



The Ecologically Destructive Tax: How the Federal Estate Is Ecologically Harmful and How to Fix It

By Brian Seasholes

Executive Summary

The ongoing debate over the federal estate tax tends to focus on the tax's economic impacts, such as on small businesses and employment, as well as the very small percentage it constitutes of federal tax receipts. Less well known, however, is the significant harm the estate tax does to the ecology of the United States.

Private lands, especially large, intact pieces of land, are critically important to ecological conservation. Conversely, land is generally of less ecological value if it is in smaller pieces. Unfortunately, the estate tax results in private land being broken-up, subdivided and sold. Over the past several decades it has become increasingly apparent that:

1. A combination of factors leads to land being subdivided, sold and converted to less ecologically beneficial uses: the estate tax's high rate and relatively low exemption; the tax must be paid within nine months of a landowner's death; and many landowners are land-rich, cash-poor, which means their assets consist largely of illiquid land. These factors are exacerbated by the "age cliff" (the growing average age of U.S. farmers, ranchers and forest owners), other federal laws, and the oil and gas boom on private land.
2. Evidence of the estate tax's negative ecological impact comes from the experiences of landowners, empirical studies and expert opinion.
3. Existing measures and proposed reforms designed to address the estate tax's negative ecological impact have fallen short because: they leave the ecologically harmful tax

largely intact; they are complex, time-consuming, difficult, expensive and unpopular with most landowners; and they are ineffective.

4. The best option for fixing the ecological harm caused by the estate tax is to eliminate the tax altogether because: the largest and most ecologically significant pieces of land are still threatened by the tax; landowners are key to conservation, but when they are forced off the land conservation suffers; and landowners are increasingly wary of government conservation programs.

The longer the federal estate tax is in existence, the more the tax's negative ecological impact will be "solved" as progressively more of the largest and most ecologically significant private landholdings are broken-up, subdivided, sold off and developed to pay the tax. Once this happens, land is gone forever as high quality wildlife habitat and loses many of its other ecological values. Whether Congress and other policymakers will grasp the ecological harm caused by the estate tax remains to be seen.

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Introduction

The ongoing debate over the federal estate tax tends to focus on the tax's economic impacts, such as on small businesses and employment, as well as the very small percentage it constitutes of federal tax receipts. Less well known, however, is the significant harm the estate tax does to the ecology of the United States.

Ecological Value of Intact, Private Land

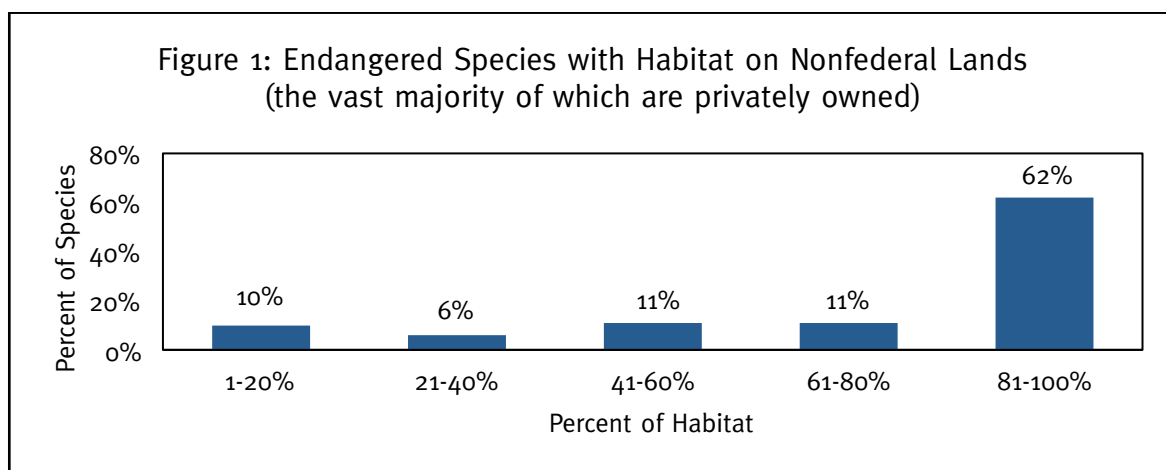
The ecological health of the United States depends heavily on private lands, which constitute approximately 60% of the country's land area. This is especially the case for large, intact, contiguous pieces of land, which tend to be more ecologically valuable. Larger pieces of unfragmented land are generally better able to provide what are known as ecosystem services, such as air and water purification, nutrient recycling, soil formation, and habitat for species. When land becomes fragmented, its ecological attributes generally decrease in quantity and quality. For example, habitat for a wide range of species tends to be less ecologically viable when it borders developed land.

The larger the area of habitat, the more distance between its borders with developed areas, and thus the more ecological support the land offers to resident species. Additionally, larger parcels can support wildlife that demand greater territory. In this way, land tends to be more ecologically valuable if it is in larger, more-contiguous pieces. These dynamics are especially the case for endangered species, which tend to have more restricted habitats than more common species, and are therefore more vulnerable to habitat destruction, degradation and fragmentation.

A key contributor to these critical ecosystem services is privately held land. For example, private forests in the lower 48 states are responsible for supplying and filtering over 25% of U.S. fresh water.¹ There are 10.4 million "family forest owners" in the U.S. who own 263,658,000 million acres, which is 35% of U.S. forest land. These forests are owned and managed, often for generations, by families who know these ecosystems well and how to sustain them. Family-owned forests represent a larger percentage than any other type of forest ownership (the federal government owns 33%, other private owners 21%, states 9%, and municipalities 1%). "It's really families and individuals that control the fate and the future of the forests," Brett Butler, coordinator of the U.S. Forest Service's family forest survey, said.²

A 1994 study estimated that 78% of endangered species depend on private land for all or some of their habitat, compared to 50% for federal land.³ As these data and the following chart show, the key for endangered species is nonfederal land, "the vast majority of which is

privately-owned land,” according to Michael Bean and his then-colleagues at the Environmental Defense Fund, Robert Bonnie, Tim Male and Tim Searchinger.⁴



Source: U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, (1994), pp.4–5.

More recently, a 2008 study estimates at least 60% of the at-risk species (defined as species listed under the Endangered Species Act or considered globally imperiled or vulnerable by NatureServe, a spinoff of The Nature Conservancy) in the lower 48 states rely on private forestlands for habitat.⁵

Land is generally less ecologically valuable when in smaller chunks and if degraded, such as being stripped of its timber. Habitat destruction and degradation are by far the leading threats to wildlife in the U.S. and around the world.⁶ These habitat dynamics are especially true for endangered and at-risk species because, by dint of having small populations, they are most vulnerable to habitat destruction and degradation.

The Estate Tax’s Unintended Ecological Harm

Unintentionally, the federal government is a significant contributor to ecological harm in America through levying the federal estate tax. Private holders of substantial land tracts often bequeath their property to their family intact, but many large parcels—the most ecologically valuable land—fall prey to the federal estate tax, resulting in ecological harm, including the destruction or degradation of vast and vulnerable habitat. Unfortunately, the estate tax causes ecological harm by compelling private landholdings to be sold off, subdivided, developed or asset-stripped in order to pay the tax. Consider the following cases of three landowning families.

Maine: Hancock Family

The Hancock family started a lumber company in 1848 in southern Maine. Even though the company has grown significantly, it is still family-owned and operated and is the 71st oldest family-owned business in America. The Hancocks gradually acquired timber land over a period of decades and currently own 12,000 acres of forestland, much of it white pine. Yet Hancock Lumber is different than most family-owned forestry businesses because it is vertically integrated. In addition to the forest land that is harvested for timber, the company consists of three sawmills and nine full service retail building supply and home improvement stores—all of which are worth around \$50 million, which is far in excess of the amount that can be exempted under the estate tax.

The Hancock family allows the public access to their land free of charge. Hancock Lumber's 5,000-acre Jugtown Forest is a popular spot for walking, horseback riding, hunting, fishing, mountain biking, and riding ATVs, motorcycles and snowmobiles.

Fly Fishing in Jugtown Forest



Photo courtesy of Hancock Lumber, Inc.

Kevin Hancock



Photo courtesy of Hancock Lumber, Inc.

A few hundred acres of the Jugtown Forest consists of “highly unusual pitch pine heath, which is considered not only the state’s most important example of this natural community, but an outstanding example in an ecoregion stretching from southern Maine to northern Maryland,” according to The Nature Conservancy.

Unfortunately, the federal estate tax—and since 2001 Maine’s additional state estate tax—are enormous threats to the Hancock family and the ecology of the family’s lands. “When my mother dies, the estate tax will be a major event for both the business and my entire family,” Kevin Hancock, president, CEO of Hancock Lumber, states. “Because we have no liquid assets within the business or outside it, paying the death tax will be very difficult.”

Most of the family’s forest land is in Cumberland County, in the more heavily populated southern portion of Maine and includes Portland, the state’s largest city. As a result, development pressure has driven up land prices in the county. This creates additional problems for Hancock Lumber because the estate tax is assessed by the Internal Revenue Service based on the “highest and best use” of land, which in southern Maine likely means development for houses. “The problem is what the Hancock family would perhaps have to do to the business in order to pay [the estate tax],” Kevin states. “The most likely outcome is that those forests would be sold off in small parcels for development.”

“The estate tax encourages people to sell timber and stop growing trees,” Kevin Hancock states. Were it not for the federal estate tax and more recently the state estate tax, the Hancock family would likely own more timber land.

Sources: Kevin Hancock, prepared statement, Hearing before the Finance Committee, U.S. Senate, November 14, 2007, Washington, D.C.; quoted in The Heritage Foundation, “Financial Burden of the Death Tax: Interview with Small Business Owner,” December 2, 2009, <https://www.youtube.com/watch?v=LT98odf2wIc>. Accessed March 3, 2015; The Nature Conservancy, “Maine: Jugtown Plains,” <http://www.nature.org/ourinitiatives/regions/northamerica/unitedstates/maine/placesweprotect/jugtown-plains.xml>. Accessed March 13, 2015; Hancock Lumber, “Jugtown Forest,” <http://www.hancocklumber.com/land-mills/jugtown-forest/>. Accessed March 12, 2015; Kevin Hancock, interview with author, March 13, 2015.

Florida: Hilliard Family

In the late 1800s, the Hilliard family started cattle ranching and farming in Hendry County, Florida, southwest of Lake Okeechobee. Over the years, the family's landholdings grew to about 60,000 acres and provided habitat for a wide range of wildlife, including the highly endangered Florida panther. Everything was going well until Marlin Hilliard died in 1981 and the family had to pay an estate tax of \$17.5 million.

In order to pay the tax within the nine months required, the family had to sell a huge amount of land and take out a massive loan. According to Joe Marlin Hilliard, Marlin's nephew: "We ended up selling 17,000 acres of land, paying back \$26 million [for the loan] and getting nothing out of it. It was a loss, just a total loss." Of the land sold to pay the estate tax, 12,000 acres were turned into sugar cane and citrus, thereby destroying much if not all of its value to panthers and other more common species of wildlife. The other 5,000 acres was, as of the late 1990s, still undeveloped but permitted for conversion to citrus groves.



Source: U.S. Army Corps of Engineers, under Creative Commons Attribution 2.0 Generic license.

Private lands, especially cattle ranches, are critically important because they constitute over half the panther's habitat. Also, ranches' "mixture of native habitat and working lands maximizes the edge effect that is beneficial for panthers and their prey," states Erin Myers, U.S. Fish and Wildlife Service biologist. The "edge effect" is the boundary between more densely vegetated habitat, such as forest, and more open land, such as cattle pastures.

Yet the estate tax is a direct threat to the panther. According to Dennis Hammond, then with the Florida Game and Freshwater Fish Commission: "The levying of the federal estate tax has created sudden and oftentimes unexpected expenses for private landowners in recent decades, typically resulting in development rendering the property less desirable to wildlife. Many acres of privately owned panther habitat in Florida are currently vulnerable in that respect."

In addition to the estate tax, ranchers in the panther's range are also under threat by the Endangered Species Act. Not surprisingly, ranchers have "no trust in government," according to Erin Myers, due to the "Florida Panther Consultation Area and associated regulation," which "inhibits some historical ranching practices" and "limits the ability [of ranchers] to implement land use changes when needed." The Consultation Area consists of the nine southern-most counties in Florida and over 7.5 million acres. Many ranchers are land rich but cash poor, so even though they may not want to sell the land, they may be forced to if ranching becomes unviable," states Myers. The Endangered Species Act puts constant pressure on ranchers, and then the estate tax can finish them off.

Sources: Dennis E. Hammond, "Protecting Panther Habitat on Private Lands in Southern Florida—A Current Assessment," *Transactions of the 63rd North American Wildlife and Natural Resources Conference* (1998), p.457; Joe Marlin Hilliard quoted in Selene Jacobs, Dennis E. Hammond, and Harvey M. Jacobs, "The Connection between Federal Estate Tax Law and Panther Habitat Loss in South Florida," draft manuscript on file with author; Jennifer L. Murrow, Cindy A. Thatcher, Frank T. van Manen and Joseph D. Clark, "A Data-Based Conservation Planning Tool for Florida Panthers," *Environmental Model Assessment* (2013), Vol.18, p.159; Erin P. Myers, "Florida Panther Conservation," presentation at the Florida Panther Symposium, Levin College of Law, University of Florida, March 21, 2014.

North Carolina: Cone Family

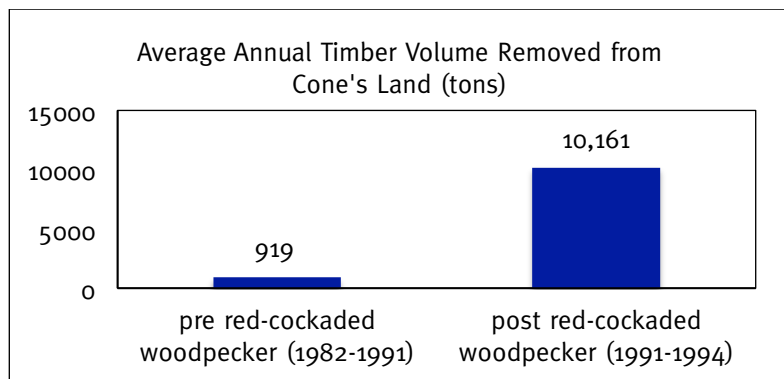
In the 1930s Ben Cone, Jr.'s father bought 8,012 acres in southeastern North Carolina with the aim of making it a private hunting and fishing preserve where family and friends could enjoy relaxing weekends and holidays. The land was in sorry condition, having been mostly cut-over for timber. Over the ensuing decades, Cone and his father worked very hard to restore it, including planting thousands of native pines.

The result was a wildlife paradise of the open, park-like, old-growth southern pine forest favored by a wide variety of wildlife. From a biological and ecological standpoint, all of Cone's land represents very high quality and important habitat. In 1995 Defenders of Wildlife published a report that identified the 21 most endangered ecosystems in the U.S., two of which are represented on Cone's property: southern forested wetlands and longleaf pine forests.

In 1991 everything changed when, in preparation for a timber cut, Cone discovered he had red-cockaded woodpeckers on his land due to the ideal habitat created over the preceding decades. As a result, the U.S. Fish and Wildlife Service put off limits 1,121 acres worth \$1,425,000 for the woodpeckers, which represented roughly 20% of the timber on the property.

Soon after learning about his endangered species problem, Ben Cone contacted the Internal Revenue Service to request a reduced tax assessment based on the value of the land taken by the Endangered Species Act for the red-cockaded woodpecker. The IRS refused to acknowledge this and still valued the land at the pre-woodpecker rate. This also complicated Cone's plans to help his two children avoid as much of the estate tax as possible. In response to the federal government's refusal to compensate him or reduce his estate tax burden for the land devalued by the red-cockaded woodpecker, Cone was forced to start clearcutting to deny the woodpeckers more habitat and stockpile funds for the estate tax. As he explained to the *Associated Press*: "Here's the tragedy of it—I cannot afford to let these woodpeckers take over the rest of the property. So I'm going to start massive clearcutting. I'm going to go to a 40-year rotation instead of a 75- to 80-year rotation."

Red-cockaded woodpecker



Source: http://commons.wikimedia.org/wiki/File:Picoides_borealis_-Mississippi,_USA_-feeding-8.jpg; Source: Gelbert and Company Consulting Foresters, Durham, North Carolina

After the plight of Ben Cone garnered significant attention from the media and Congress, the U.S. Fish and Wildlife Service cut him an extraordinary deal, by essentially exempting him from the Endangered Species Act's penalties in an attempt to get his embarrassing story out of the spotlight and to get him to withdraw the lawsuit he filed in the U.S. Court of Claims. Even so, Cone still harbored lingering anger over being punished for his outstanding land stewardship.

Sources: Associated Press, "Stage is set for confrontation over endangered species law," *Wilmington Morning Star*, November 10, 1992, p. 6C; Benjamin Cone, Jr., prepared statement, Hearing before the Committee on Resources, U.S. House of Representatives, Task Force on Private Property Rights, June 13, 1995, Washington, D.C.; Benjamin Cone, Jr., interview with author, April 9, 1995; Dan Gelbert, interview with author, April 24, 1995; Reed F. Noss and Robert L. Peters, *A Status Report on America's Vanishing Habitat and Wildlife* (Washington, D.C.: Defenders of Wildlife, 1995).

As depicted in these examples, the federal government routinely forces landowners to subdivide and sell land, as well as liquidate assets such as timber, to pay the estate tax. When land is subdivided and sold it is almost invariably converted to more intensive, less ecologically beneficial uses. The sad result is that heirs of land, especially those inheriting large pieces of land who would often prefer to keep it in agriculture and forestland, have no option but to subdivide, develop and sell. Families lose treasured land, wildlife loses valuable habitat, and other ecological benefits are diminished.

Provisions of the Federal Estate Tax and Landowner Realities

There are several provisions of the estate tax that, in combination with other factors, make it especially onerous for inheritors of land and particularly damaging to America's ecology. The cases of the Hancock, Cone and Hilliard families illustrate many of these factors.

1. Land-Rich, Cash-Poor and Illiquid Assets

Many private landowners, especially those who have to make a living off their land, such as ranchers, farmers and timber owners, are often what is known as “land-rich, cash-poor,” because most, if not all, of their wealth consists of land, and they have very few liquid assets, such as cash, stocks and bonds. The Hancock and Hilliard families are examples of this. The Hancock family also illustrates the problem created by families and landowners that are cash-poor by having essentially all of their wealth tied-up in illiquid assets in addition to land: in the Hancock's case, lumber mills and retail stores. Yet because the stores and mills generate a steadier return on investment than trees on the family's land, which take about 80–100 years to mature, the land is most likely to be sold first when the Hancock family is hit by the estate tax.

The result of being land-rich, cash-poor is that in order to pay the estate tax many of these landowners have no other option than to take one or a combination of three actions:

- a. Subdivide and sell land that they would prefer to continue owning
- b. Retain ownership but strip valuable resources, such as timber
- c. Retain ownership but develop land to commercial, residential and industrial uses

2. Highest and Best Use

When assessing the estate tax the Internal Revenue Service values land based on its “highest and best use,” which often means commercial, residential and industrial development, rather than as more ecologically beneficial agricultural and forest land. So, while family members inheriting land may value it as farm, ranch or forest, and often want to keep it as such, they are forced to accept the highest and best use valuation—the hypothetically most lucrative use of the land—which leads to a massive estate tax bill that can usually only be paid by subdividing, developing and selling land, and liquidating valuable resources such as timber. By taxing according to “highest and best use,” more land parcels, especially ecologically valuable land bordering more-developed areas as the Hancock’s does, qualify for the federal estate tax. Ensuring that private lands are assessed for substantially higher value than for how the land is currently used, paradoxically, encourages the development and ecological degradation of that land through the estate tax.

3. Exemption, Rate, and Nine Months to Pay Rule

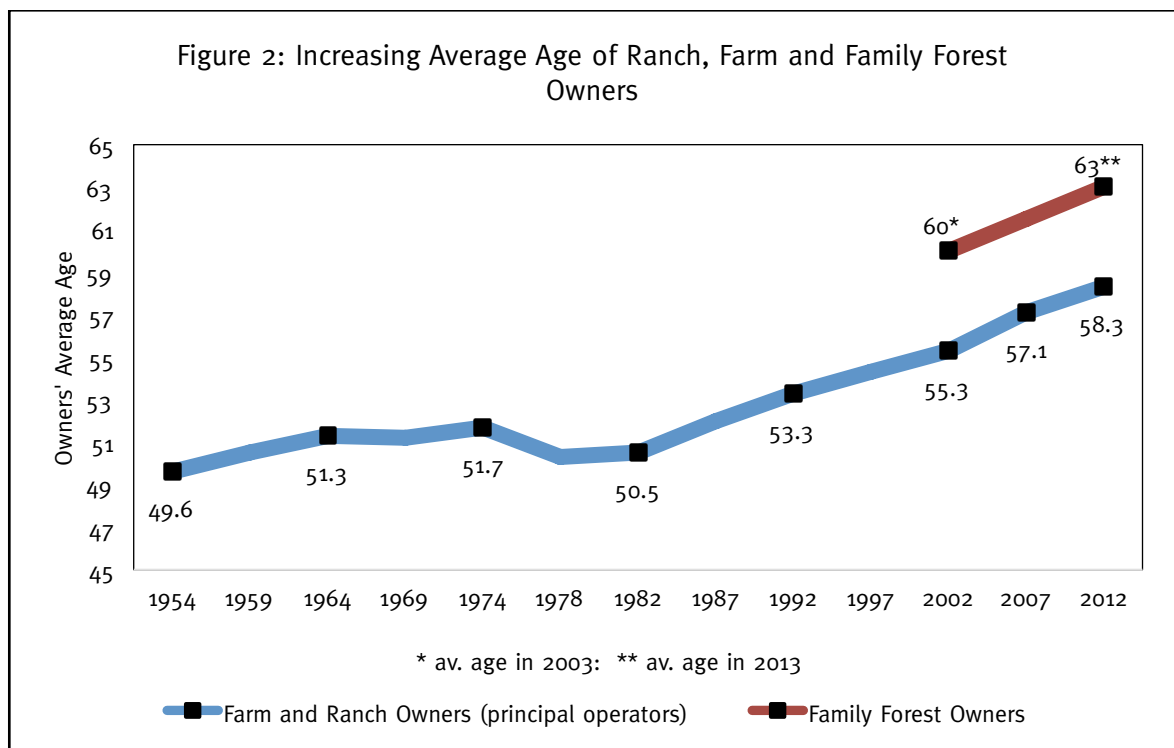
While the combination of the estate tax’s very high top rate (40%) and relatively low exemption (\$5.43 million) are calculated at the land’s “highest and best use” (meaning most lucrative)—which makes owners pay, and pay highly, for their private forests and land—the fact that the bill is due in only nine months sets up desperate situations for these families, causing further ecological damage. Since the owners of large land holdings can be land-rich and cash-poor, these pieces of land often constitute much if not essentially all of a family’s assets, leaving heirs no choice but to degrade or sell the land to pay its taxes. Since the estate tax must be paid in full within nine months of the property owner’s date of death, cash-poor inheritors of relatively illiquid assets—so named because these assets are difficult to sell in a short amount of time—such as real estate often end up in financial crisis. These tax bills, typically in the millions, can lead to what are referred to as “distress sales” or “fire sales,” in which inheritors receive less than market value for their land because prospective buyers who are aware of the time pressure to sell land make purchase offers below market value, which families often have no option but to accept. When owners have to sell land quickly and therefore accept below-market value, they must sell more land to afford the estate tax bill than if they had received market value.

While a six-month extension is available, this is of little help to the inheritors of real property, especially owners of relatively large, and hence valuable, amounts of land, as division and sale of land is a lengthy process. As a result of the synergy of high tax rates,

low exemption, inflationary valuation of land, and the nine-month rule, estate taxes often destroy the asset they are taxing.

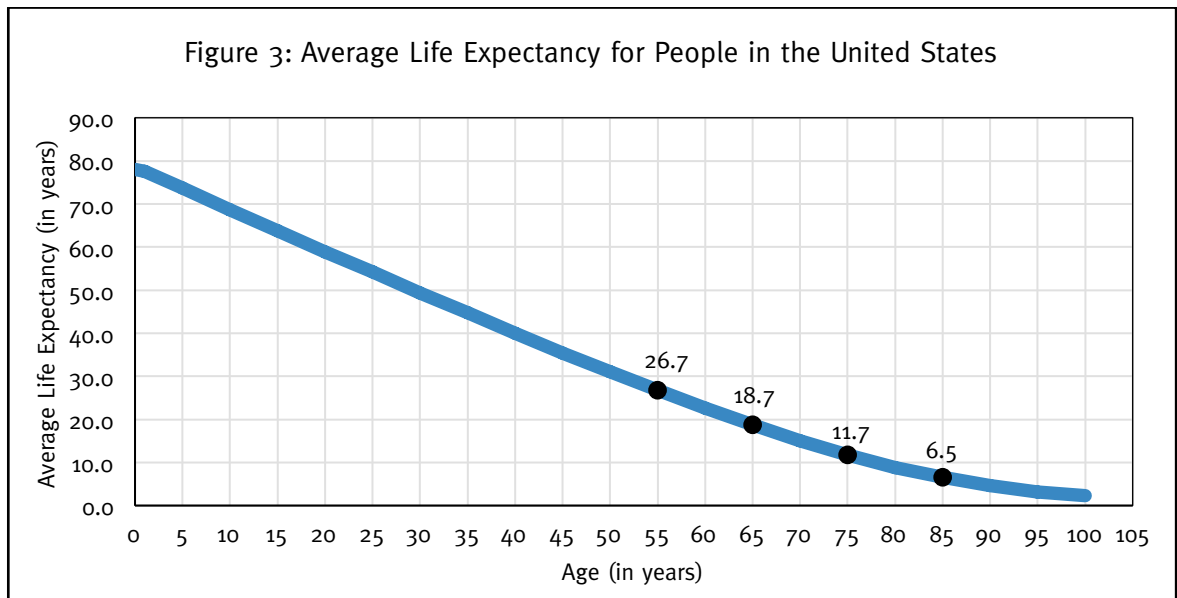
4. The Age Cliff

The increasing average age of America's ranchers, farmers and forest owners means that they are more likely to die sooner and trigger the estate tax. Landowners' increasing average age has been a growing concern for some conservationists. Amos Eno, president of Resources First Foundation, terms this issue "the age cliff facing private landowners" because as landowners age they are increasingly likely to transfer their land.⁷



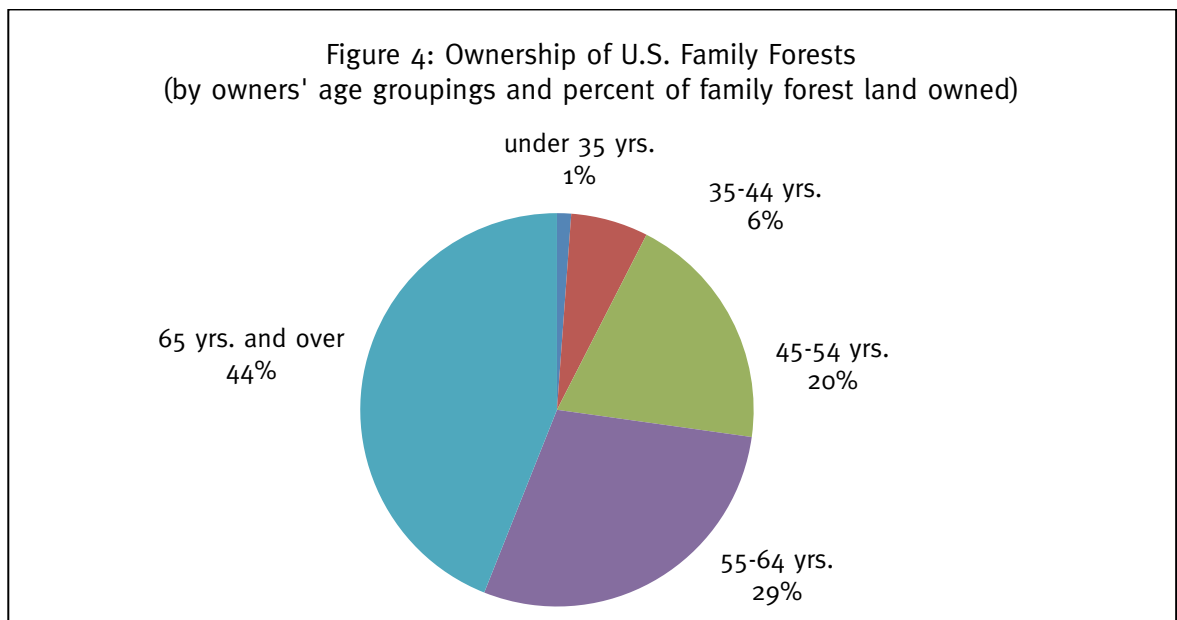
Sources: Brett J. Butler, and Eric C. Leatherberry, "America's family forest owners," *Journal of Forestry*, Vol. 102, No. 7 (2004), pp. 4-14; Brett Butler, personal communication with the author, March 4, 2015; Census of Agriculture (2002-2012) Historical Statistics of the United States, Millennial Edition Online.

When the increasing average age of farmers, ranchers and forest owners is compared to average life expectancy statistics, the dimensions of the age cliff become more apparent.



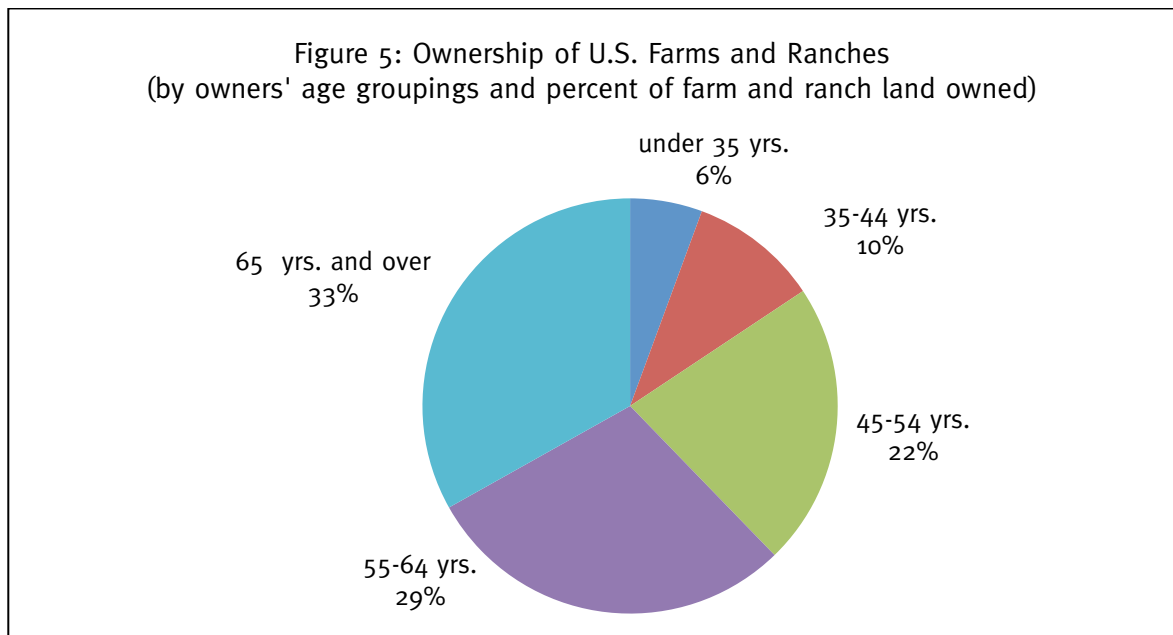
Source: Elizabeth Arias, "United States Life Tables, 2008," *National Vital Statistics Reports* (U.S. Department of Health and Human Services) (2014), Vol. 61, No. 3, p.4

A closer look at ownership statistics for forest, farm and ranch owners reveals the severity of the age cliff. The cliff is especially pronounced for family forest owners. Indeed, 20% of family forest land, or almost 53,000,000 acres, is owned by people who are 75 years of age or older.⁸ This means that rather soon 53 million acres of American forest is likely to be transferred, some of which will likely be assessed the estate tax, thereby putting some of the best habitat available at risk.



Source: Brett J. Butler, *Family Forest Owners of the United States, 2006*, General Technical Report NRS-27 (U.S. Department of Agriculture, Forest Service, Northern Research Station: Newtown Square, Pennsylvania, 2008), pp.46-47.

The 2,109,303 U.S. farms and ranches that encompass 914,527,657 acres, all of which are privately owned, show somewhat similar ownership patterns to family forest owners.⁹ The major difference is that not quite as much farm and ranch land is owned by people sixty-five years and older.



U.S. Department of Agriculture, 2012 Census of Agriculture: United States, Summary and State Data, Vol. 1, Part 51 (Washington, D.C. 2014), pp.204-205.

Exacerbating Factors

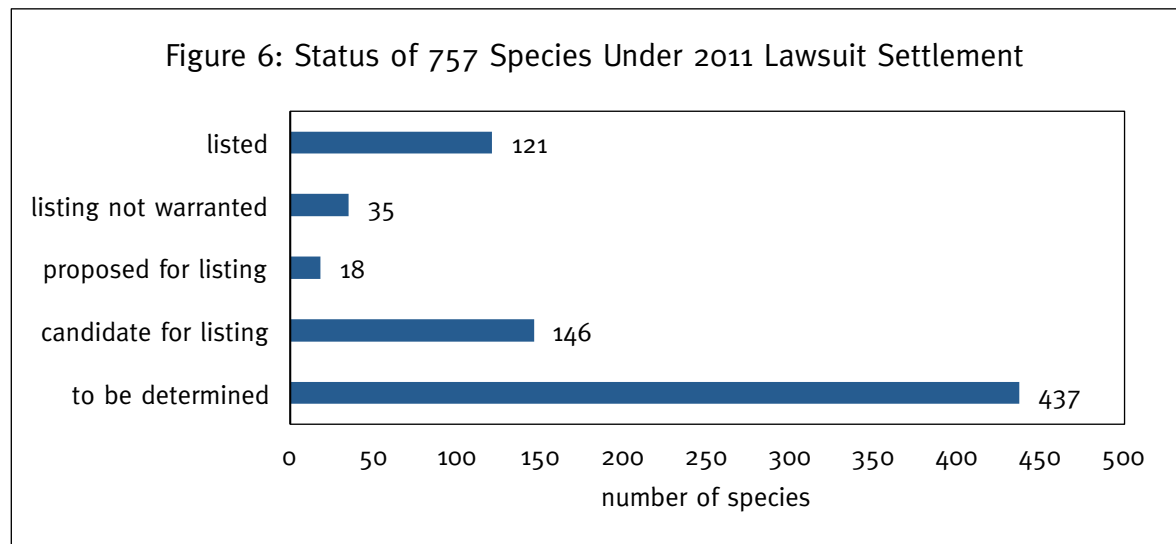
Three factors that exacerbate or potentially exacerbate the estate tax's ecological harm are the Endangered Species Act, the Clean Water Act and the oil boom on private land.

1. Endangered Species Act

The presence of species protected under the federal Endangered Species Act can make the impact or potential impact of the estate tax even worse because the Internal Revenue Service does not recognize the devaluation of land locked-up by species protection requirements. Ben Cone's property in North Carolina is an example of this. As a result of the Internal Revenue Service's refusal to allow landowners to deduct the value of land devalued by Endangered Species Act, heirs of such lands would still have to pay the estate tax as if the land was not devalued and in fact was highly developed, and one of the likely

outcomes would be increased asset-stripping or more land sold to pay the high tax. While Ben Cone did not have to pay the tax, his tenfold increase of timber cut to stockpile funds to pay the anticipated estate tax and prevent woodpeckers from taking more of his land provides a good indication of how these conflicting government policies encourage heirs of such land to act, which subverts good stewardship of the land and imperils species.

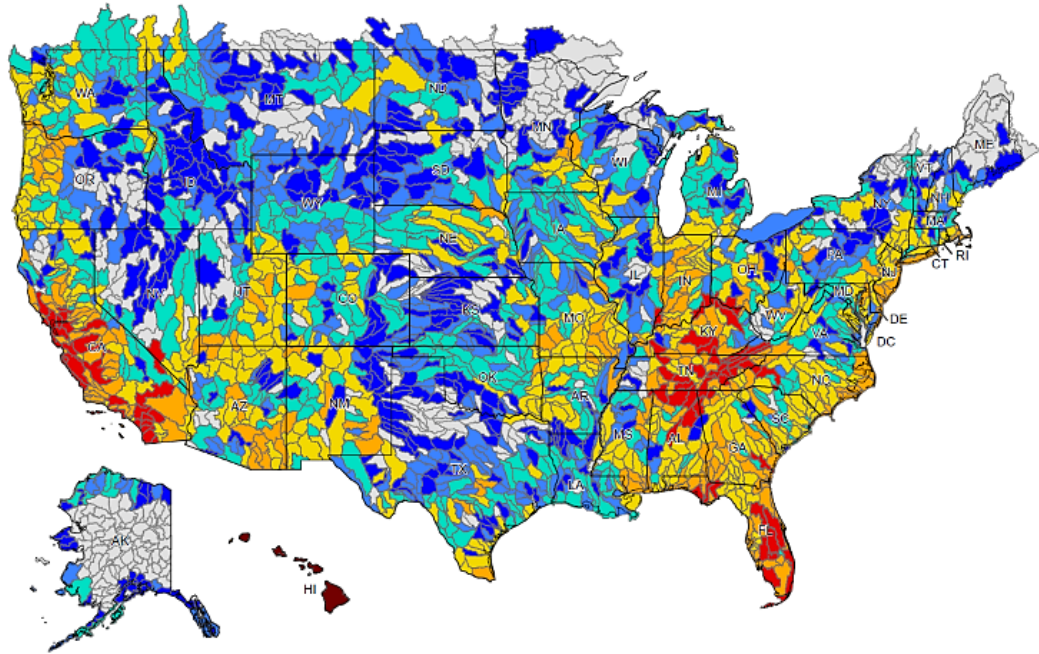
The pressures put on landowners and their heirs by the Endangered Species Act are in the process of getting much worse because the number of species listed under the Act is in a period of unprecedented growth. Due to a 2011 lawsuit settlement between the U.S. Fish and Wildlife Service and two environmental pressure groups, the Service is now obligated to consider for listing 757 species by 2018. Of these species, final listing decisions must be made about 253 species by 2016. To date, final listing decisions have been made about 156 species, or 21% of the total, which means the final status of 79% of species has yet to be finalized or determined.



Sources: U.S. Fish and Wildlife Service, Environmental Conservation Online System; Center for Biological Diversity, "Landmark Agreement Moves 757 Species Toward Federal Protection," Press Release, July 12, 2011; U.S. Fish and Wildlife Service, Listing Accomplishments (October 2014), http://www.fws.gov/endangered/improving_ESA/pdf/20140528_MDL_2010_CNOR_Accomplishments.xlsx.

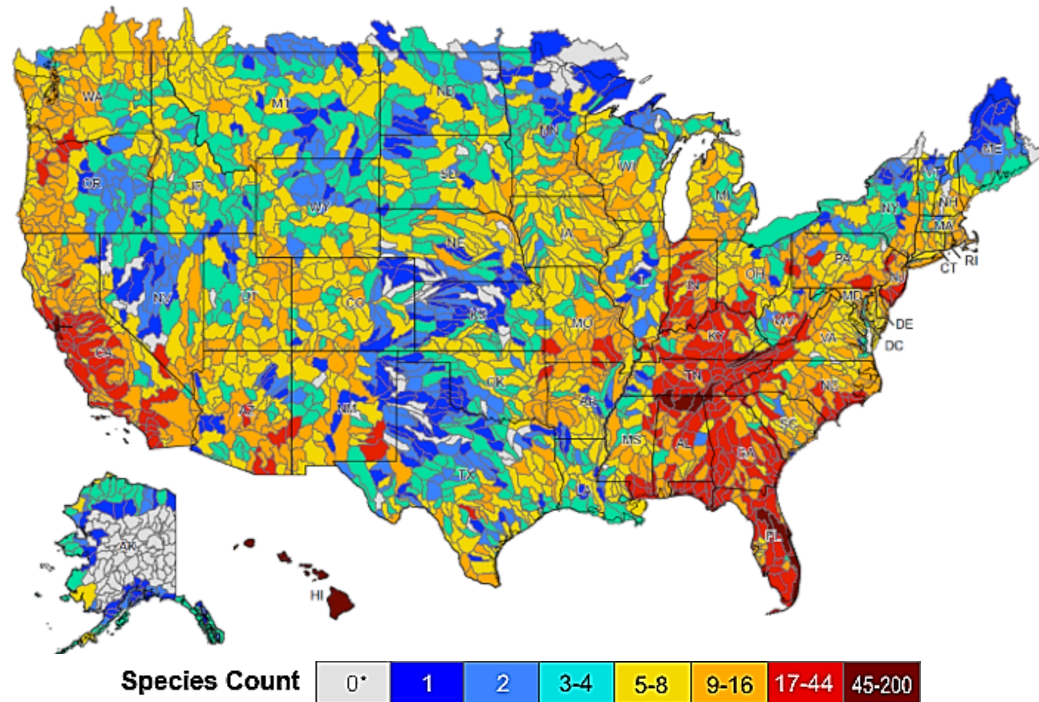
As more of these species are listed, more regions of the U.S. will be affected, as these two maps illustrate.

Figure 7: Federally Listed Endangered and Threatened Species (as of July 2014)



Compiled by the Texas Comptroller of Public Accounts using data acquired from NatureServe

Figure 8: Combined Federally Listed Endangered and Threatened Species, and Species Under Review for Possible Listing



Compiled by the Texas Comptroller of Public Accounts using data acquired from NatureServe

2. Clean Water Act

In addition to the Endangered Species Act, the Clean Water Act is also very problematic for landowners because it is the means by which the federal government regulates wetlands. In a situation similar to the Endangered Species Act, in the decades following the Clean Water Act's passage in 1972, the federal government gradually but massively expanded the Act's ability to regulate wetlands. Currently, the Environmental Protection Agency is proposing to expand the regulatory definition of wetlands significantly. According to the National Association of Counties:

The proposal states that “waters of the U.S.” under federal jurisdiction include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands, and “other waters.” It also redefines or includes new definitions for key terms—adjacency, riparian area, and flood plain—that could be used by EPA and the Corps to claim additional waters as jurisdictional.¹⁰

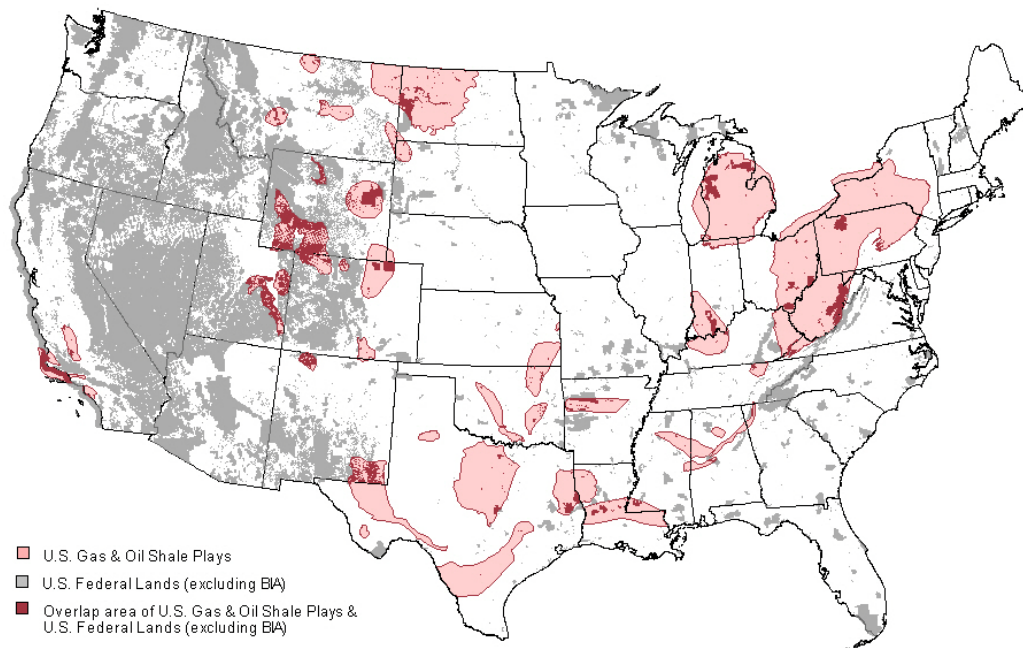
The combination of the Endangered Species Act's expansion and the proposed expansion of the Clean Water Act is likely to create significant problems for U.S. farmers, ranchers and forest owners. A 2008 study found that more than 67% of the watersheds in the lower 48 states have private forests that contain a minimum of one at-risk species. Watersheds that contain the most at-risk species are in the West Coast, Midwest and Southeast.¹¹

3. Oil and Gas Boom

Over the past decade, the oil and gas boom on private lands in large portions of the U.S.—much of it shale formations—appears to be resulting in a large increase in the number of farms and ranches that may be subject to the estate tax. It seems that substantial numbers of farm and ranch owners are making very large sums of money from oil and gas royalties on their lands, and as a result the heirs of these owners may be subject to the estate tax.

If and when owners of land who have made substantial amounts of money from oil and gas royalties are hit with the estate tax, land is vulnerable to being sold off and subdivided. Land that has unexploited oil and gas is also vulnerable. The situation facing landowners with oil and gas is somewhat similar to that facing the Hancock family in Maine. When hit by the estate tax, such landowners will likely opt to hold on to their most valuable assets, such as oil and gas royalties and rights, or lumber mills and retail stores, and sell less valuable land.

Figure 9: Oil and Gas Shale Formations Areas in the United States



Source: U.S. Energy Information Administration, "Lower 48 oil and gas shale formations and federal lands," in Adam Sieminski, prepared statement, hearing before the Subcommittee on Energy and Power, Committee on Energy and Commerce, U.S. House of Representatives, Washington, D.C., August 2, 2012.

The amounts of money being generated are so substantial that they have caught the attention of Deloitte, one of the four largest companies in the world that provide a range of tax planning, accounting, financial advice and consulting services. A Deloitte marketing document aimed at landowners has the following Q & A:

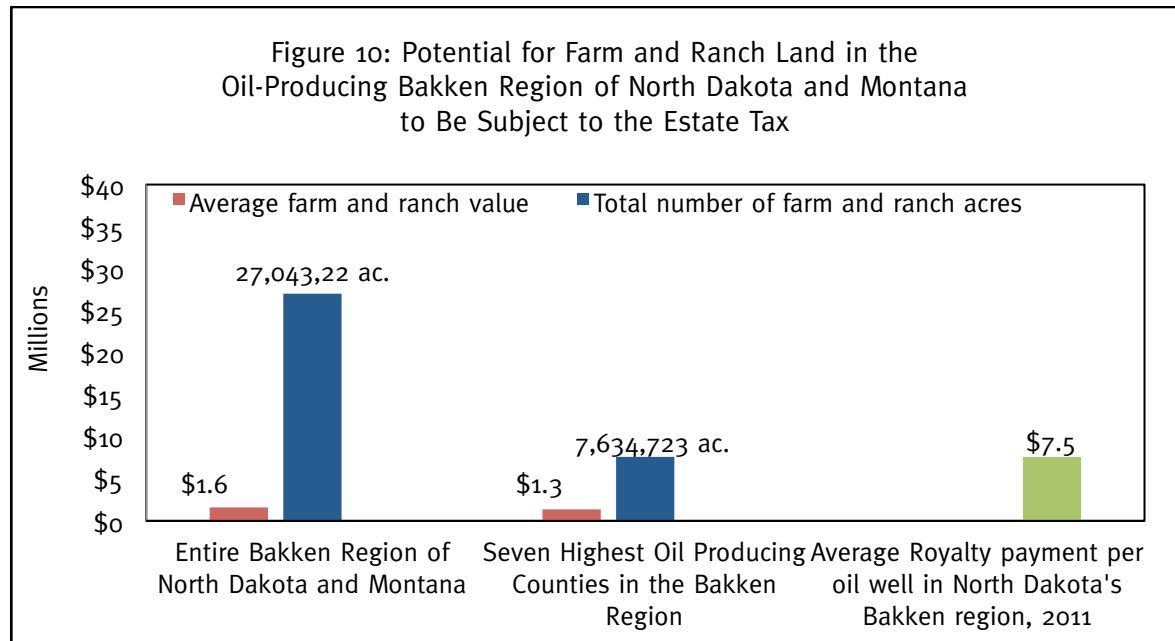
How does having oil and gas property affect my estate planning?

Landowners with property that has increased substantially in value will also have a host of new wealth planning considerations. Families of landowners who were previously not subject to an estate tax at death are now going to potentially be subject to a significant tax at death.¹²

a. Bakken Region

One of the centers of the oil and gas boom is the Bakken region of western North Dakota and eastern Montana. The combination of the roughly \$1.5 million average value of farms and ranches and the \$7.5 million average royalty payment per oil well in North Dakota means that there are likely significant numbers of private landowners in the entire 27 million-acre Bakken region who will be liable for the estate tax. The average size of farms and ranches in the seven highest oil-producing counties in North Dakota and Montana is

2,012 acres, and the number of wells drilled per acre ranges from one well per 160 acres to one well per 1,280 acres, with most wells appearing to be one well per 320–640 acres.¹³



Sources: U.S. Department of Agriculture, 2012 Census of Agriculture: North Dakota State and County Data, Vol. 1, Part 34 (Washington, D.C. 2014), pp.224-230; U.S. Department of Agriculture, 2012 Census of Agriculture: Montana State and County Data, Vol. 1, Part 26 (Washington, D.C. 2014), pp.224-231; Alison Ritter, "Bakken Basics," (North Dakota Department of Mineral Resources: Bismarck, North Dakota), <https://www.dmr.nd.gov/oilgas/presentations/IowaPetroleumMarketers2012-07-19.pdf>. Accessed March 11, 2015.

While the price of oil has dropped by about half since 2011, which means that royalty payments have also dropped by roughly the same amount, the estate tax is still likely a significant threat to farms and ranches in the Bakken region because the price will likely rebound to a certain degree in coming years, and oil will be produced in the Bakken region for many decades.

b. Weld County, Colorado

Another area of the country that has been part of the oil and gas boom is Weld County, Colorado, located in the north-central part of the state. In 2014 the estate tax exemption was almost \$11 million per married couple, but "we're seeing a lot of wealth in far excess of that," Jeff Bedingfield, a local attorney who helps landowners negotiate with oil and gas companies, stated to *The Tribune* of Greeley and Weld Counties. "So there are people trying to find ways to get the next generation involved now to minimize gift or estate tax, which means shifting some assets."¹⁴

While oil and gas exploitation is often thought of as ecologically destructive, this may well not be the case because the royalty payments many private landowners are receiving are

likely making farming and ranching viable for many families. “Where before [the oil and gas boom] it was going to be hard to make the family farm continue to work, it appears some people we’re talking with are redirecting that line of thought, ‘Maybe we can do the family farm,’” Bruce Hemmings, senior vice president of wealth management at the Centerra Morgan Stanley office in Loveland, Colorado remarked to *The Tribune*. “I’ve actually seen some families where sons are going back in and joining the family farm, and I think it has something to do with the available cash flow to help fund and offset the costs of agriculture, and make it a doable business again.”¹⁵

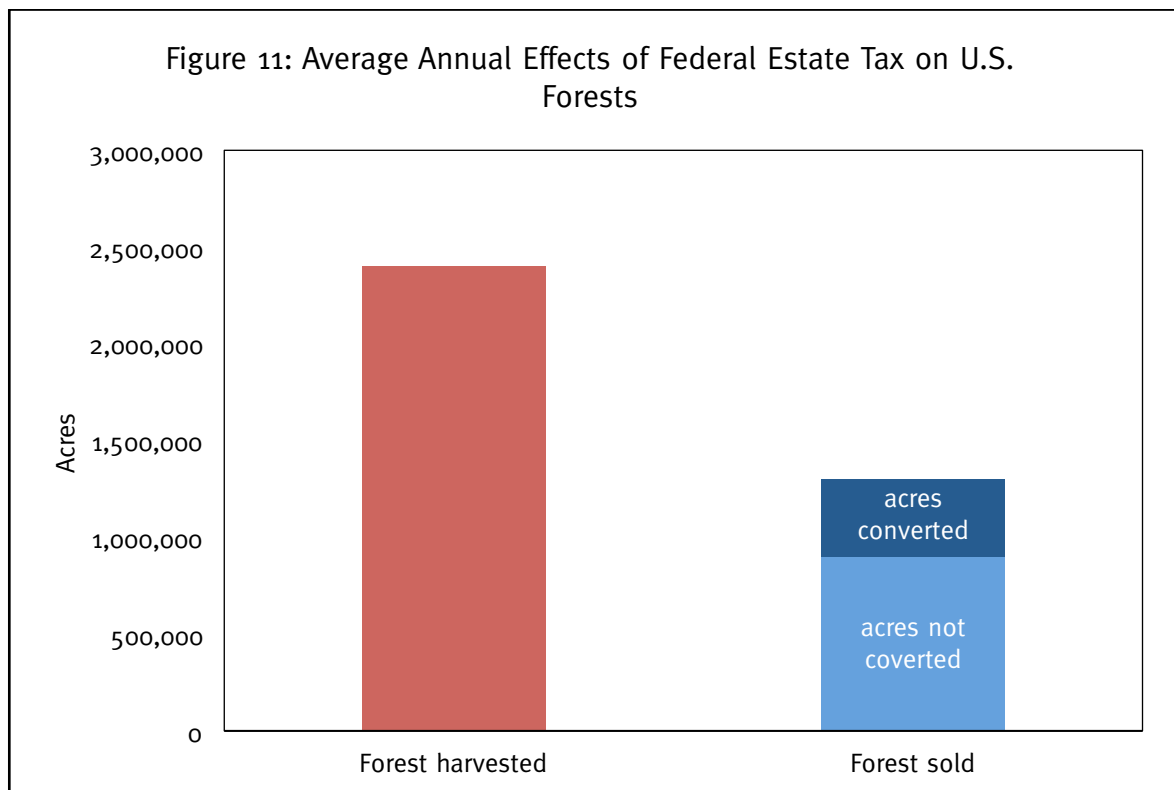
Oil and gas can have negative ecological impacts, but the oil and gas boom on private land in the U.S. may well be a net benefit ecologically because royalties are keeping private farms and ranches intact and viable, and preventing subdivision and sale of land. These royalties appear to be helping to keep family lands intact so long as there is not significant external pressure to subdivide and sell, as occurs due to the estate tax. As Bruce Hemmings points out, oil and gas royalties have made farming and ranching viable for another generation of family landowners, which means family land is more likely to be passed on intact rather than sold off in pieces and likely converted to less ecologically beneficial uses to finance parents’ retirements. Furthermore, oil and gas extraction on a given piece of land is temporary, typically lasting a few decades at most. After the oil and gas are gone, the land typically reverts to a more natural state, which is likely preferable from an ecological conservation standpoint than not exploiting the oil and gas and risking land being sold and subdivided. The ecological value of keeping family lands intact, due to oil and gas royalties, may well outweigh the ecological damage of drilling for oil and gas.

Evidence of Ecological Harm

As the estate tax’s negative impacts on the ecological health of the U.S. and private landholdings have become more apparent, there have been efforts to quantify this damage. The focus of most of this research has been on forest landowners due to the generally higher value of forest land compared to farm and ranch land.

1. Impact on Forests

The most notable of this research, published in 2006, estimated that due to the federal estate tax, each year approximately 2.4 million acres of forest land are harvested and 1.3 million acres sold. Of the acres sold, roughly 400,000 are converted to less ecologically friendly forms of land use.¹⁶



Source: John L. Green, Steven H. Bullard, Tamara L. Cushing, and Theodore Beauvais, "Effect of the Federal Estate Tax on Nonindustrial Private Forest Holdings," *Journal of Forestry*, Vol. 104, No. 1 (2006), pp.15-20

The study also found that 38% of forest landowners had to pay estate tax when transferring land, compared to 2% of the U.S. population. The authors conclude that the study "indicate[s] the magnitude of the effect the federal estate tax has in precipitating fragmentation and conversion of forest and other rural landholdings and unplanned timber harvests."¹⁷ Yet it is important to note that the survey asked respondents about their experiences with the estate tax between 1987 and 1997 when the maximum exemption was \$600,000 and the top rate was 55%. Even adjusted for inflation, and using 1992 as the "midpoint" date, the maximum exemption would be almost \$1,000,000 in 2015 dollars, which is still considerably below the 2015 exemption of \$5,430,000.

There is, however, a more recent estimate for the effects of the estate tax on forest ownership, but the estimate is only for Minnesota. A preliminary study, which is cited by the American Forest Foundation in their report on the estate tax, focused on Minnesota's 194,000 family forest owners who own more than 5.3 million acres of forest. The preliminary study found that the federal estate tax, with an exemption of \$5 million and a 35% rate, could jeopardize 250,000 acres of forest.¹⁸

State Estate Taxes

Federal estate taxes aren't the only ones that plague privately owned land. Estate taxes in 19 states and the District of Columbia are the result of a change to federal tax law that took effect in 2005 that effectively eliminated most states' estate taxes. In response, some states elected to impose stand-alone estate taxes. Minnesota's state estate tax, for example, currently has rates of 9–16% and a maximum exemption of \$1.6 million, which is far below the federal exemption. Then in 2011 the federal estate tax exemption increased substantially to \$5 million, indexed for inflation, which provided relief to substantial numbers of landowners.¹⁹ Yet as Tamara Cushing, Starker Chair of Private and Family Forestry and Extension Specialist in Forest Economics, Management and Policy at Oregon State University, points out:

Lurking in the background, however, and receiving little attention from the forestry community, media, and even some tax advisors, was the lingering bogeyman of state estate tax laws (or state death taxes). Even after the federal estate tax burden was lifted for 2011 and beyond, a number of states retained—and still retain—more oppressive estate tax burdens.²⁰

2. Impact on Farms and Ranches

The 2006 study of forest landowners cited above also surveyed other rural landowners (who consisted mainly of farmers and ranchers) and found that there were no statistical differences between the two types of landowners for most issues, and that land and timber would have to be sold because other assets were insufficient to pay the tax.²¹

A 2013 study estimated that 1.4% of farm and ranch owners would have to file an estate tax return in 2013, compared to 0.2% for the whole population. Yet when deductions were accounted for, the percentage of farm and ranch estates that would owe estate tax was about 0.7%, or 288 farms and ranches in 2013, which is still three-and-a-half times that for the whole population obligated to pay the estate tax.²² The study found that the average wealth of farms and ranches that would be subject to the estate tax was \$11.2 million, not including non-farm or ranch wealth, which made the average amount of estate tax owed \$1.83 million.²³ While 288 farms and ranches might not seem like very many, when this number is projected over longer periods of time it becomes larger and more significant. For example over a decade the number of farms and ranches hit by the estate tax approaches 3,000.

3. Expert Opinion

Even experts who generally support the estate tax admit it is ecologically harmful, which is an indication of the significance of the problem. Perhaps the most notable observation about the estate tax's negative impact on conservation is by Michael Bean, widely regarded as the foremost expert on U.S. wildlife law, currently a senior employee of the Interior Department, and from 1977–2009 head of the wildlife program at the Environmental Defense Fund. Indeed, Bean literally wrote the book on the topic, with the 1977 publication of *The Evolution of National Wildlife Law*. The book is currently in its third edition, for which Bean is a co-author.

According to Michael Bean, the estate tax is:

*“highly regressive in the sense that it encourages the destruction of ecologically important land in private ownership. In order to pay estate taxes, cash-poor inheritors of ranches, farms, and forests must often liquidate timber assets, subdivide the property, or otherwise destroy ecologically valuable land that had been cared for by owners who had truly loved it.”*²⁴

Bean also stated:

*“Federal estate tax requirements are destroying some of the largest and most important endangered species habitats in private ownership.”*²⁵

Another notable person to acknowledge the estate tax's negative ecological impact is Stephen Small. Like Michael Bean, Stephen Small “wrote the book” on a topic, in his case conservation easements: agreements between landowners and land trusts to protect private land, which are governed by Internal Revenue Service regulations because they have tax implications. From 1978–1982, when Small was an attorney and advisor in the Office of Chief Counsel of the Internal Revenue Service, he wrote the income tax regulations on donations of conservation easements. Since leaving the IRS, Small set up his own law firm specializing in conservation easements, wrote four books on land conservation, and “is recognized as the nation's leading authority on private land protection options and strategies,” according to his website.²⁶

As for the estate tax, Stephen Small made the following observation:

“For the community that cares about protecting the quality of life, the federal estate tax may be the biggest single threat to the protection of farmland and forestland, watershed, open space, wildlife habitat, and scenic vistas.”²⁷

The Keystone Center, a respected non-profit organization that convenes groups of experts to discuss, make recommendations for and issue reports about a wide variety of issues such as endangered species, published a report that made a number of insightful observations about the estate tax. “The pernicious environmental effects of the federal estate tax laws have been widely recognized,” the report states.²⁸ It adds:

Federal estate tax requirements are a major obstacle for private landowners whose land stewardship has been sensitive to its environmental value and who would like to be able to pass on their land to their heirs without destroying that value. The imposition of federal estate taxes often forces large parcels of environmentally valuable land to be broken up into smaller, less environmentally valuable parcels. Some of the best remaining habitat for endangered species is put at risk in this manner.”²⁹

Fixing the Ecological Harm Caused by the Estate Tax

The best option for fixing the ecological harm caused by the estate tax is to eliminate the tax altogether. There are a number of reasons for this.

1. Largest and Most Ecologically Significant Land

Much of the largest, most valuable and ecologically significant land in private ownership continues to be jeopardized by the estate tax, even though the exemption is currently \$5.43 million. Proponents of the estate tax point out that few farms, ranches and forest lands are subject to the estate tax. Yet this fails to acknowledge that the largest and most ecologically significant pieces of land are much more prone to being hit by the tax. Not all land is of equal ecological significance, and the largest pieces of land tend to be the most ecologically significant. It is ironic and very unfortunate that those who own the most ecologically valuable lands are most likely to be clobbered by the estate tax.

2. Landowners Are Key to Successful Conservation

Successful conservation depends on private lands and stewardship by private landowners. Private landowners typically possess three factors necessary for successful conservation:

- a. Detailed knowledge of their land and its ecological characteristics, including habitat for wildlife.
- b. Detailed, long-term knowledge of the social characteristics of the area surrounding their land, including relationships with neighbors.
- c. A deep attachment and dedication to care for their land, and a desire to pass it on to the next generation.

When one or more of these three factors are lost, damaged or overcome, due to the necessity to sell land to pay the estate tax, conservation suffers. Conservation on private lands is as much—if not more—dependent on social factors as it is ecological factors, with the key factor being the involvement, commitment and expertise of landowners.

3. Landowners Are Increasingly Wary of Government

Landowners are increasingly wary of federal and state government and environmental pressure groups due to laws like the Endangered Species Act that have precluded owners' use of their land and thereby devalued it. Unfortunately, as environmental regulations devalue owners' land, tax regulations not only fail to acknowledge that devaluation, but inflate the value, which the case of Ben Cone illustrates. The Endangered Species Act and Clean Water Act are going through a period of unprecedented expansion. This can create a significant added burden for landowners struggling to deal with the estate tax. As more U.S. land is subject to federal endangered species and wetlands regulations, these problems will only get worse.

In other words, family landowners tend to take pride in their legacy and stewardship of their land. As various government regulations combine to exert an exponentially severe economic burden on inheritors of large land tracts—the most ecologically valuable parcels—they discourage such stewardship and indeed compel the destruction of these ecologically critical sites, with dire ramifications for conservation of species.

4. Existing Measures Are Complex, Time-Consuming, Difficult, Expensive, Unpopular and Ineffective

There are a number of measures, many of which have been added to the tax code to lessen the ecological harm done by the estate tax. However, these measures are of limited use and popularity to most landowners, especially those who have to make a living from their land, for a number of reasons.

Overall, most existing measures and proposals to make the estate tax less ecologically harmful are complex, time-consuming, difficult and expensive. “Farm estate planning is an extremely complicated process,” according to the Land Trust Alliance.³⁰ A brief guide to the federal estate and gift tax by attorney Timothy Lindstrom, who is probably the next-most-leading authority on land conservation and the estate tax after Stephen Small, is preceded by the following [emphasis in original]:

*WARNING: Estate and gift tax rules are generally highly complex. The rules and concepts discussed below are merely summarized. NO ONE should undertake an estate plan or annual gifting plan without consulting knowledgeable tax counsel.*³¹

If one of the nation’s leading experts finds estate tax planning difficult and complex, imagine what the average landowner thinks.

Many landowners are cash-poor, very busy simply trying to run their businesses, and have little time to decipher the bewildering intricacies of federal tax law and little cash to spend on elaborate estate tax avoidance measures, such as conservation easements, trusts, family limited partnerships and limited liability corporations.

If all of these existing measures and proposed reforms appear complex and even overwhelming, imagine how they appear to an independent farmer, rancher or forest owner, many of whom work 50-60 hour weeks for very little pay, and have scant spare time or income to spend on these typically complex estate tax avoidance measures. The estimated average *net* income for a cattle rancher in 2015 is \$38,000.³²

Furthermore, these measures for avoiding the estate tax can make active, income-generating land and resource management more complex and difficult. As a result, owners of working lands who are short of cash will find these and other complex estate tax avoidance measures of limited usefulness.

a. Problems with Permanent Conservation Easements

Conservation easements are voluntary conservation agreements in which a landowner continues to own his or her property but usually donates some of the rights to the property, typically the development rights, to a non-profit organization, typically a land trust. In exchange, the landowner is eligible for a one-time income tax deduction and, due to the property's reduced value, a reduced estate tax assessment. But a conservation easement must be in perpetuity in order for the donating landowner to be eligible for these tax breaks. Conservation easements are by far the most prevalent measure and reform advocated by proponents of the estate tax for the tax's negative ecological impacts. Yet there are a number of issues that call into question the value and applicability of conservation easements to the estate tax.

1) Landowners Don't Like Permanent Easements

Even though permanent conservation easements have become increasingly popular among estate tax proponents, most landowners don't like permanent easements. Over the past 10 years there have been a number of landowner surveys published in the academic literature that provide crucial insight into the factors that encourage and discourage landowners from conserving endangered and at-risk species. Two factors that are relevant to the estate tax are:

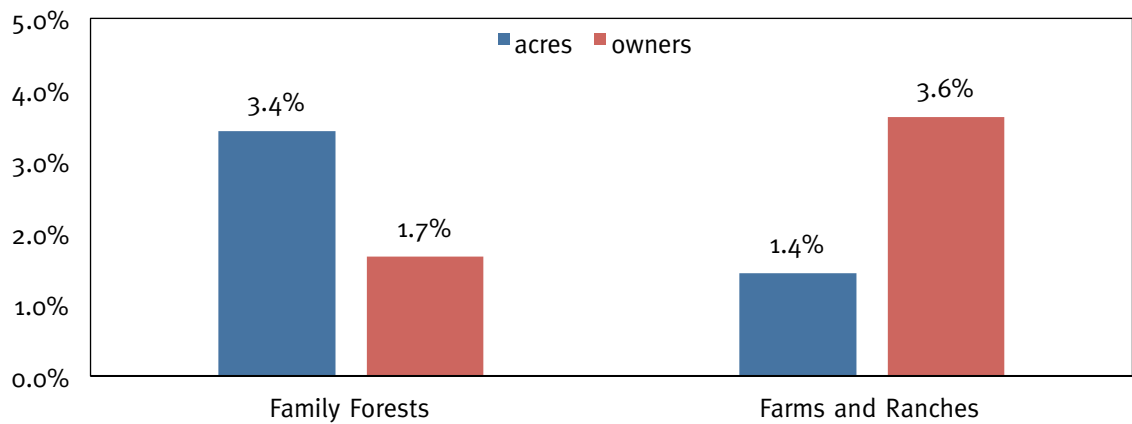
- Landowners do not like long-term contracts or permanent conservation easements.³³
- Landowners prefer shorter (5–40 year) contracts to conserve endangered and at-risk species.³⁴

One of the more recently published landowner surveys, which also incorporated findings from other surveys, noted:

Landowners were most sensitive to programs that are highly controlling, require permanent conservation easements, and put landowners at risk for future regulation. Programs designed with greater levels of compensation and that support landowners' autonomy to make land management decisions can increase participation and increase landowner acceptance of program components that are generally unfavorable, like long-term contracts and permanent easements.³⁵

Not surprisingly, data from U.S. government surveys show that permanent conservation easements are generally not popular with farmers, ranchers and family forest owners.

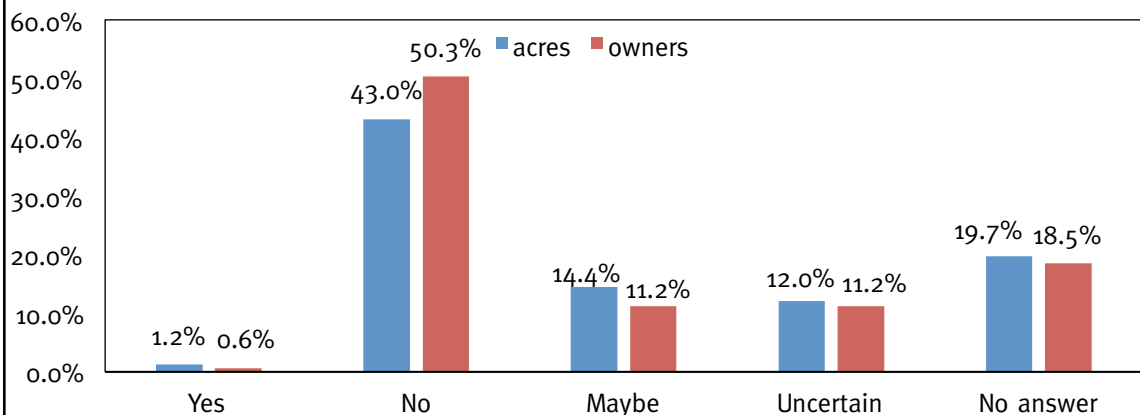
Figure 12: Family Forests*, Farms and Ranches in Conservation Easements (percentage of total U.S. acres and owners)



*The question for family forest owners was intended to assess participation in conservation easements, but many survey respondents included other types of easements, such as rights-of-way, so the response has an unknown amount of error.

Sources: U.S. Department of Agriculture, 2012 Census of Agriculture: United States, Summary and State Data, Vol. 1, Part 51 (Washington, D.C. 2014), p.50; Brett J. Butler, *Family Forest Owners of the United States*, 2006, General Technical Report NRS-27 (U.S. Department of Agriculture, Forest Service, Northern Research Station: Newtown Square, Pennsylvania, 2008), p.60.

Figure 13: Family Forest Owners' Interest in a Conservation Easement for Their Land (of those not currently in an easement*)



The question was intended to assess interest in conservation easements, but many survey respondents included other types of easements, such as rights-of-way, so the response had an unknown amount of error.

Source: Brett J. Butler, *Family Forest Owners of the United States*, 2006, General Technical Report NRS-27 (U.S. Department of Agriculture, Forest Service, Northern Research Station: Newtown Square, Pennsylvania, 2008), p.60.

2) Perpetuity of Easements Is Problematic

The requirement that conservation easements be in perpetuity may well not be in the best interests of the environment because nature is constantly in flux, and scientific knowledge is constantly evolving. For much of the latter 19th through the mid-20th century the “old ecology” held sway. The old ecology was predicated on a number of ideas, including that biological systems consisted of orderly, predictable relationships that were self-regulating, discreet, largely self-contained, harmonious, and tended toward states of equilibrium.³⁶ Examples of this would be the pine forests owned by the Hancock and Cone families profiled at the beginning of this study. Under the old ecology, these forests were thought to go through certain predictable stages, from early successional growth through to a mature or climax forest, at which point the trees would begin to die and the pattern repeat itself. Following this view, forces could affect forests, such as drought and fire, but they could not alter the essential, and in many ways inevitable, successional process from nascent to mature pine forest.

Yet starting in the 1970s scientists increasingly began to question this view of a neatly ordered, balanced nature. Observations and data revealed that habitat types were anything but orderly, inevitable, predictable, and did not follow step-wise progressions to known end-points. The “new ecology” as it came to be known was based on ideas of instability, spatial and temporal variability, disequilibrium and threshold effects that could fundamentally alter the composition and trajectory of habitats and ecosystems.³⁷ Therefore, conservation initiatives must be flexible and adaptable, not locked in perpetuity to the conditions under which they were written, as occurs with conservation easements.

Perpetuity can also be problematic from a landowner’s perspective, especially those landowners who have to earn income from their land, such as farmers, ranchers and forest owners. Over time, landowners might very well have to change how they use their land in order to respond to different environmental and economic conditions. Or knowledge of land use can change in ways that is incompatible with the terms of a perpetual conservation easement, but this knowledge may still be compatible with the overall goals of environmental conservation.

3) Post-Mortem Conservation Easements

In 1997 Congress amended the tax code to provide heirs of land with what is known as a post-mortem conservation easement. Under a post-mortem conservation easement a donor is eligible to receive a 40% tax exclusion of the remaining value of the land, after the value of the easement is subtracted, so long as the easement reduces the value of the land encumbered by the easement by 30%. The value of the exclusion is capped at \$500,000. If

the value of the conservation easement is less than 30% of the property's value then the value of the exclusion decreases by two percentage points for every percentage point the value of the easement is less than 30%.³⁸

Yet the presence of endangered species or wetlands may render a post-mortem easement of little value because of the requirement that the easement lower a property's value by 30%. According to two of the foremost experts on the estate tax and conservation easements, Stephen Small and Timothy Lindstrom:

*The 30 percent threshold may actually penalize the owners of land having wetlands regulated under section 404 of the Clean Water Act or providing habitat to endangered species under the provisions of the Endangered Species Act. This is because the existence of those conditions triggers federal regulation that may reduce the value of land to such an extent that a conservation easement will have only a negligible effect on its value. If that occurs it is likely that the requirement that the easement reduce the value of the land by at least 30 percent for the donor to enjoy the full 40 percent exclusion may deny the donor of an easement on federally regulated land any meaningful benefit under the new law. For the same reason an easement on such land may not result in any other significant tax benefits.*³⁹

As more of the U.S. is subject to regulations for endangered species and wetlands, post-mortem conservation easements are likely to decrease in value and usefulness.

4) The Enhanced Easement Incentive

As part of the Pension Protection Act of 2006, Congress provided the Enhanced Easement Incentive for donors of conservation easements. Prior to the Enhanced Incentive, the income tax deduction a conservation easement donor could take was capped at 30% of the donor's adjusted gross income for one year, but any unused portion of this could be carried forward for five additional years. The Enhanced Easement Incentive expanded the deduction to 50% for most donors and 100% for qualifying farms and ranches, and allowed the deduction to be carried forward for 15 years.⁴⁰ The Enhanced Easement Incentive expired at the end of 2014, and conservation easement advocates are actively pushing legislation in Congress to reinstate it.⁴¹

While the Enhanced Easement Incentive can encourage landowners to enroll their property in a conservation easement, there are a number of troubling issues with easements and land trusts. Furthermore, conservation easements can diminish the ecologically harmful effects of the estate tax but do not eliminate them.

5) Problems with Land Trusts

At first glance, land trusts—the non-profit organizations that most often hold conservation easements—appear to be landowner-friendly and committed to voluntary, non-regulatory conservation. “Land trusts are nonprofit organizations that work with private landowners to voluntarily conserve forests, farms, parks and other cherished places that enrich our lives,” the Land Trust Alliance asserts.⁴² A closer look, however, reveals a very different picture. Jean Hocker, while she was president and CEO of the Land Trust Alliance from 1987–2002, stated:

As nongovernmental organizations, land trusts are not, of course, bound by the rules, regulations, and procedures that so often constrain public programs. And one must recognize that those constraining government rules and procedures are often required to ensure protection of the public dollar and avoid abuses.

Nevertheless, the very lack of bureaucratic constraint makes land trusts exceedingly good to complementing, supplementing, and implementing public open-space agendas. Land trusts, can, for example, negotiate donations and below-market acquisitions of land.

*They have credibility with, and access to, the very landowners who may hesitate to deal directly with government.*⁴³

It is remarkable that Hocker regards rules meant to prevent abuse and waste as inconveniences. Equally as problematic is Hocker’s admission that land trusts serve as quasi-public extensions of public land management and environmental agencies.

Jean Hocker is not, however, alone in her view of land trusts as agents of government land and resource use control programs. According to two other influential people in the land trust world, Ole Amundsen III of the Conservation Fund, and Susan Culp, then working on a joint venture of the Lincoln Institute of Land Policy and Sonoran Institute and currently principal of NextWest Consulting, a land use planning consultancy:

*Land trusts should consider participating more extensively in regional scale land use planning” because “[p]lanning at a comprehensive, regional scale is optimal, especially for conservation goals that involve connectivity across a broad landscape, whether for wildlife corridors, scenic viewsheds or ecological integrity.*⁴⁴

Amundsen and Culp add:

But many communities do not have access to a regional-scale process. When this is the case, most land use decision-making occurs at the local government level, so land trusts should look to influence those local processes, and consider whether they might help stimulate a larger, regional-scale planning dialogue.⁴⁵

Land trusts also appear to be heavily involved in helping the federal government implement the Endangered Species Act. The Land Trust Alliance has the following on its website:

The Cooperative Endangered Species Conservation Fund (Section 6 of the Endangered Species Act) is administered by the U.S. Fish and Wildlife Service (FWS) and provides funding for state agencies to implement two distinct land acquisition programs: HCP Land Acquisition Grants and Recovery Land Acquisition Grants. A growing number of land trusts have developed partnerships with state and federal agencies to access these funds.⁴⁶

The Endangered Species Act is a highly problematic law for landowners, one aspect of which is the so-called reforms, such as the Safe Harbor Program and the HCPs (Habitat Conservation Plans), about which the Land Trust Alliance is enthusiastic. These reforms are analogous to conservation easements and other estate tax reforms because they are superficial and leave intact the punitive federal law, or portion of law, causing ecological harm. A detailed analysis of these initiatives is available in a study by Reason Foundation.⁴⁷

b. Problems with Special Use Valuation

One of the apparently landowner-friendly and ecologically beneficial portions of the tax code is the “Special Use Valuation,” which allows owners of agricultural and forest land to lower the value of their land and, hence, decrease the amount of estate tax owed. While the Special Use Valuation appears to offer owners of farms, ranches and forest land substantial relief from the estate tax, in reality this is not the case. According to the Land Trust Alliance:

Section 2032A of the tax code allows for the valuation of family farms at their agricultural value, with or without a conservation easement, but the requirements for taking this election are so complex that it is rarely used.⁴⁸

Forest owners face essentially the same problems, as a number of academics and federal researchers point out:

*Special use valuation provisions for forest land exist at the national level and in a few states. The provisions of some of these programs are of limited use to many owners: the programs are too stringent and limit forest owners' future options.*⁴⁹

In addition, the Special Use Valuation, otherwise known as 2032A for the relevant section of tax code, is of limited, if any, use in regions that have high real estate prices. John Halsey of the Peconic Land Trust, which is in eastern Long Island, notes:

*The provisions of 2032A have been rendered useless to most landowners in our area given high real estate values, the maximum amount of value that estates can be reduced (\$750,000 adjusted by inflation), and the complexities of complying with its requirements.*⁵⁰

c. Life Insurance Is Ineffective

Life insurance is of very limited use for those landowners who are anticipating a significant estate tax bill, such as the Hancock family in Maine. Even though the Hancock family is paying around \$75,000 per year in life insurance to cushion being hit by the estate tax, this will in all likelihood be insufficient, and the family will still have enormous estate tax liabilities.

d. Trusts, Family Limited Partnerships and Limited Liability Corporations Are of Limited Use

There are a variety of other ways to reduce estate tax liability that involve more complex measures, such as by-pass trusts, qualified terminable interest property trusts (better known as QTIP trusts), and forming family limited partnerships and limited liability corporations.⁵¹ These complex measures are of limited usefulness to most landowners, especially those who depend on their land for their income, and cannot afford to encumber their land with complicated arrangements.

5. Proposed and Potential Reforms Are Inadequate

a. Increasing the Exemption

Increasing the dollar amount exempt from the estate tax may well not work because large landholdings are among the most economically and ecologically valuable. “Even with a \$5.1 million unified credit, the estate tax will affect a surprisingly large amount of land important to the public for its agricultural and environmental values,” states the Land Trust Alliance. “The recent tripling of farmland prices in many parts of the country (due to record high crop prices) has exacerbated this.”⁵² According to John Halsey, president of the Peconic Land Trust, “Even if Congress increases the exemption to \$5–\$10 million, while helpful, it will not solve the problems for landowners on Long Island or other areas in the country near major metropolitan areas.”⁵³ Raising the exemption merely ensures that the largest parcels (the most ecologically valuable) are put at risk of subdivision and sale, resulting in habitat destruction. No amount of tweaking can fix regulation that creates perverse consequences.

b. Deferring Payment of Estate Tax

Deferring payment of the estate tax so long as land is kept as open space or farm, ranch and forest land is a popular reform offered by proponents of the tax. Yet deferral just delays the day of reckoning and does not solve the underlying problem of the tax causing ecological harm. Landowners know that “deferment” means the tax still exists and at any time the deferment can be lifted. This uncertainty in itself devalues the land and encourages people to give up private landownership because estate taxes can be assessed at any time. In this way, mere presence of the estate tax, and its availability for tinkering by government, is the problem. Also, for those landowners who have to make use of their land to earn income from it, deferral may preclude ecologically valuable land from being able to support its costs, also leading to destruction of habitat.

c. Increasing the Exclusion in Post-Mortem Conservation Easements

One proposal is to increase the estate tax exclusion for land in a post-mortem conservation easement from 40% to 50% and increase the value of the exclusion to \$5,000,000.⁵⁴ Yet increasing the exclusion is similar to increasing the exemption because it would still leave the largest and in many cases most ecologically significant pieces of land vulnerable to the estate tax.

Repeal, not Reform

Tinkering with the estate tax to make it more landowner-friendly will only encourage pursuit of additional changes in the future, some of which may well reverse landowner-friendly reforms. This is a very real possibility, given the reluctance of Congress and the Executive Branch to reduce the size of government. If the estate tax is eliminated, then Congress, special-interest groups and others will not be tempted to tinker with the tax or reverse any new landowner-friendly provisions.

Landowners need clear signals from government, especially landowners who have to plan on decadal bases, such as forest owners. Constant regulatory changes to the estate tax, and the growing threat of factors like endangered species and wetlands, make land and resource management more difficult. Eliminating the estate tax would send a clear signal that would provide enormous relief for many private landowners.

A Better Ecological Future

The longer the federal estate tax is in existence, the more the tax's negative ecological impact will be "solved" as progressively more of the largest and most ecologically significant private landholdings are broken-up, subdivided, sold off and developed to pay the tax. Once this happens, land is gone forever as high quality wildlife habitat and loses many of its other ecological values. Time is running out. The longer estate taxes are in place, the more open space and wildlife habitat will be lost forever.

Many of those in Congress, the Executive Branch, and various special interest groups often address problems like the negative ecological impact of estate taxes by creating more programs and more intricate regulations. Yet it is federal laws and regulations that can often cause harm to the ecology of the United States. Existing and proposed landowner-friendly provisions ameliorate but do not eliminate the ecologically harmful effects of estate taxes. Eliminating the tax—instead of adding more complex, conservation-specific provisions that will be difficult for landowners to understand, use and afford—is the best solution.

Dennis Hammond, when he worked on Florida panther conservation for the Florida Game and Freshwater Fish Commission observed:

Many decisions which determine the survival of endangered species are made by those who have no interest in nor understanding of population dynamics. It will be critical in the future that such decisions-makers become aware of the consequences of their actions. It is a certainty that senators and representatives in Congress who passed the current federal estate tax law in 1916 had no concept of its future adverse impacts on privately owned wildlife habitat. The future of the Florida panther may well depend on how quickly this concept can be grasped by lawmakers today.⁵⁵

Whether Congress and other policymakers will grasp the ecological harm caused by the estate tax remains to be seen. There is one question that people should keep in mind: Is the estate tax worth irreparable harm to America's ecology?

About the Author

Brian Seasholes is director of Reason Foundation's endangered species project. His work deals with wildlife and land-use issues, especially the Endangered Species Act, property rights, wildlife conservation, including private approaches to conservation in the U.S. and around the world, the effects of wind and solar energy generation on wildlife, the effects of the estate tax on conservation and wildlife, and the intersection between wildlife conservation and energy development. His writings have appeared in the *Forbes*, *National Review Online*, *Christian Science Monitor*, *Houston Chronicle*, *Orange County Register*, *The Daily Caller* and *The Washington Times*.

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Endnotes

- ¹ Susan M. Stein, Ronald E. McRoberts, Lisa G. Mahal, Mary A. Carr, Ralph J. Alig, Sara J. Comas, David M. Theobald and Amanda Cundiff, *Private Forests, Public Benefits: Increased Housing Density and Other Pressures on Private Forest Contributions*, General Technical Report PNW-795, (Portland, 2014).
- ² Wilson Ring, “As forest owners age, future of land in doubt,” *The Register-Guard* (from the *Associated Press*), December 8, 2014.
- ³ United States General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, GAO/RCED-95-16, (Washington, D.C., 1994), pp. 4–5.
- ⁴ Michael Bean, Robert Bonnie, Tim Male and Tim Searchinger, *The Private Lands Opportunity: The Case for Conservation Incentives* (Washington, D.C.: Environmental Defense Fund, 2003), p. 2.
- ⁵ Marcos D. Robles, Curtis H. Flather, Susan M. Stein, Mark D. Nelson, and Andrew Cutko, “The geography of private forests that support at-risk species in the conterminous United States,” *Frontiers in Ecology and Environment*. Vol. 6, No. 6 (2008), pp.301–307.
- ⁶ David S. Wilcove, David Rothstein, Jason Dubow, Ali Phillips and Elizabeth Losos, “Quantifying Threats to Imperiled Species in the United States,” *BioScience*, Vol. 48, No. 8 (1998), pp. 607–615; D.B. Lindenmayer, R.B. Cunningham, and M.L. Pope, “A large-scale ‘experiment’ to examine the effects of landscape context and habitat fragmentation on mammals,” *Biological Conservation*, Vol. 88, Issue 3 (1999), pp.387–403; Victoria Saab, “Importance of Spatial Scale to Habitat Use by Breeding Birds in Riparian Forests: A Hierarchical Analysis,” *Ecological Applications*, Vol. 9, Issue 1 (1999), pp.135–151; Cintia Cornelius, Hernán Cofré and Pablo A. Marquet, “Effects of Habitat Fragmentation on Bird Species in a Relict Temperate Forest in Semiarid Chile,” *Conservation Biology*, Vol. 14, Issue 2 (2000), pp. 534–543; Diane M. Debinski, and Robert D. Holt, “A Survey and Overview of Habitat Fragmentation Experiments” *Conservation Biology*, Vol. 14, Issue 2 (2000), pp. 342–355; D. Brent Gurd, Thomas D. Nudds, and Donald H. Rivard, “Conservation of Mammals in Eastern North American Wildlife Reserves: How Small Is Too Small?,” *Conservation Biology*, Vol. 15, Issue 5 (2001), pp. 1355–1363; Lenore Fahrig, “Effect of Habitat Fragmentation on the Extinction Threshold: A Synthesis,” *Ecological Applications*, Vol.12, Issue 2 (2002), pp.346–353; Lenore Fahrig, “Effects of Habitat Fragmentation on Biodiversity,” *Annual Review of Ecology, Evolution, and Systematics*, Vol. 34 (2003), pp. 487–515; David H. Reed, “Extinction risk in fragmented habitats,” *Animal Conservation*, Vol. 7, Issue 2 (2004), pp. 181–191; Laura R. Prugh, Karen E. Hodges, Anthony R. E. Sinclair and Justin S. Brashares, “Effect of habitat area and isolation on fragmented animal populations,” *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 105, No. 52 (2008), pp. 20770–20775.
- ⁷ Amos Eno, “The Age Cliff Facing Private Landowners,” The Private Landowner Network Blog, February 6, 2013, <http://www.privatelandownernetwork.org/plnblog/post.aspx?id=145>. Accessed March 6, 2014.
- ⁸ Brett J. Butler, *Family Forest Owners of the United States, 2006*, General Technical Report NRS-27 (Newtown Square, Pennsylvania: U.S. Department of Agriculture, Forest Service, Northern Research Station, 2008), p.30.
- ⁹ U.S. Department of Agriculture, 2012 Census of Agriculture: United States, Summary and State Data, Vol. 1, Part 51 (Washington, D.C. 2014), pp.204–205.

-
- ¹⁰ National Association of Counties, “New ‘Waters of the United States’ Definition Released,” Policy Brief (Washington, D.C. 2014).
 - ¹¹ Robles et. al., “The geography of private forests that support at-risk species in the conterminous United States,” p.305.
 - ¹² Deloitte, “Oil and gas tax and wealth planning considerations for landowners,” 2013, <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-pcs-oil-and-shale-100913.pdf>. Accessed March 8, 2015.
 - ¹³ U.S. Department of Agriculture, 2012 Census of Agriculture: North Dakota State and County Data, Vol. 1, Part 34 (Washington, D.C. 2014), pp.224–230; U.S. Department of Agriculture, 2012 Census of Agriculture: Montana State and County Data, Vol. 1, Part 26 (Washington, D.C. 2014), pp.224–231; John Kemp, “Column-Bakken output may be boosted by closer oil wells: Kemp,” *Reuters*, May 8, 2013.
 - ¹⁴ Sharon Dunn, “Energy Pipeline: Managing newfound oil wealth rife with complexities, responsibility,” *The Tribune* (of Greeley and Weld Counties, Colorado), November 2, 2014.
 - ¹⁵ *Ibid.*
 - ¹⁶ John L. Green, Steven H. Bullard, Tamara L. Cushing, and Theodore Beauvais, “Effect of the federal Estate Tax on Nonindustrial Private Forest Holdings,” *Journal of Forestry*, Vol. 104, No. 1 (2006), pp.15–20.
 - ¹⁷ *Ibid.*, p.19.
 - ¹⁸ American Forest Foundation, *The Impact of Estate Taxes on Forest Stewardship: Preliminary Report*, (American Forest Foundation: Washington, D.C., 2012), p.7; Brett Butler, *Assessing the Number of Family Forest Owners and Acres Potentially Impacted by the Federal Estate Tax: Phase 1 (MN) – Preliminary Result*, (Amherst, Massachusetts: U.S. Forest Service, Family Forest Research Center, 2012).
 - ¹⁹ Tamara Cushing, “The State Death Tax,” ND (Forest America, a project of the Forest Landowners Association, Atlanta, Georgia), <http://forestamerica.org/issues/state-death-tax>. Accessed March 9, 2015.
 - ²⁰ *Ibid.*
 - ²¹ Green et. al., “Effect of the federal Estate Tax on Nonindustrial Private Forest Holdings,” pp.18–19.
 - ²² Ron L. Durst, “The Effects of the Federal Estate Tax on Farm Households,” *Choices* (published by the Agricultural and Applied Economics Association), Vol. 28, No. 1 (2013), pp.1–4.
 - ²³ *Ibid.*, p.1.
 - ²⁴ Michael J. Bean, “Shelter from the Storm: Endangered Species and Landowners Alike Deserve a Safe Harbor,” *The New Democrat*, Vol.9, No.2 (1997), p.20.
 - ²⁵ Environmental Defense Fund, “Unique Consensus on Endangered Species Incentives Embraces EDF Ideas,” News release, July 31, 1995.
 - ²⁶ Stephen Small Law Offices, “About Us: Stephen J. Small,” <http://lawofficeofstephensmall.com/stephensmall.html>. Accessed March 11, 2015.
 - ²⁷ Stephen J. Small, *Preserving Family Lands, Book I* (Boston: Landowner Planning Center, 1998), p.7.

-
- ²⁸ The Keystone Center, *The Keystone Dialogue on Incentives for Private Landowners to Protect Endangered Species – Final Report* (Keystone, Colorado: Keystone Center, 1995), p.26.
- ²⁹ Ibid.
- ³⁰ Land Trust Alliance, “Conservation Donation Rules,” <http://www.landtrustalliance.org/policy/tax-matters/rules/conservation-donation-rules>. Accessed March 19, 2015.
- ³¹ C. Timothy Lindstrom, Esq., “The Federal Estate and Gift Tax—2011, 2012 and Beyond,” (Land Trust Alliance: Washington, D.C.), http://www.landtrustalliance.org/conservation/conservation-defense/documents/the-federal-estate-and-gift-tax-2011-2012-and-beyond/at_download/file. Accessed February 25, 2015.
- ³² U.S. Department of Agriculture, Economic Research Service, “Farm business average net cash income by resource region and commodity specialization, 2010–2015F, Nominal (current dollars),” <http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/farm-business-average-net-cash-income.aspx#.VRhRwuHLm4w>. Accessed March 22, 2015.
- ³³ Daowei Zhang and Sayeed R. Mehmood, “Safe Harbor for the Red-Cockaded Woodpecker: Private Forest Landowners Share Their Views,” *Journal of Forestry*, vol.100, no.5 (2002), pp. 24–29; Michael G. Sorice, Chi-Ok Oh, Todd Gartner, Mary Snieckus, Rhett Johnson and C. Josh Donlan, “Increasing participation in incentive programs for biodiversity conservation,” *Ecological Applications*, vol.23, no.5 (2013), pp. 1146–1155.
- ³⁴ Keith L. Olenick, Urs P. Kreuter and J. Richard Conner, “Texas landowner perceptions regarding ecosystem services and cost-share land management programs,” *Ecological Economics*, Vol. 53 (2005), pp. 247–260. Kendra Womack, *Factors Affecting Landowner Participation in the Candidate Conservation Agreements with Assurances Program*, Master’s Thesis, (Logan, Utah: Utah State University, 2008); Michael G. Sorice, Wolfgang Haider, J. Richard Conner and Robert B. Ditton, “Incentive Structure of and Private Landowner Participation in an Endangered Species Conservation Program,” *Conservation Biology*, vol.25, no.3 (2011), pp. 587–596; Sorice et al., “Increasing participation in incentive programs for biodiversity conservation,”; Shari L. Rodriguez, M. Nils Peterson, Frederick W. Cabbage, Erin O. Sills and Howard D. Bondell, “Private landowner interest in market-based incentive programs for endangered species habitat conservation,” *Wildlife Society Bulletin*, vol.36, no.3 (2012), pp. 469–476.
- ³⁵ Michael G. Sorice, Chi-Ok Oh, Todd Gartner, Mary Snieckus, Rhett Johnson and C. Josh Donlan, “Increasing participation in incentive programs for biodiversity conservation,” *Ecological Applications*, vol.23, no.5 (2013), p. 1146.
- ³⁶ Karl Zimmerer, “Human geography and the ‘new ecology’: the prospect and promise of integration,” *Annals of the American Association of Geographers* 84, no.1 (1994), pp. 108–125; Ian Scoones, “New Ecology and the Social Sciences: What Prospects for a Fruitful Engagement?” *Annual Review of Anthropology* 28 (1999), pp. 479–507.
- ³⁷ R.P. McIntosh, “Pluralism in Ecology,” *Annual Review of Ecology and Systematics* 18 (1987), pp. 321–341; Daniel Botkin, *Discordant Harmonies: A New Ecology for the Twenty-First Century*, (Oxford, UK: Oxford University Press, 1990); Zimmerer, “Human geography and the ‘new ecology’: the prospect and promise of integration,”; Scoones, “New Ecology and the Social Sciences: What Prospects for a Fruitful Engagement?”
- ³⁸ Ibid.

-
- ³⁹ C. Timothy Lindstrom, and Stephen J. Small, “New Estate Tax Relief for Land under Conservation,” *Tax Notes Today*, March 2, 1998.
- ⁴⁰ Land Trust Alliance, “Frequently Asked Questions About the Enhanced Easement Incentive,” <http://www.landtrustalliance.org/policy/tax-matters/campaigns/incentive-faqs>. March 17, 2015.
- ⁴¹ Land Trust Alliance, “The Enhanced Easement Incentive,” <http://www.landtrustalliance.org/policy/tax-matters/campaigns/the-enhanced-easement-incentive>. Accessed March 26, 2015.
- ⁴² Land Trust Alliance, 2010 National Land Trust Census Report: A Look at Voluntary Conservation in America, (Land Trust Alliance: Washington, D.C., 2010), p.2.
- ⁴³ Jean W. Hocker, “Patience, Problem Solving, and Private Initiative: Local Groups Chart a New Course for Land Conservation,” In Henry L. Diamond and Patrick F. Noonan (eds.), *Land Use in America* 1996 (Washington, D.C.: Island Press), pp.250–251.
- ⁴⁴ Ole Amundsen III and Susan Culp, “Conservation in a Broader Context: Land Trusts and Land Use Planning,” *Saving Land* (the magazine of the Land Trust Alliance), (2003), Winter, p.15.
- ⁴⁵ Ibid.
- ⁴⁶ Land Trust Alliance, “Section 6 Endangered Species Grants,” <http://www.landtrustalliance.org/policy/public-funding/section>. Accessed March 25, 2015.
- ⁴⁷ Brian Seasholes, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program*, (Los Angeles: Reason Foundation, 2014) http://reason.org/files/endangered_species_act_reform.pdf
- ⁴⁸ Land Trust Alliance, “Conservation Donation Rules,” <http://www.landtrustalliance.org/policy/tax-matters/rules/conservation-donation-rules>. Accessed March 2, 2015.
- ⁴⁹ Brett J. Butler, Jaketon H. Hewes, Paul Catanzaro, John L. Greene, Michael A. Kilgore, David B. Kittredge, Judy Langer, Zhao Ma, Aaron Reuben and Mary Tyrrell, *Effects of federal, state, and local tax policies on family forest owners: Technical report*, FFRC Research Paper No. 2010-01 (Amherst, Massachusetts: U.S. Department of Agriculture, U.S Forest Service/University of Massachusetts Amherst, Family Forest Research Center, 2010), p.52.
- ⁵⁰ Halsey, “Federal Estate Tax Policy.”
- ⁵¹ Lindstrom, Esq., “The Federal Estate and Gift Tax—2011, 2012 and Beyond.”
- ⁵² Land Trust Alliance “The Estate Tax and Natural Resources,” www.landtrustalliance.org/policy/documents/hill-estate-tax. Accessed March 19, 2015.
- ⁵³ Halsey, “Federal Estate Tax Policy.”
- ⁵⁴ Land Trust Alliance, “Estate Tax Reform and Land Conservation,” <http://www.landtrustalliance.org/policy/tax-matters/campaigns/estate-tax-reform-and-land-conservation>. Accessed April 5, 2015.
- ⁵⁵ Dennis E. Hammond, “Protecting Panther Habitat on Private Lands in Southern Florida—A Current Assessment,” *Transactions of the 63rd North American Wildlife and Natural Resources Conference* (1998), p.461.