Part 6: Evaluating Options for Fixing Problem Easements

Several approaches are generally available to land trusts for working through the issues. Some are problematic, some more workable. We do not suggest that land trusts fully ignore options that we label “problematic.” However, those options must be explored with caution.

Sometimes, it may be possible for the conservation focus to be reconfigured to revitalize the conservation values. When that is not the case, there may still be a “silver lining” in existing easements that have low conservation value for the land trust that holds them. Where the opportunity is available, and it will further the conservation values of the easement, a land trust may convey the easement to a holder whose mission is more aligned to the type of easement. Of course, this new holder will be more inclined to accept transfer of an easement if its complicating matters have been addressed, and if the easement is accompanied by sufficient stewardship and defense funding.

When there is no potential alternative holder for a problem easement, other action must be taken. This section provides four workable options, although the last option may have significant ramifications not only for a land trust that chooses this course of action but for the land trust community as a whole.

While the option of transferring an easement to a new holder, described above, may have limited viability, other options remain for improving or managing problem easements. These include options for fixing mistakes of various types through reformation or correction deeds, amending easements, using the courts to provide judicial relief, or – in very rare cases – extinguishment. The Tools that follow address these options.
Tool #1: Fixing Misstatements, Mutual Mistakes and Technical Errors

In some cases the problem with the language of an easement is simply a mistake in preparing the original document. Such mistakes may be mundane, such as a spelling error or an incorrect address. Or they may be more serious, such as an incorrect property description or a misstatement of the original agreement. The land trust should take steps to correct such errors as soon as they are noticed. There are two vehicles for correcting errors in the original document; the choice depends on the nature of the error, whether or not both parties agree that the error exists, and the law of the state in which the property lies. The land trust should consult experienced local counsel to determine which tool to use. The corrections made by both of these tools are retroactive to the date of the original agreement, which means they have the same title priority as that agreement. They are thus distinct from amendments.

**Correction deeds** may be used (in some states) to correct technical errors, if both parties agree to the error and the correction. These do not require court approval and can be a simple and inexpensive solution. They can be used to correct errors such as typos, missing exhibits or incorrect property descriptions. They may not be appropriate for correcting the description of the restrictions and reserved rights in the easement. The possible repercussions for title and appraisal issues in such cases suggest that it would be safer to seek court approval for the proposed change. There may be specific definitions in the statutes and case law of the state for when a correction deed may or may not be used.

**Reformation** is a process requiring court approval that changes the deed or other writing to be consistent with the actual agreement originally made by the parties, not to make it more favorable to any party or to address changes occurring over time. As such, it can correct easement process problems such as vague language, in order to conform with the original donor’s intent. It may also be used to rectify transaction issues such as baseline problems, land description problems, or title issues. When appropriate, reformation is typically obtained with minimal expense or effort. In cases where the parties do not agree on either the existence of the error or the appropriate correction, either party may seek reformation unilaterally. A contested reformation is likely to require more expense and effort.

**QUICK POINTS IN REFORMATION**

- The tax code and regulations do not address reformation.
- Reformation will always require court approval.
- Even if the easement was not donated for federal tax benefits, an inappropriate reformation could jeopardize a land trust’s tax exempt status, lead to other federal or state penalties or result in negative publicity.
- Known or reported cases of conservation easement reformation are rare because most reformations are neither opposed nor appealed.
- Reformation is not the same thing as amendment.
Land trusts considering reformation or a correction deed should always obtain assistance from legal counsel with a good understanding of conservation easement and tax law. Donors whose past tax returns may need amendment should retain qualified tax counsel. In any reformation or correction, land trusts must ensure there is no impermissible private benefit or private inurement.

The discussion below refers mainly to the reformation process; some of the issues raised apply equally to correction deeds.

**The Basics**

Reformation is available when the parties actually reached an agreement and the written manifestation of that agreement was not properly expressed, most often by accident. Thus, reformation requires proof that (1) the parties actually reached an agreement; (2) they agreed to reduce that agreement to writing; (3) there is a writing that purports to be their agreement; (4) the writing and the agreement are inconsistent because an agreed-upon term was omitted or a term that was not agreed upon was inserted into the writing (5) either through mutual mistake of the parties or through the mistake by one party taken advantage of by another.

A mutual mistake is one common to all parties that occurs in the writing of the document. Much less often in the conservation easement context, reformation is also available if one party knew the easement deed did not accurately reflect the parties’ agreement and concealed the defect from the other at the time of signing the deed. Reformation most often arises from a mistake of fact, and a mistake of law (a mistake as to the legal effect of known facts) may not support reformation in some states or circumstances.

In conservation easements, common circumstances in which reformation may be appropriate include

- omission of an exhibit or attachment to the easement,
- omission of an intended term from the document,
- inclusion of a term that had been discussed and was agreed would not be included,
- error in setting out the property description or otherwise in identifying the property and its boundaries, and
- inaccurate depiction of the building envelope.

All parties to the conservation easement, or their successors, must participate in the reformation, at least to the extent of declaring their lack of opposition. The party seeking reformation typically must plead (1) the identity of all interested parties, (2) the existence and substance of the actual agreement between the parties, (3) the parties’ agreement to reduce their agreement to writing, (4) the content of the written agreement, (5) the variance between the parties’ actual agreement and the writing, and (6) mutual mistake or other basis for
reformation of the writing. Upon proof of these elements, the court will order the agreement reformed to state the true agreement unless the rights of a third party will be unfairly affected. Absent a third party or a dispute, reformation can often be obtained based on a petition, briefing and declarations or affidavits of the parties. There may be a short hearing, but no trial or extended proceeding is required if there is no dispute about the mistake and need for its correction.

If a federal tax deduction was taken, the IRS (or the taxpayers) may be a third party to be considered. So long as the error is limited to the conservation easement, and the appraisal was based on the actual agreement, there should be no tax consequence. Some errors have no tax consequence in any event, such as the misspelling of a name or omission of an exhibit. If appraisal relied on the easement terms and the reformation would change the easement in a way that would alter the appraisal to the taxpayer’s benefit, however, the land trust cannot seek or agree to reformation without ensuring that there is no private benefit. The briefing submitted to the court should address any tax consequences or explain the absence of any consequences.

Reformation can be used for any written instrument. An error or omission in the baseline documentation can be remedied through reformation in the same way as the conservation easement itself. If the baseline was recorded with the easement, and the error is significant, reformation may be appropriate. Often, however, there would be no need for judicial reformation of a baseline as the parties could document and agree to the correction.

**Problems in Obtaining Reformation**

If the easement property changes hands before the omission or error is discovered, and if the new owner relied on the terms of the original easement as recorded, then reformation may be unavailable. For example, if a donor and land trust agree that the 500-acre property may have only two residences built in envelopes near the northeast corner, but the conservation easement is accidentally drafted to permit ten, not two, residences, reformation is possible while the donor owns the land. There are likely drafts and notes of conversations reflecting the agreement; committee and board minutes showing the true agreement, and appraisal and communications with the appraiser showing the two-residence restriction.

Donor and land trust may seek reformation together. Even if the donor objects, the available evidence is likely to be overwhelming. If the donor sold to an innocent third party who had no knowledge of the two-residence restriction and relied on the recorded easement document in making the purchase, however, reformation is likely to be denied.

The donor in this example enjoyed tax benefits based on the two-residence restriction, so reformation is consistent with the land trust’s obligations in signing the form 8283 at the time of the donation and in ensuring there is no private benefit. The innocent third party obtained
no tax benefit and presumably paid for land with a ten-residence restriction. The court will consider the circumstances of each party at the time of a proposed reformation to achieve a fair result. Thus, proof that the third party visited the land trust before the purchase and was told of the two-residence restriction could well change the result.

Reformation is equitable in origin. Undue delay in seeking reformation coupled with prejudice to others may be sufficient to prevent reformation. The equitable defense of “unclean hands,” or action in bad faith, may prevent reformation.

**Legal and Other Factors Guiding Reformation Decisions**

*Conservation Easement Provisions*

Many easements have a provision declaring that the easement is the final and complete expression of the agreement between the parties and that any and all prior or contemporaneous agreements with respect to this subject matter, written or oral, are merged into and superseded by this written instrument. Reformation is inconsistent with this provision but not prevented by it. In some states, reformation may require proof to a higher degree than a preponderance of the evidence (such as clear and convincing proof) because of the presumption that the writing correctly states the agreement.

*Land Trust Standards and Practices*

Practice 02A provides: “The land trust complies with all applicable federal, state and local laws.” Practice 02C provides that the land trust complies with requirements for retaining its tax-exempt status, including prohibitions on private inurement. Practice 10A provides: “The land trust on its own behalf reviews each transaction for consistency with these requirements.” To the extent reformation is seen as analogous to amendment, Practice 11I prohibits private inurement and impermissible private benefit and requires compliance with conflict of interest rules and any funding requirements.

All of these Practices are founded on the assumption that the land trust will seek to correct any errors in a recorded conservation easement and will act to prevent private benefit and private inurement. This assumption is consistent with IRC § 170(h) and 501(c)(3) and the nonprofit laws of the various states.

*Uniform Conservation Easement Act (UCEA)*

The Act is silent as to reformation. The drafters of the UCEA explain that “the Act has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement’s validity” and that “the Act is intended to be placed in the real property law of adopting states …. ” The real property law of all states includes reformation, so there was no need to address reformation in the UCEA itself.
The Statute of Frauds, Rescission, Amendment

Reformation is not amendment. An amendment changes the content of the conservation easement from the original agreement to a new agreement. A reformation causes the conservation easement to be worded as originally agreed. An easement amendment takes effect at the time it is made, whereas reformation is retroactive to the date of the original easement deed.

Reformation is not rescission. Reformation affirms the existence of the conservation easement and normally corrects an inadvertent error or omission. Rescission terminates the effectiveness of the rescinded document.

Reformation is not barred by the statute of frauds.

Perception by Donors, Landowners, Supporters and the General Public

Since reformation conforms the document to the actual agreement of the parties, reformation is less likely to raise concern among donors, landowners, supporters and the general public and may not come to their attention. As the complaint or petition seeking reformation will be filed with the court, it may be read by local news reporters, especially if the land trust or owner is controversial or newsworthy. The drafter should include appropriate explanation supporting the reformation and explaining its justification. The types of mistakes that give rise to reformation are not unusual in real estate transactions and, although embarrassing, do not reflect negatively on the organization.

Judicial and IRS Review (Relevant Cases)

There are essentially no cases considering reformation in the context of conservation easements. In Glass v. Commissioner, 124 T.C. 258 (2005), the Tax Court noted in passing that the taxpayers had sued the land trust for reformation in state court. That action was dismissed, apparently when the taxpayers realized it would not assist them in the federal proceedings.

Reformation is recognized and approved in private letter rulings involving charitable giving. Depending on the nature of the error and its impact on taxes owed, if any, the easement donor may be required to amend a past tax return and the land trust may need to provide a revised form 8283. If the appraisal is consistent with the actual agreement, however, these activities may not be required.


- Facts: Taxpayer created and funded a charitable remainder unitrust, then discovered a drafting error that made it impossible for her to designate one or more private foundations, organizations described in section 170(c) but not in sections 170(b)(1)(A) or 509(a)(3), as remainder beneficiaries as she originally intended. Evidence of intent was provided.
Holding: “Because the proposed reformation is the correction of a drafting error, it will not be treated as violating the requirement that the remainder interest to charity must be irrevocable. “

Comments: The IRS noted that reformation of the unitrust would affect taxpayer’s income tax deduction for the charitable contribution made to the unitrust, so its ruling was conditioned on filing a timely amended return reporting a reduced charitable deduction.

Similarly permitting reformation is Private Letter Ruling 201133004 (Aug. 19, 2011) (the attorney used the wrong form and created a NIMCRUT instead of a CRUT; reformation permitted).

Some Examples

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<th>INCONSISTENT WITH THE ORIGINAL AGREEMENT</th>
<th>CANNOT REFORM</th>
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<td>A land trust has held a scenic, open space conservation easement over a 5,000 acre ranch for some years. The easement prohibits cell towers and commercial uses. The donor contends that he always intended that he could place cell towers inside the tall barn and silo located at the ranch because they will be invisible. Moreover, he argues that cell towers disguised as trees could be placed on the ridge line because they would not be noticed in among the existing trees. The land trust checked its records and found no notes indicating intent to permit cell towers. The express prohibition on cell towers is consistent with the prohibition on commercial uses which would itself prohibit the towers, so internal evidence in the easement confirms the memories of land trust personnel and board minutes. Allowing cell towers would also be inconsistent with the appraisal done at the time of donation, giving the donor a significant financial benefit not contemplated in the appraisal.</td>
<td>The land trust cannot reform or agree to a reformation. The changes are inconsistent with the original agreement, would grant the donor an impermissible private benefit and would violate federal and state tax laws.</td>
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<td>LACK OF DISPUTE, NO TAX CONSEQUENCES</td>
<td>REFORMATION OR CORRECTION DEED</td>
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<td>One of a land trust’s first conservation easements was written in 1978 when the land trust was run by volunteers with little money, so no legal advice was obtained. The easement exhibits were accidentally omitted. No one noticed until the land trust was preparing for accreditation and reviewed its older easements. The donor had died, but her children had inherited and the donor’s copy of the easement which had been used by the appraiser had the omitted pages and paragraphs. They agreed it made sense to correct the recorded copy.</td>
<td>The original agreement is clear and without any dispute. No tax consequence would be created. The land trust sought reformation through the court, to attach the relevant documents. This case might also have been addressed through a correction deed in states where they are allowed.</td>
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<th>ERROR IN STATING RESTRICTIONS, RESERVED RIGHTS</th>
<th>REFORMATION</th>
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<td>Shortly before an easement was signed, the donor agreed to reduce the number of permitted residences from two to one, in exchange for looser restrictions on the size of the permitted building. In the rush of the end-of-year deadline, the land trust printed out an earlier draft of the easement that did not include the changes and that copy was signed and recorded. It was not until two years later that the staff person who negotiated the easement noticed the discrepancy during a pre-monitoring review of the document. A search of the files revealed a clear trail of correspondence regarding the change and both parties’ agreement to it.</td>
<td>The land trust should seek reformation of the easement to reflect the original agreement. It could do so unilaterally even if the donor has had second thoughts about giving up the second residence and resists. The appraisal should be reviewed to determine which set of restrictions was given to the appraiser. Reformation could have tax consequences for the donor if the appraiser relied on the incorrect document.</td>
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<th>DISPUTE, TAX CONSEQUENCES</th>
<th>CAUTION</th>
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| The land trust accepted an easement over a 20 acre parcel as forever wild habitat. Right at the end of the negotiations, the donor realized he needed access through this parcel to another parcel he owned. The land trust reluctantly agreed and revised the easement to permit construction of a road where it would have the least undesirable impact. Unfortunately, because the knowledgeable land trust staff members were at Rally, the original version of the easement was signed, recorded and used for the appraisal. The mistake was discovered when the donor asked that the Form 8283 be signed. The donor wants the easement deed corrected, but he likes the appraisal number and prefers not to involve the appraiser. The land trust refuses to sign the Form 8283 unless the donor agrees to accept the recorded easement as the final version and to give up the road. | The donor clearly wants more tax deduction than he is entitled to, and the land trust cannot be complicit. The dispute can be resolved with no reformation, no new appraisal and use of the existing Form 8283. Or the deed can be reformed if there is a new appraisal and a new Form 8283.
Inquiries and Action Items for Reformation

For any reformation of a conservation easement, look closely at the existing language and documents and compare them to the proposed reformed documents. If the existing documents reflect the actual agreement that was made, then reformation is inappropriate. If the existing documents fail to reflect that original agreement, then reformation may be appropriate:

- If the content of the actual agreement can be convincingly established,
- If there is no dispute or no credible dispute between the land trust and owner/donor,
- If there is no intervening third party whose rights would be adversely affected and who opposes the reformation,
- If there is no impermissible private benefit or private inurement and any potential private benefit can be eliminated by such steps as amending tax returns and Forms 8283 and obtaining new appraisals and paying any taxes that may be owed.

Legal Issues and Inquiries

- Land trusts should be sure to involve attorneys who understand the tax and conservation easement issues at both the state and federal level.
- Look at the proposed reformation from all angles to ensure there is no impermissible private benefit or private inurement.
- Schedule D of the most recent Form 990 (annual nonprofit tax return) requires the reporting of the amendment and extinguishment of a conservation easement. Although reformation is not specifically identified, it is sufficiently similar that it should be disclosed. The land trust, working in cooperation with its accountants and attorneys, should provide a short explanation in the Form 990 and the pleadings and other papers filed with the court should provide a well-documented explanation of the reformation if the IRS questions it.

Public Perception Issues and Inquiries

- To the greatest extent possible, contact the easement’s donor or donor’s family to make sure that they understand the purpose of the reformation and to address any of their concerns. In most cases, the need for reformation will be discovered relatively quickly, often when the donor remains in ownership.
- If the reformation is likely to be controversial, communicate with key supporters (such as major donors and community leaders). More often, the reformation can be done with little publicity.
- Consider whether the reformation would surprise or affect adjacent and other nearby landowners and whether to communicate with them. When the reformation conforms the document to what everyone believed it to state, there may be nothing to communicate.
Still a little confused about the difference between when to seek amendment and when to pursue reformation? Here’s a way to think about it – bearing in mind, of course, the importance of talking with legal counsel to understand how best to move forward:

- **PROBLEM:** Technical error
  - **SOLUTION:** Reformation or Correction Deed

- **PROBLEM:** Vague language
  - **SOLUTION:** Amendment
Tool #2: Amending the Easement

With a cooperative landowner and no private benefit issues, the cleanest solution to sloppy drafting may be to amend the easement. State laws and easement provisions vary concerning the process required to do this, and in some cases it could be expensive and time-consuming. But the benefits to the future stewardship of the easement may be worth the cost.

Land trusts must proceed very cautiously and deliberately when considering an amendment of a donated conservation easement that compromises a conservation purpose or materially alters a prohibition, instruction, or restriction. The law is still unsettled in most states, and there is controversy in the land trust community about basic matters as whether amendments ought to be governed by federal law, the law of contracts, or by other standards. Experienced attorneys can be found on various sides of the issues. This discussion is not intended to propose that one view or the other is correct but, rather, to make readers aware of the diversity of views so that they are prepared to seek the best and most useful advice possible in their jurisdiction and situation.

Special caution: some state attorneys general have taken the position that donated conservation easements are charitable trusts or restricted gifts. In their view, amendments that deprive the public of the charitable benefits of the easement or ignore the donor’s stated instructions (and in particular, the donor’s conservation-related restrictions) require court approval. No amendment should be entered into without consulting counsel experienced in tax, nonprofit law, and the law of charitable gifts. An amendment that only corrects a mistake, clarifies an unclear provision, or enhances conservation effectiveness can usually be entered into by the easement holder and the landowner. While the land trust community generally believes that amendments should be rare, it is also true that, over time, most conservation easements will probably be more effectively administered if the holders are willing to craft and enter into appropriate amendments.

The Basics

The amendment of conservation easements has attracted a good deal of attention over recent years in the land trust community. Arguments over proper amendment procedure have made many more cautious about proper amendments than they need to be. Almost all
knowledgeable advisers agree about two points: first, an instrument that defines a perpetual interest is likely to require amendment over time. Second, close attention to consequences is called for if a proposed amendment would eliminate a specific prohibition or restriction or compromise a stated conservation purpose or conservation value.

The Land Trust Alliance, appropriately cautious about amendments, has stated that amendments should be rare. Its 2007 research report, *Amending Conservation Easements: Evolving Practices and Legal Principles*, includes a set of amendment principles on which there is general agreement and provides guidance for land trusts trying to place easements on the risk spectrums as they decide how to proceed. While that policy usefully counsels caution and care, it is also true that over time and over a fair-sized portfolio of easements, amendments can be very appropriate and useful.

Land trusts must be careful to uphold the conservation purposes of the easement, to assure the public interest is paramount for making the amendment, and to otherwise avoid conferring any impermissible private benefit in the amendment process. These issues may not even be raised in some amendments. However, in other amendments, such as those that deal with administrative provisions, any needed approvals will be available under more relaxed standards. Yet others, such as amendments that could be interpreted as relaxing the conservation prohibitions or restrictions, would likely raise different issues. In all cases, the amendments may be scrutinized by the IRS since current federal tax regulations require the disclosure of all amendments in a land trust’s annual tax return. The easement terms themselves may require judicial approval of any amendment, and this may be true for all kinds of easements. Therefore, great care by the land trust is warranted.

### Applicability of Charitable Trust Laws and Contract Laws

Conservation easements, like some other instruments that convey real property, are contracts. Because, however they also serve as part of a system for publicly documenting real property interests, they are more than contracts. They are also deeds. The IRS, some state attorneys general and some practitioners believe that donated or partially donated conservation easements also represent instruments for conveying restricted gifts or instruments of trust.

If donated easements are restricted gifts or charitable trusts, some attorneys would agree that they are subject not only to the law of contract and deed, but also to the well-developed legal principles that govern administration of charitable gifts. Some other attorneys take the view that conservation easements, governed as they are by the law of the states that make them enforceable, can be amended just as other easements can be – by the agreement of the parties to the easement.
Federal tax law (e.g., 170(h)) incorporates the key principles from the charitable gift view of easement law, by requiring that conservation easements intended to be deductible incorporate terms that prohibit extinguishment unless a court determines that accomplishment of conservation purposes is impossible. So, an amendment that compromises— or partly extinguishes—a conservation easement donated under 170(h) will require judicial approval in almost all circumstances. (See the appendix for additional resources.)

State laws vary. About half of the states have adopted a form of the Uniform Conservation Easement Act (UCEA). The published comments that accompany the act make it clear that the authors of the UCEA believe that charitable trust/restricted gift law applies to donated conservation easements. Many UCEA states have included a provision stating that, for interpretation purposes, they intend to have the law correspond as closely as possible to the Uniform Act, meaning that the official comments have significant weight. However, many UCEA states have customized that Act significantly, and many other states have conservation easement laws that differ in very significant respects from the Uniform Act. Moreover, it is dangerous to consider state law in isolation in evaluating actions affecting donated easements for which federal deductions were taken. A state lacks the power to diminish the requirements of IRC sections 170(h) or 501(c)(3) or Treasury Regulations 1.170A-14(c) for purposes of federally deductible donations. Thus, there is no substitute for securing counsel that is familiar with the issues at stake in conservation easement, charitable and nonprofit law when considering an amendment.

Land Trusts should be careful about concluding, absent the support of experienced counsel, that the amendment process is as simple as the language in some states makes it appear. That is, there are likely to be considerations beyond the words of a statute that includes a provision stating that a conservation easement can be amended or terminated in the same manner as other easements—for example, there may be conservation easement amendment language in the deed itself. Many experienced attorneys believe that the language in the UCEA was intended to address only the procedures for amendment—use of a writing, signatures, notarization, recordation and the like. Therefore, for amendments that change a restriction, an instruction, a prohibition or a purpose of a donated or partially donated conservation easement a land trust should consider, with good counsel, whether to seek court approval. The judicial proceeding in which that kind of approval is sought may include the state’s attorney general—representing the public interest—as a party.

There is one further consideration here, arising from the current dispute in the land trust community about the extent to which amendments are permitted and the requirements to effect them. A land trust should consider what results may ensue if a course of action is selected and it is later, definitely determined to be wrong. A land trust that seeks judicial approval that turns out to have been unnecessary will have spent some money if would not
have spent had it known the future. A land trust that elects not to seek judicial approval may have placed its donor, its land protection program and its nonprofit status at risk. The risks are far greater for the land trust that assumes judicial approval is not required.

**Other Kinds of Amendments**

Other amendments merely clarify an ambiguous term, correct an error, add property, or add protection. These typically do not require public participation and can be agreed upon by the property owner and the easement holder, acting alone. Even these must be disclosed to the IRS with an explanation on the land trust’s Form 990. In some cases, where the intent is to correct a technical error or misstatement of the original agreement in the document, a correction deed or reformation of the contract may be a more appropriate vehicle than amendment. See Tool #1: Fixing Misstatements, Mutual Mistakes and Technical Errors for a detailed discussion, and consult an attorney about whether these are available options.

**Other and General Amendment Considerations**

There are two other factors to consider in all conservation amendments, even amendments of purchased conservation easements. First, the land trust needs to review any representations made to donors in securing funds used for easement purchase or stewardship, as well as any restrictions imposed by the donor of funds. If the funds were donor-restricted, careful review and observance of the requirements of the restrictions are essential. If solicitations included a representation that the conservation achieved would be permanent, as is common, the land trust may want to consider approval by a court or the attorney general of a proposed amendment that affects that permanence, simply to have an independent affirmation of the good faith purpose that the amendment is designed to accomplish. That will reduce the likelihood of success of any claim of fraudulent solicitation. Second, the amendment needs in all respects to be consistent with the land trust’s corporate purposes and its obligation to administer its resources exclusively for charitable purposes.

**Public Perception**

The land trust should be ready to respond to questions from the press and the public about a decision to amend. Depending on the nature of the amendment, it would certainly be good practice to inform the original donor or seller or the donor’s heir of an intention to amend an easement, even if the property has changed hands. Doing so will improve the chance of maintaining good will in that relationship, as well as provide those parties an opportunity to recall history that may be useful.
**Discretionary Consent**

It's not always necessary to go to the length of amending an easement document, if the document includes language that allows “discretionary consent.” This type of language in an easement permits a land trust to make interpretations of the easement provisions at its discretion. The idea is to provide flexibility for the land trust. At its discretion, the land trust may re-think activities that it might once have thought harmful, or consider activities not explicitly permitted or prohibited by the easement document, as long as the proposed uses substantially conform to the intent of the grant, are not inconsistent with the conservation purposes, and don't materially increase the adverse impact of actions expressly permitted under the easement.

Without such discretionary consent language, if there is some doubt about whether a landowner can take a particular action, the land trust could still analyze the potential impact to the conservation value and permit the activity if it found no adverse impact. But having that language provides comfort for the land trust in defending its decision and allows both parties to avoid the expense of legal fees associated with amendment. The permission can be limited to a period of years or to a particular owner, giving the land trust much greater control over the activity than the land trust would enjoy with an amendment.

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**Some Examples**

**WRONG**

An easement cites protection of natural open space and an unobstructed view of the ocean from a state highway among its conservation purposes. It allows construction of one residence in a defined building envelope in a corner of the property along the road. The landowner wishes to build the permitted residence but would prefer to locate it at the top of a bluff overlooking the ocean. He approaches the land trust to request an amendment.

The desired placement of the residence would be in the middle of the open space and the view from public vantage points. Moving the building envelope there would clearly compromise the conservation purposes of the easement. Moreover, since a house overlooking the ocean would likely be worth considerably more than the same house placed along the road, the requested easement would confer an impermissible private benefit.
An easement protects sensitive native plants and prohibits the introduction of invasive species. The easement also prohibits use of herbicides. However, an invasive plant that for practical purposes can only be controlled with herbicide now threatens the integrity of the conservation purpose.

Because prohibition of herbicides would in this case defeat the conservation purpose, an amendment appears warranted. As in other such situations, the easement must be reviewed in totality to determine whether the land trust should seek court approval of the amendment (or attorney general approval, depending on the jurisdiction).

An easement permits “residential uses” of the restricted parcel, but a fair reading of the whole easement makes it clear that the phrase does not mean that the property owner can build a house in the restricted area; rather, it means that the restricted property can be used in the way a residential owner would normally use open space adjacent to a residence.

The easement can be amended to eliminate the phrase “residential uses” and replace it with a short, illustrative, non-exclusive list of permissible activities. The amendment can be entered into by the easement holder and the landowner without public proceedings.

An easement cites natural and scenic values as purposes. The specific terms are weighted to the scenic purpose, citing the view across the property from a public vantage point of a skyline and mountains. However, the easement prohibits the cutting of vegetation, and trees are beginning to block that scenic vista.

A case could be made that the prohibition on vegetation control was a mistake, as the real purpose was scenic. Thus, it could be argued that a clarifying amendment could be entered into by the owner and the holder without court approval. A more conservative view, however, is that there may be natural values other than the view-blocking trees that the easement was meant to protect, and thus that a judicial approval of any suggested remedy is desirable. A limited amendment, permitting the cutting of trees that obstructed the scenic view could be presented to a court for approval, with notice to the attorney general. Questions to consider might include who else benefits from the tree-cutting besides the viewing public, what will happen to the trees when cut and who will benefit.
Tool #3: Asking the Court for Assistance

Where the landowner will not consent to an amendment, and it is vital that the easement be clarified to avoid an imminent dispute, the land trust can ask a court to step in. This is more complicated and usually more expensive. For this reason, seeking court assistance (“judicial relief”) is usually, but not always, the option of last resort. Before deciding to seek judicial relief, determine the financial cost and the risk of landowner opposition or supporter or public misunderstanding.

The Basics

Alternative Dispute Resolution

Some easements may require alternative dispute resolution (ADR) before seeking certain types of judicial relief (as long as there is no imminent threat of harm to conservation values). In some cases, a land trust may simply want to try ADR before going to court. ADR consists of three options:

- Negotiations. The parties can try to work things out between each other through one or more discussions, by phone, in writing, or in person. In-person negotiations are almost always better.
- Mediation. The parties can seek the assistance of a third-party neutral charged with assisting the parties to find resolution. Good mediators usually have training, experience and a good understanding of the court system. The mediator should also have a good understanding of the law relating to the issue at hand.
- Arbitration. Arbitration is not a way to seek compromise; instead it is an alternative to going to court. It may be faster and less expensive than going to court, but not always. Arbitration is usually fully binding on the parties and enforceable by law, including by the courts. It usually is not appealable.

Judicial Relief

A court will usually have the authority to grant a variety of kinds of “relief” (assistance to the parties), including the following relevant ones:

- Injunctive relief. A court orders a party to do something, or to stop doing something.
- Monetary relief (damages). A court orders one party to pay another party.
- Declaratory relief. A court interprets a contract (such as a conservation easement), or a provision therein, or issues a ruling based on facts presented to it (however, the facts...
will need to constitute a real case and controversy). Sometimes a request for declaratory relief can be presented in a non-adversarial fashion, such as if both the landowner and land trust agree to a particular course of action. In that case, they may present the issue as co-petitioners.

- Reformation of contract. A court modifies the contract to accomplish the original intentions of the parties. In the conservation easement context, reformation could be requested by a land trust if a provision is absent, but both parties understood that the missing provision was a part of the original agreement. This Guidebook includes a separate Tool that addresses reformation of contracts.

**Jurisdiction**

A court must have “jurisdiction” to hear the matter. This basically means two things.

- First, the issues presented in the matter must be of the type that the court can hear. For example, a land trust would go to the court that has jurisdiction over civil matters, including contracts and real property matters. This will usually be a state court.
- Second, the court must have jurisdiction over the parties in the case. For example, a Nebraska state court would not have jurisdiction to hear a case involving land in Colorado, when neither of the parties resided or had its principal place of business in Nebraska.

**Standing**

The person bringing the court case must have a legal right to bring it, called “standing.” This can involve complex factors, but in most cases it means: Will the person bringing the case suffer injury? In conservation easement cases, it can be stated even more simply: Does the person bringing the case have the right to enforce the conservation easement? Or is the person bringing the case subject to the easement terms by virtue of having an interest in the land encumbered by the conservation easement? Either would have standing.

**Parties**

The person who initiates a lawsuit is a plaintiff. The person named as the opposing party is the defendant. A case can have multiple plaintiffs and multiple defendants. In some states, the attorney general may need to be named as a party. Some states may require public notice of the lawsuit and an opportunity for others to intervene. In some instances dealing with non-adversarial declaratory rulings, where both parties are requesting the same relief, the parties may be identified as petitioners. Such a filing may be more in the form of a petition (e.g., “In the Matter of the Blackacres Conservation Easement”).
Basic Parts of a Case

- **Complaint.** To initiate a case, a plaintiff must prepare and serve a complaint on the defendants who will be affected by the court’s ruling. In the case of a conservation easement, the parties are usually limited to the holder and the landowner and often the state attorney general. The complaint provides a brief description of the controversy and identifies the relief requested by the plaintiff.

- **Answer.** The defendant will provide a brief answer to the complaint. Neither the complaint nor the answer is meant to resolve the case in itself. These documents are initial procedural steps that define the scope of the issues the court is to resolve.

- **Discovery.** Court rules permit the parties to investigate facts by requesting documents, asking for written answers and questioning potential witnesses through depositions.

- **Motion.** Some matters can be resolved by motion. Each party is provided an opportunity to provide written reasons for a particular result. There is usually a hearing where oral argument is heard. Then the court will rule on the motion and issue an order.

- **Evidentiary hearing.** In some cases, there will be testimony and documents presented before a trial. This could be for a motion or for other reasons.

- **Trial.** At a trial, the court hears all the relevant, admissible evidence. Some controversies are entitled to a jury trial. It will depend on the state, the issue, and whether the plaintiff or defendant requests a jury. Otherwise, a judge will hear the trial.

- **Judgment.** A judgment is a final ruling by a court. A judgment can be issued after a trial and sometimes after a motion.

- **Appeal.** An appeal to a higher court can sometimes be taken from a judgment.

When to Use the Courts to Resolve Problem Easements

There are situations in which a land trust may want to seek judicial relief. In other instances, the land trust will have no choice but to seek judicial relief. Here are a few of these situations:

- The landowner has violated the conservation easement, the violation is causing significant harm to the conservation values, and the landowner refuses to cure the violation. Here the land trust has no choice but to seek help from a court. The land trust will seek injunctive relief and possibly monetary relief, as well as possibly attorneys’ fees and costs for having to bring the case.

- The landowner and land trust believe the easement should be extinguished. In this case, the parties will present the law and facts and ask the court to rule favorable to them. There may be the need for the attorney general to be a party to this type of case.

- The land trust and landowner are in agreement as to an amendment to the conservation easement, but the land trust wants to make sure the action does not constitute impermissible private benefit. (The ruling may have relevance only with respect to state laws, however, as the state court’s ruling would not be binding on the IRS. A land trust might be able to get a private letter ruling from the IRS, or the parties may seek declaratory relief in federal court.)
The land trust and landowner disagree over the interpretation of a provision in the easement and either of them (or both of them) desire to have the issue resolved by the court. Either party can seek judicial relief. More often than not, it will be the land trust that forces the issue, with or without the consent and support of the landowner. Here the land trust would seek a declaratory ruling or possibly reformation of terms in the easement.

Preparing to Use the Court

Land trusts should anticipate that at some point they will need to use the court to assist with one of the issues discussed above. Here are some steps that will help the land trust be prepared.

- Identify local counsel with the background to assist the land trust. This will not always be the same as the attorney who assists on nonprofit issues or conservation law issues. It will be a civil trial attorney (litigator) with experience in real property or tax matters. It should also be someone genuinely interested in the land trust's specific issues, willing to provide early counsel, and, as necessary, prepared to represent the land trust.
- Consider supporting legal help from a national source. Conservation easements are unique, and there are benefits to having the assistance of an attorney who understands litigation as well as the nuances of conservation easement law. This person may not practice in your area but could assist a local attorney behind the scenes or by presenting in court through a process known as pro hac vice. Typically, it is not wise to rely exclusively on an attorney from far away because of lack of knowledge of state law and local judges, rules, and procedure.
- When considering whether the land trust’s enforcement funds are sufficient, include the likelihood of court costs associated with amendment, reformation or extinguishment. Conduct sufficient fundraising to meet any shortfalls. Consider seeking help from the Conservation Defense Fund, if the case may be precedential in nature.

Applicable Land Trust Standards and Practices

Here’s a quick rundown of relevant practices. More information can be found at the Land Trust Alliance’s on-line Learning Center.

Practice 11D: Landowner Relationships

The land trust maintains regular contact with owners of easement properties. When possible, it provides landowners with information on property management and/or referrals to resource managers. The land trust strives to promptly build a positive working relationship with new owners of easement property and informs them about the easement’s existence and restrictions and the land trust’s stewardship policies and procedures. The land trust establishes and implements systems to track changes in land ownership.
Practice 11E: Enforcement of Easements

The land trust has a written policy and/or procedure detailing how it will respond to a potential violation of an easement, including the role of all parties involved (such as board members, volunteers, staff and partners) in any enforcement action. The land trust takes necessary and consistent steps to see that violations are resolved and has available, or has a strategy to secure, the financial and legal resources for enforcement and defense. (See 6G and 11A.)

Practice 11I: Amendments

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

Practice 11K: Extinguishment

In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.
**Tool #4: Extinguishing the Easement**

Where there is absolutely no conservation value, extinguishment of the easement *may* be an available option. This is a last-resort option, appropriate with conservation easements *only in rare cases*. Extinguishment should be pursued only with extreme caution and excellent legal counsel. And the land trust’s entire share of any proceeds from any sale of the extinguished easement property must be used in a manner consistent with the conservation purposes of the easement.

“Extinguishment” has been defined as “[t]he destruction or cancellation of a right, power, contract or estate.” When a conservation easement is extinguished by both the landowner and the easement holder, it ceases to exist. The property is returned to its original unencumbered state and can thereafter be used for any legal purpose. In most cases, it will be much more valuable after extinguishment of the conservation easement. For extinguishment to be successful, it will ordinarily require the agreement of both the land trust and the landowner and also the assent of a court.

Extinguishment should not be confused with “merger,” a different legal concept. In merger, there is a carrying on of the substance of the thing, except that it is merged into and becomes a part of a separate thing with a new identity. In the case of a merger involving an easement, the substance of the thing is the conservation purpose of the easement. For example, if a landowner were to transfer the fee interest in her land to a land trust that held the conservation easement over that land, the fee interest and the easement are now held by the same entity. In theory, this could cause the two interests to “merge,” thereby potentially causing the easement to legally “evaporate” and no longer be enforceable. However, this rarely if ever could happen in the conservation easement context.

Under most state laws and in the eyes of the IRS, the easement and the management and monitoring responsibilities associated with the conservation easement survive even though there is only one owner of both interests. This is a sound legal and practical result because otherwise, merger could be used to circumvent state and federal laws that apply to the extinguishment of a conservation easement. This is a critical distinction that must

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**QUICK POINTS ON EXTINGUISHMENT**

- The tax code and regulations identify only one situation where extinguishment would be permitted of a qualified conservation easement – where an unexpected change in the condition surrounding the property makes it “impossible or impractical” to use the property for conservation purposes.
- Extinguishment of a tax deductible easement will require court approval.
- Even if the easement was not donated for federal tax benefits, an inappropriate extinguishment could jeopardize a land trust’s tax-exempt status or lead to other federal or state penalties
- Known or reported cases of the extinguishment of a conservation easement are quite rare, and those that do exist do not provide clear guidance for the land trust community.
be understood by any land trust that is contemplating the extinguishment of one of its conservation easements. In one instance the easement has been terminated and in the other the easement still exists. The distinction has both legal and public relations repercussions.

**Problem Easements and Extinguishment**

At first blush, extinguishment might appear to be a particularly attractive way to deal with an easement that the land trust determines, in retrospect, has low conservation value. The land trust may be rightly concerned that it will be spending some of its limited stewardship and enforcement resources on land that has questionable public benefit and want to say: “Look, we didn’t get it right when we accepted this easement, years ago. We now know it’s not benefiting the environment or people. Let’s extinguish it and move on to bigger and better projects.” This reasoning is even more attractive because many landowners might not complain if the easement were extinguished. And it may be especially tempting if the landowner is offering to “buy back” the easement at its appraised value.

Legally and perception-wise, it’s just not that easy, as explained further below. The better option may often be something other than extinguishment of the conservation easement such as amending the easement or transferring the easement to another land trust that is better suited to own and manage the easement. Nevertheless, there may be limited situations where extinguishment is the best option – for example, for an easement where no conservation value can be objectively ascertained. It is rare to have an easement that has no conservation value. But if that situation does exist, the land trust will want to consider whether extinguishment is the best option.

**Deciding When to Pursue Extinguishment: Legal and Other Factors**

*Conservation Easement Provisions*

Most easements, and virtually all donated easements, contain language relating to extinguishment. This language must be carefully reviewed to ascertain what the original parties to the agreement intended and what contractual basis there may be to extinguish the easement. In the case of a tax-deductible easement, the language must be consistent with the IRC regulations discussed below. For example, in 2012, a tax court held that a provision in the easement that allows a land trust and donor to extinguish the easement at their mutual discretion will prevent the easement from qualifying for federal deductibility (*Carpenter v. C.I.R. Tax Court Memo 2012-1*). How can the easement be extinguished in these circumstances and also meet the perpetuity requirement of the IRC?
Land Trust Standards and Practices

Practice 11K says:

**Extinguishment.** In rare cases, it may be necessary to extinguish, or a court may order the extinguishment of, an easement in whole or in part. In these cases, the land trust notifies any project partners and works diligently to see that the extinguishment will not result in private inurement or impermissible private benefit and to prevent a net loss of important conservation values or impairment of public confidence in the land trust or in easements.

This language flags critical issues related to extinguishment discussed below.

**IRC § 170(h)**

If the original donor claimed a tax deduction for donating the easement to the land trust, Section 170(h) and related sections and regulations of the IRC are applicable. For an easement to be deductible under the IRC, it must comply with the IRC, including the requirement that the easement be “perpetual.” Clearly there is an inherent tension between “perpetual” and “extinguishment.”

Treasury Regulation Section 1.170A-14(g)(6) addresses the issue of extinguishment. It provides that, if a subsequent unexpected change in the condition surrounding the property can make “impossible or impractical” the continued use of the property for conservation purposes, then, subject to a judicial proceeding and the required sharing of proceeds between landowner and easement holder, the easement may be extinguished.

These regulations anticipate that an easement may be extinguished by seeking court action in accordance with a judicial proceeding that is often based upon the doctrine of “cy pres.” “Cy pres” (pronounced “see-pray,” which in French means “as near as possible”) permits a court to terminate a charitable trust, such as a conservation easement, when the purposes of the trust are impossible or impractical to continue. Recent examples of cy pres outside the easement context arose with respect to donated land and buildings restricted to exclusive use by men, or by members of a particular race. When these restrictions became recognized as unconstitutional, courts were asked to terminate the donation or to eliminate the restriction, based on the best determination possible at the time of the donor’s wishes.

After a court has agreed to the extinguishment, upon the subsequent sale of the property and receipt of its required share of the proceeds, the land trust must use its share of the proceeds in a manner consistent with the original conservation purposes of the easement. The land trust’s share of the proceeds can be no less than the easement’s proportionate value of the property’s full value at the time of the donation. For example, if at the time of the donation, the easement was valued at 60% of the property’s full fair market value, then after extinguishment
and upon the subsequent sale of the property, the land trust is entitled to no less than 60% of the proceeds of the sale of the property. Until the subsequent sale of the property, for which there is no time limit, the land trust has a vested legal right in the property that will protect its right to its share upon the property’s sale.

IRC § 501(c)(3) and State Nonprofit Statutes

If the original donor did not claim a federal tax deduction, IRC § 170(h) may not apply. Nonetheless, the land trust still has significant obligations due to its status as a 501(c)(3) “public charity,” or as a “nonprofit corporation” under federal law and under most state statutes. To receive the tax-exempt benefits provided by federal or state law, the land trust agrees to abide by restrictions and prohibitions that protect the public interest. These include the federal rules that a public charity act “exclusively” for charitable purposes and not for private purposes.

In a similar vein, most state nonprofit corporation statutes include provisions quite similar to the federal rules. Inappropriate extinguishment of an easement may violate these requirements. A land trust should not undertake an extinguishment action without the assistance of excellent legal counsel who understands both the federal law and applicable state statutes.

Perception by Donors, Landowners, Supporters and the General Public

In addition to legal restrictions, an easement extinguishment opens a land trust to potential scrutiny. An extinguishment could result in members of the public questioning the land trust’s principles. If the land trust decides an extinguishment is necessary, it should develop a plan for how to present the decision to a number of different audiences. The original easement donor, donors of other easements, neighbors of the property, other conservation organizations, the press and public watchdog organizations all have the potential to weigh in with an opinion. The land trust should know how it will answer their questions and, in some cases, may want to include some of these stakeholders in the decision-making process.
### Summary of Potential Outcomes of Extinguishment

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<th>POTENTIAL POSITIVE OUTCOMES</th>
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<tr>
<td>The land trust will free up resources to devote to projects with real public benefit, provided that the proceeds are used in a manner consistent with the extinguished easement’s purposes.</td>
<td>The land trust is required to report the extinguishment of any conservation easement on its Form 990. It is reasonable to assume that such a report will draw IRS attention to the details of the action, given the rarity of the event. Even if extinguishment is found to be justified, scrutiny will be uncomfortable at best.</td>
</tr>
<tr>
<td>The land trust will realize the value of the extinguished easement and must apply those funds to a project that protects the conservation values more effectively. (Note that, while payment of the easement value to the holder may be seen as a positive outcome, it should never be a factor in the board’s decision to seek an extinguishment.)</td>
<td>If the extinguishment is found to violate any of the regulatory requirements discussed above, the land trust risks losing its status as a tax-exempt public charity and as a qualified easement holder.</td>
</tr>
<tr>
<td>The land trust’s supporters may see the decision as a thoughtful approach to how the land trust evaluates conservation value and public benefit.</td>
<td>Even if extinguishment passes the regulatory tests, public reactions may be negative. The original donor might complain publicly. Existing and potential donors of other easements may question the land trust’s promises of permanent protection. Watchdog agencies may also object.</td>
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<td>There is a risk that the original easement donor could claim that the land trust fraudulently encouraged the donation, contending that the extinguishment violates promises and commitments made by the land trust at the time of the donation. In many states, the donor could ask the state’s attorney general to investigate the land trust, and fraudulent solicitation can result in fines, penalties and loss of tax-exempt status.</td>
<td>There is a potential for establishing legal precedents that may be cited in attempts to extinguish other, more valuable easements.</td>
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A possible extinguishment example

**CAN EXTINGUISH?**

A freight train derailment results in toxic contamination of a 20-acre suburban wetland property protected by a conservation easement. The wetland – protected for its value as a nesting area for migrating waterfowl – is polluted with chlorine, benzene, and petrochemicals. Adjacent residences have been evacuated while the area is evaluated for public health hazards.

A case could conceivably be made for extinguishment, given the level of damage to the wetland. This would be more supportable if the land trust conducted an analysis that determined that restoration of the wetland would be “impracticable or impossible” (this is the bar set by 170h).

On the other hand, consider this: While the conservation value of this wetland has ostensibly been damaged by the contamination, there may yet be potential for cleanup: drainage of the wetland, removal of toxic soils, and regrading. A land trust should not assume that this situation – as dire as it seems – is irreparable. With the funds from the settlement with the railroad, the land trust could work with the nearby university to use this land as a research/study demonstration on reclaiming damaged land.

**What do you think?**

Is there a case for extinguishment?

A land trust holds a scenic easement along the bank of a brook facing the south side of a state road between two towns. It had the effect of rendering a four-acre area at the top of the bank undevelopable. Following Hurricane Irene, the brook had completely scoured the bank at this location, and a landslide obliterated the area at the top of the bank. Emergency repairs ordered by FEMA and the Highway Department resulted in a huge rip rap wall from the stream bed to the top of the bank. The land trust unsuccessfully sought damages and mitigation from the Highway Department, which cited its responsibility to protect public health and safety and restore transportation routes following a declared state of emergency.
Inquiries and Action Items for an Extinguishment Issue

There are at least two considerations in extinguishment of a conservation easement. The first involves a thorough review of the law at both the federal and state level. The second should address the public response to extinguishment. Both are largely uncharted territory. At a minimum, any land trust involved in extinguishment of a conservation easement should consider the following.

Legal Issues and Inquiries

- Seek legal support from lawyers who understand the issues at both the state and federal level.
- Review IRS code and Treasury regulations (1.170A-14(g)(6)) that address extinguishment and ask and answer the question: does the potential extinguishment of the easement meet the “subsequent unexpected change in conditions” test?
- Review the applicable state statutes and consider whether the potential extinguishment is consistent with state law.
- Anticipate IRS inquiries. Schedule D of the most recent Form 990 (annual nonprofit tax return) requires reporting of amendment and extinguishment of conservation easements. In the event of an extinguishment, does the land trust, working in cooperation with its accountants and attorneys have a well-documented explanation of the extinguishment process if the IRS questions this action?

Public Perception Issues and Inquiries

- Make every effort to contact the easement’s donor or the donor’s family to make sure that they understand the purpose of the extinguishment and to address any of their concerns.
- Communicate with key supporters, including major donors, community leaders, organizational partners, and jurisdictional partners.
- Consider the perspective of adjacent and other nearby landowners and be prepared with a strategy to address their concerns. Although neighbors may not have a legal interest in the extinguishment, they can complain to a local newspaper or to a public agency.

Consider the potential for setting a precedent affecting other land conservation organizations. Although the local impact of an extinguishment may be minimal, it could establish a state, regional or nationwide precedent. Has the land trust, as part of the process, contacted organizations such as the Land Trust Alliance for information and guidance purposes?
Easement Revitalization: Getting Started

Here’s a way to think about beginning your analysis. We’ve deliberately simplified the decision tree on the following page. The versions that appeared earlier were also fairly basic, but they offer a pathway into thinking about problem easements.

A Possible Decision Tree

Are the conservation values that the easement set out to protect still present?

- **YES.** This easement will stay in your portfolio.
  - Fix or manage any drafting problems or transactional issues.
  - Will the landowner work with you to amend the easement?
    - **YES.** Amend the easement to correct vague or contradictory language.
    - **NO.** Seek judicial relief or reformation.
      - Watch out for potential public relations pitfalls and private benefit issues.
  - **NO.** Seek judicial relief or reformation.

- **NO.** Is there any conservation value at all?
  - **YES.** Is there a potential alternative holder for this easement?
    - **YES.** You might sequester the easement while you evaluate options. Extinguishment could be an option.
    - **NO.** You’re going to have to hold and steward this one.
  - **NO.** You’re going to have to hold and steward this one.