEABILITY AND DEDUCTIBILITY

The tax benefits of qualified conservation contributions make the relationship between enforceability and deductibility a key consideration in planning and drafting cultural conservation easements. If conservation easements are to develop as a tool for the protection of cultural resources, then the parties creating cultural conservation easements must pay careful attention to the uncertainties surrounding such easements, particularly with regard to potential gaps between state law and federal tax law. Failure to capitalize on the tax benefits' incentive mechanism may prohibit the further development of conservation easements as a cultural protection tool.

As we discussed above, the enforceability of conservation easements is primarily a matter of state law. State laws delimit the types of resources that a conservation easement may protect, the qualified holders that may hold and manage an easement, and the easement's qualities as a real property interest (i.e., whether and how an easement may be created, transferred, extinguished or otherwise enforced against others).[40] A conservation easement complying with all state statutory requirements is a legally enforceable real property interest, regardless of whether or not the easement qualifies its grantor for federal tax benefits. Many conservation easement grantors are fully compensated for the fair market value of the easement's restrictions on their property, and are therefore not eligible for any tax benefits because they have made no charitable contribution. Another example of an enforceable, but not deductible, conserva-

39. *See* UTAH CODE ANN. § 57-18-2 (2005).

40. For an example of a statutory description of a conservation easement's qualities as an interest in real property, *see* COLO. REV. STAT. §§ 38-30.5-103 to -108 (2005).

tion easement is one where the property's surface and mineral estates are severed from each other, and the possibility remains that "at any time there may be extraction or removal of minerals by any surface mining method."[41]

Deductibility, on the other hand, is primarily a matter of federal law.[42] As we noted in Part II, the I.R.C. and Treasury Regulations are less than clear as to whether cultural conservation easements will enjoy tax benefits, particularly if those easements protect culturally important land areas containing no historic structures. At a minimum, federal law seems to require prudent cultural conservation easement donors to apply for National Register or historic district recognition of their properties before claiming a tax deduction for their contribution. Depending on the state, of course, state law may require no such historic designation to create a fully enforceable easement. Meeting state requirements in the creation of legally enforceable cultural conservation easements is thus a necessary, but not a sufficient condition for the enjoyment of federal tax benefits for donated easements. This gap between state enforceability and federal deductibility shrouds cultural conservation easements in uncertainty, and may stifle the financial incentives that would make their use more widespread and reliable.

CONCLUSION: CAN NATIVE AMERICAN TRIBES HOLD CONSERVATION EASEMENTS?

Since much of the Symposium's discussion focused on Native American cultural resources and efforts to protect them, we would like to briefly address the question of whether the same state enforceability and federal deductibility requirements discussed above allow Native American tribal governments to hold cultural conservation easements. Although many other legal tools exist for the protection of Native American cultural resources, such as the Archaeological Resources Protection Act[43] and the Native American Graves Protection and Repatriation Act,[44] cultural conservation easements may offer an opportunity for tribes to protect culturally important land areas on a scale beyond the archaeological or grave site. A full examination of the nature of tribal property ownership and its relation to state or federal regulation is beyond the scope of this article. A quick look at the state and federal laws examined herein, however, reveals an odd potential result not seen in other areas of conservation easement law.

---

41. The I.R.C.'s prohibition on surface mining appears at I.R.C. § 170(h)(5)(B) (2006).

42. Many states also provide for state income tax deductions or tax credits for conservation easement donations. These tax benefits vary among the states, and some of them mirror the federal tax benefits. These state tax benefits, however, are beyond the scope of this article.

43. Archeological Resources Protection Act of 1979, 16 U.S.C.A. §§ 470aa-470mm (West 2006).

44. Native American Graves Protection and Repatriation Act, 25 U.S.C.A. §§ 3001-3013 (West 2006).

Each state's conservation easement statute describes who is qualified to hold an easement. Every state except New Mexico allows governmental entities to be grantees of and hold conservation easements.[45] Some of the statutes, however, are unclear as to whether a "governmental entity" must be a political subdivision of the state, or whether a federal agency or a Native American tribe would also qualify as a governmental entity.[46] Given the unique sovereign nature of tribes as political entities, it is not clear whether state law permits them to hold enforceable easements. New Mexico clearly prohibits them from doing so.

The I.R.C. is also unclear as to whether a gift to a tribe would qualify as a gift to a "qualified organization" for tax purposes. The Code limits deductions for gifts to governmental entities to those gifts made to "a State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia . . . ."[47] Again, the unique sovereign nature of Native American tribes arguably does not fit into any of the Code's categories.

Even assuming that the tribes would qualify as a governmental entity under the I.R.C., the question of state enforceability remains. The odd result would arise in New Mexico, for example, where an otherwise federally valid and deductible conservation easement would fail to meet the Code's requirements solely because it was granted to a Native American tribe, an unauthorized holder under state law. Thus, uncertainty also surrounds the potential for tribes to hold cultural conservation easements over culturally important land areas. This is another area of both state and federal law that could be clarified through legislation, regulation or IRS rulings.

45. *See supra* Part III.

46. *See, e.g.*, UTAH CODE ANN. § 57-18-3 (West 2005)("A charitable organization which qualifies as being tax exempt under Section 501(c)(3) of the Internal Revenue Code *or a governmental entity* may acquire a conservation easement by purchase, gift, devise, grant, lease, or bequest." (emphasis added)).

47. I.R.C. § 170(c)(1) (2005). This is the definition referenced by the qualified conservation contribution portion of the I.R.C. in § 170(h)(3)(A).