

“A TINGE OF MELANCHOLY LAY UPON THE COUNTRYSIDE”:
AGRICULTURAL HISTORIC RESOURCES WITHIN
CONTEMPORARY AGRICULTURAL AND HISTORIC
PRESERVATION LAW

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Preservation of working lands and resources has become the focus of many interested in the protection of rural areas. Despite public support for such initiatives and quantifiable successes, preservation advocates have struggled to utilize the current tools available to safeguard historic resources. To address this gap, this Article first considers the unique nature of agricultural historic resources and the challenges they present from a preservation perspective. It then assesses the current framework of historic preservation laws, developed largely for urban neighborhoods, and the issues preservationists face in applying these tools to the rural context. Last, this Article proposes a series of policy solutions that would provide meaningful assistance to rural preservationists in achieving their objectives. Ultimately, historic preservation has the potential to play a strong role in preserving the character of rural areas, but only if this profound policy disconnect can begin to be bridged.

To his eyes all seemed beautiful, but to me a tinge of melancholy lay upon the countryside, which bore so clearly the mark of the waning year. Yellow leaves carpeted the lanes and fluttered down upon us as we passed. The rattle of our wheels died away as we drove through drifts of rotting vegetation—sad gifts, as it seemed to me, for Nature to throw before the carriage¹

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¹ ARTHUR CONAN DOYLE, THE HOUND OF THE BASKERVILLES: ANOTHER ADVENTURE OF SHERLOCK HOLMES 80 (1902).

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I. INTRODUCTION

Agricultural lands have a deep emotional resonance within American history and culture.² These lands are an important part of our shared cultural heritage regardless of how much distance ultimately comes between our increasingly urbanized society and its rural past.³ In recognition of this significance, considerable attention has been given to implementing programs designed to protect working agricultural lands against development pressures.⁴ Farmland protection programs, particularly those relying on agricultural conservation easements, have been successful in protecting thousands of acres of working lands with the assistance of an increasing array of advocates and non-profit organizations focused on this form of resource protection.⁵ These efforts have made a profound difference, notably along the rural-urban fringe, and in many areas farmland protection has become integrated into the overall thinking regarding long-term land use planning.⁶

What has been relatively absent from this movement is any meaningful discussion of the significance of these resources from a historic preservation perspective.⁷ Many of the cultural resources located on this country's farmsteads have immense cultural and societal

² Blanche Lincoln, *Protecting Our Rural Heritage*, FORUM J., Winter 2010, at 5, 5; see also JACK LARKIN, *WHERE WE LIVED: DISCOVERING THE PLACES WE ONCE CALLED HOME* 52–55 (2006) (noting the early appreciation of these resources).

³ WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* vii–viii (3d ed. 1996) (explaining the value of traditional agricultural production and the need for strong connections with informed urban consumers); see also Stephen R. Miller, *Three Legal Approaches to Rural Economic Development*, 23 KAN. J.L. & PUB. POL'Y 345–49 (2014) (discussing the changes increasingly impacting rural areas—nationally and internationally).

⁴ See, e.g., *Farmland Protection*, AM. FARMLAND TRUST, <http://www.farmland.org/programs/protection/> (last visited Jan. 23, 2015) (summarizing one prominent farmland protection advocate's efforts in this vein). For an overview of farmland protection programs and some of the corresponding challenges, see Edward Thompson, Jr., "Hybrid" *Farmland Management Programs: A New Paradigm for Growth Management*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831 (1999).

⁵ See, e.g., *Agricultural Preservation Restriction Program (APR)*, MASS. DEP'T ENERGY & ENVTL. AFF., <http://www.mass.gov/eea/agencies/agr/land-use/agricultural-preservation-restriction-program-apr.html> (last visited Jan. 23, 2015) (explaining the impact of Massachusetts's Agricultural Preservation Restriction program in protecting over 800 farms and 68,000 acres since its creation in the late 1970s); see also Cynthia J. Nickerson & Daniel Hellerstein, *Protecting Rural Amenities Through Farmland Preservation Programs*, 32 AGRIC. & RESOURCE ECON. REV. 129, 129 (2003).

⁶ Michael Bunce, *Thirty Years of Farmland Preservation in North America: Discourses and Ideologies of a Movement*, 14 J. RURAL STUD. 233, 233–34 (1998).

⁷ WILLIAM J. MURTAGH, *KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA* 135, 146 (1990) ("[f]rom a preservationist standpoint, the rural picture is far from bright and deserves timely attention before these rural resources disappear entirely").

significance—architecturally, historically, and aesthetically.⁸ Additionally, these irreplaceable resources present challenges because they are not static; “[f]arming practices change and what agriculture once produced naturally for our great satisfaction such as country lanes, landscapes, traditional buildings and so forth [are] no longer being produced.”⁹ The current threats to agricultural historic resources are considerable and include “[i]ncreasing operational costs, declining prices, development pressures, and an aging farm population[, all of which place] the future of many farms at risk.”¹⁰

Within the farmland preservation movement, agricultural historic resources such as barns, farmhouses, and other vernacular structures are not typically separated from the working lands in the public’s perception of what these efforts are designed to accomplish.¹¹ For example, in rural Maine, land use planners studying the role of place attachment recently surveyed local residents to assess what features of the rural landscape they most valued, or in short, what they actually wanted to see preserved.¹² In this comprehensive photo-preference survey, the most highly rated views or vistas included rural landscape elements as well as historic farm structures—demonstrating the public’s appreciation of this subset of the built environment.¹³ Despite strong appreciation for rural historic structures, there has been little attention paid to how these structures present unique challenges to the existing

⁸ Charles E. Roe, *The Natural Environment*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 223, 238 (Robert E. Stipe ed., 2003); *see also* ISABEL VANSLEMBROUCK & GUIDO VAN HYLENBROECK, *LANDSCAPE AMENITIES: ECONOMIC ASSESSMENT OF AGRICULTURAL LANDSCAPES* 43 (2004) (detailing the amenity benefits of agricultural landscapes).

⁹ Jean-Eudes Beuret & Marie-Christine Kovachazy, *Rural Amenity Policies: Future Stakes*, in *AMENITIES AND RURAL DEVELOPMENT: THEORY, METHODS, AND PUBLIC POLICY* 33, 33 (Gary P. Green et al. eds., 2005).

¹⁰ Mass. Dep’t of Conservation & Recreation, *Rooted in History: Preserving Historic Farms*, TERRA FIRMA, 2009, at 1, 1; *see also* FOOD LAW & POL’Y CLINIC OF HARV. L. SCH. FOR CONSERVATION L. FOUND., *FARM & FOOD LAW: A GUIDE FOR LAWYERS IN THE LEGAL SERVICE FOOD HUB NETWORK* 5–14 (2014) (providing an overview of the state of the farm economy in Massachusetts).

¹¹ Gary P. Green et al., *Introduction*, in *AMENITIES AND RURAL DEVELOPMENT: THEORY, METHODS, AND PUBLIC POLICY* 1 (Gary P. Green et al. eds., 2005) (noting that rural amenities also include “historic buildings and sites and cultural settlements”); *see also* Randy Kraft, *State Misses Its Old Barns*, MORNING CALL, Mar. 7, 2006, http://articles.mcall.com/2006-03-07/news/3650000_1_barns-farms-disappearing (discussing the loss and importance of barns in rural Pennsylvania).

¹² Robert L. Ryan & Amanda J. Walker, *Place Attachment and Landscape Preservation in Rural New England: A Maine Case Study*, 86 *LANDSCAPE & URB. PLAN.* 141, 146 (2008).

¹³ *Id.* (weighed individually, preservation of historic structures came in only slightly behind landscape features in voter preferences, with “special buildings” ranking the highest of all features for protection).

body of historic preservation law.¹⁴ In fact, many agricultural preservation initiatives specifically omit protection of the farm structures from programmatic goals as this resource type often falls outside of the skillset of the agency or non-profit actor tasked with implementation.¹⁵

It is the purpose of this Article to explore the range of issues that complicate efforts to preserve agricultural historic resources and to evaluate possible options for promoting their preservation. To this end, Section II of this Article will briefly detail the unique nature of agricultural historic resources. Section III will detail the challenges that preservationists face in attempting to apply existing tools to the rural context at the local, state, and federal levels. Last, Section IV will analyze and assess possible policy options to improve efforts to protect agricultural historic resources within federal preservation and agricultural policy. Ultimately, if consideration for these resources can become better integrated within agricultural and historic preservation policies, advocates can begin to work more effectively to protect vulnerable rural historic structures and livelihoods.

II. THE UNIQUE NATURE OF AGRICULTURAL HISTORIC RESOURCES

Rural historic resources, particularly those that are agricultural-related, are acutely vulnerable to loss.¹⁶ To provide a working definition of agricultural historic resources, one must first understand the nature of rural areas.¹⁷ For the purposes of this Article, “rural” can be generally defined according to the United States Department of Agriculture’s (“USDA”) Economic Research Service’s framework—which focuses on

¹⁴ Valerie Talmage, *Lessons from Land Conservation*, FORUM J., Fall 2010, at 11 (explaining that preservation and conservation efforts often exist in separate spheres—leading to a material disconnect that is not often bridged); see also Genevieve P. Keller & Timothy Keller, *Preserving Important Landscapes*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 187, 206–07 (Robert E. Stipe ed., 2003) (noting the challenges of rural preservation).

¹⁵ Wendy Nicholas, *Collaborating to Save Whole Places*, FORUM J., Fall 2010, at 7 (discussing the destruction of a c.1740 Massachusetts farmhouse despite the protection of the eight hundred acre farm through conservation easements and other legal mechanisms).

¹⁶ JAN ALBERS, *HANDS ON THE LAND: A HISTORY OF THE VERMONT LANDSCAPE* 281 (2000) (explaining the ephemeral nature of barns as their survival hinges upon economic viability). The realization that agricultural historic resources are particularly vulnerable is not a new one. For example, the poet John Clare, as early as 1818, bemoaned changing agricultural practices due to the enclosure acts and losing the individual cultivation model (typified by narrow furrow patterns) of the feudal era. DAVID HALL, *TURNING THE PLOUGH* 52 (2001) (quoting John Clare, *The Lamentation of Round-Oak Water* (1818)).

¹⁷ ANDREW F. COLBURN ET AL., *CHOOSING RURAL DEFINITIONS: THE IMPLICATIONS FOR PUBLIC HEALTH*, ISSUE BRIEF #2, at 1 (Mar. 2007) (noting the challenges of providing a definition to encapsulate this amorphous geographic construct).

non-metro counties that include either: (1) open countryside; (2) rural towns; or (3) urban areas that are not part of larger labor market areas.¹⁸ Based upon this broad definition, rural historic resources obviously exist within both smaller towns as well as working farms.¹⁹ While these smaller communities also face very real challenges, this Article focuses on the specific subcategory of rural historic resources associated with agricultural production; or agricultural historic resources.²⁰

Within this context, agricultural historic resources are rural historic structures that directly relate to productive farming activity—either historically or at the current time.²¹ These historic resources generally served as the centers of varied, and necessary productive activities that sustained the individuals living on the land.²² For example, a farmstead of the early 1800s would often consist of a farmhouse, several barns, and other outbuildings dedicated to specific tasks—from the storage of ice to livestock production.²³ These buildings, emblematic of particular moments in history, vary by region and the nature of the agricultural production.²⁴ Iconic examples include the tobacco barn of the Tidewater region,²⁵ the Dutch aisled barn of the Hudson Valley,²⁶ and the

¹⁸ Econ. Research Serv., *Rural Classifications: What is Rural?*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural.aspx> (last visited Jan. 23, 2015). There are, however, a number of ways to define this concept, which is admittedly to some extent a subjective distinction. See Rural Info. Ctr., *What is Rural?*, U.S. DEP'T OF AGRIC., <http://ric.nal.usda.gov/what-is-rural> (last visited Jan. 23, 2015) (explaining the difficulty in developing a precise definition of this term).

¹⁹ ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., UNDERSTANDING RURAL AMERICA 1–5 (1995) (noting the diversity within the rural context). The construct between rural and urban is itself somewhat artificial as the urban context is shaped by the rural surroundings and vice versa. See, e.g., WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 17–19 (1991) (exploring this phenomenon in the development of Chicago over the second half of the nineteenth century).

²⁰ See SAMUEL N. STOKES ET AL., *SAVING AMERICA'S COUNTRYSIDE: A GUIDE TO RURAL PRESERVATION* 16–17 (2d ed. 1997) (discussing the challenges of revitalizing small rural towns).

²¹ Mass. Dep't of Conservation & Recreation, *supra* note 10, at 1 (defining agricultural landscapes).

²² PAUL K. CONKIN, *A REVOLUTION DOWN ON THE FARM* 31–35 (2008) (explaining the persistence of some variant of this model through the 1930s in many areas).

²³ William H. Tishler, *The Site Arrangement of Rural Farmsteads*, 10 BULL. ASS'N BUILDING TECH. 63, 63–66 (1978); see also SALLY LIGHT, *HOUSE HISTORIES: A GUIDE TO TRACING THE GENEALOGY OF YOUR HOME* 11–14 (1989) (discussing site configuration).

²⁴ MICHAEL J. AUER, NAT'L PARK SERV., PRESERVATION BRIEF 20: THE PRESERVATION OF HISTORIC BARN 2–4 (1988) (providing an overview of historic barn types); see also RICHARD K. CLEEK & ALLEN C. NOBLE, *THE OLD BARN BOOK* 1–11 (1996) (discussing historic farm structures).

²⁵ *Tobacco Barn Preservation Project*, PRESERVATION VA., <https://preservationvirginia.org/p/programs/tobacco-barns-protection-project> (last visited Jan. 23, 2015).

²⁶ MALCOLM KIRK, *SILENT SPACES: THE LAST OF THE GREAT AISLED BARN 75–87* (1994); see also DANIEL BLUESTONE, *BUILDINGS, LANDSCAPES, AND MEMORY: CASE STUDIES IN*

interconnected barn complexes of New England.²⁷ Countless smaller utilitarian structures such as “[i]ce houses, cellar holes, smokehouses, and more remain to remind us of the once-robust agricultural past . . . both real and imagined.”²⁸ As such, these buildings all serve to fundamentally shape the character of rural areas.²⁹ Despite the unquestioned significance of these structures, there are several reasons they remain largely outside of mainstream historic preservation efforts. A few of the principal reasons are addressed in turn.

A. Designed for a Limited Economic Use

Beginning at least as early as the 1930s, intensification in farming activity began to substantially change the need for agricultural building stock.³⁰ Traditional farm structures, predicated on feeding large and varied number of both draft and production livestock began to be rendered superfluous by mechanization and a growing specialization in farming activity.³¹ The layout of these utilitarian structures was not conducive to modern agricultural use, quickly rendering many obsolete.³² For example, “[o]ur magnificent barns were often built to

HISTORIC PRESERVATION 78 (2011) (noting the loss of early Dutch homesteads in Brooklyn throughout the early 20th century).

²⁷ THOMAS C. HUBKA, *BIG HOUSE, LITTLE HOUSE, BACK HOUSE, BARN 3* (1984); *see also* THOMAS VISSER, *FIELD GUIDE TO NEW ENGLAND BARNS AND FARM BUILDINGS 1–10* (1997).

²⁸ Mark P. Lapping, *Stone Walls, Woodlands, and Farm Buildings: Artifacts of New England's Agrarian Past*, in *A LANDSCAPE HISTORY OF NEW ENGLAND* 128, 141 (Blake Harrison & Richard W. Judd eds., 2011); *see also* Nora P. Small, *New England Farmhouses in the Early Republic: Rhetoric and Reality*, in *PERSPECTIVES IN VERNACULAR ARCHITECTURE* 33 (Carter L. Hudgins & Elizabeth C. Cromley eds., 1997).

²⁹ *See, e.g.*, PAUL S. GILLES, *UNCOMMON LAW, ANCIENT ROADS AND OTHER RUMINATIONS ON VERMONT LEGAL HISTORY* 90–102 (2013) (discussing the Merino sheep boom and bust of nineteenth century Vermont and the ultimate abandonment of many hill farms after the crash); *see also* Mass. Dep't of Conservation and Recreation, *supra* note 10, at 3–5 (profiling the various agricultural landscapes formed in Massachusetts pursuant to various agricultural production processes—such as cranberry farms, dairy farms, and maple sugaring).

³⁰ JENNIFER GOODMAN & BILL KIMBALL, *PROTECTING OLDER AND HISTORIC BARNS THROUGH BARN PRESERVATION PROGRAMS* 1–3 (2004); EDWARD HOOGERP, *NAT'L TRUST FOR HISTORIC PRES., HISTORIC BARNS: WORKING ASSETS FOR SUSTAINABLE FARMS* 11 (2007); *see also* CAROLYN DIMITRI ET AL., *U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY* 1–3 (2005) (exploring the changes in agricultural production during this period).

³¹ R. DOUGLAS HURT, *AMERICAN AGRICULTURE: A BRIEF HISTORY* 321–22 (1994).

³² Again, take the example of sheep barns in Vermont. Sheep production during the merino wool craze of the early nineteenth century made sheep production immensely profitable and led to the construction of purpose built structures to support this economic activity. It would not be uncommon for one sheep farm to have over 10,000 sheep on a fairly small parcel of land. Despite the thousands of sheep barns built during the eighteenth century, only a handful survive intact to the current time. *See* GILLES, *supra* note 29, at 90–102; *Glen Dale Farm*, U. VT., <http://www.uvm>

house machinery, animals and hay; but today's combines do not fit through the barn doors, livestock live in feedlots, and hay stays outside in compact one-ton bales."³³ Barns were then either demolished or neglected as they were no longer worth further investment.³⁴ Based upon this harsh reality, "[b]arns [have been] among [the] most ephemeral landscape features, for their useful lives are often tied to their adaptability to modern farming technology; when a barn has outlived its usefulness, it is often too expensive to maintain."³⁵

Barns are not alone in this regard. Take as another example the chicken barn or house. In New England, "scattered across the region are the remnants of this once-flourishing Yankee industry. . . ."³⁶ Over time, industry concentration eliminated competition as "cheaper grains, improved transportation systems, and a milder climate that made chicken housing less expensive conspired to move the center of the industry southward to the Delmarva Peninsula region of Delaware, Maryland, and Virginia."³⁷ "Today, these buildings—the vast majority abandoned—can be seen across the landscape. Some have been turned into small living units and others are used for storage; more than a few now house workshops, offices, or small businesses. Most, however, have been left to deteriorate."³⁸ Other agricultural historic resources have faced similar challenges including "stone walls, apple orchards, tobacco drying sheds, and other landscape elements."³⁹

Overall, changes in agricultural production have led to the loss of large numbers of traditional farm structures.⁴⁰ Thousands more only survive owing to the heavy framing and solid construction methods utilized by earlier generations.⁴¹ As utilitarian structures built for a

.edu/~hag/barns/glendale.html (last visited Jan. 23, 2015) (discussing the historic significance of one of the few surviving sheep barns at Glen Dale Farm, in rural Cornwall, Vermont).

³³ STOKES ET AL., *supra* note 20, at 45.

³⁴ AUER, *supra* note 24, at 1 (explaining that "[b]arn raisings have given way to barn razings").

³⁵ ALBERS, *supra* note 16, at 281. Albers also notes an additional component of this economic calculus—that changing normative standards about what standards animals require in barns also shape agricultural building stock. *Id.*

³⁶ Lapping, *supra* note 28, at 139.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 141.

⁴⁰ David Mercer, *Midwest's Old Barns Disappearing*, U.S.A. TODAY, June 16, 2007, http://usatoday30.usatoday.com/news/nation/2007-06-16-barns_N.htm; *see also* Susan A. Schneider, Keynote Address, *Reconsidering the Industrialization of Agriculture*, 19 J. ENVTL. L. & LITIG. 19, 19–21 (2011) (charting this movement to a more intensive form of agricultural production).

⁴¹ AUER, *supra* note 24, at 5 (explaining that "[h]istoric barns . . . are so well built they remain useful even after a hundred years or more.").

specific purpose, agricultural historic resources remain highly susceptible to loss due to disinvestment and lack of continued function.⁴²

B. Lack of Clear Economic Return/Reuse

Relatedly, there is also an issue of demand for these resources.⁴³ If a building is to be restored, absent extraordinary circumstances, it will need to have a future market value at least comparable to the level of investment needed to complete the rehabilitation in order to attract a willing investor. This level of return is not always clear in many rural communities.⁴⁴ If an owner cannot recover the cost of rehabilitating the building, absent some form of subsidies or grant support, it will be unrealistic to rely on emotional attachment to preserve more than a handful of isolated examples.⁴⁵ As noted in Section II.A., these buildings were generally built to promote a certain form of productive activity. This customization often further contributes to the needed investment to make these buildings serve a new use.⁴⁶ If the former agricultural use is rendered obsolete, a new use will be needed in order to promote ongoing investment in maintaining the historic structure.⁴⁷ While barns have been converted to residential use, many smaller agricultural historic resources may present novel challenges based upon their size and configuration.⁴⁸ Even if this type of adaptive reuse is not impossible, the pool of interested owners will likely be substantially

⁴² See, e.g., HOOGERP, *supra* note 30, at 3; JAMES GARVIN, A BUILDING HISTORY OF NORTHERN NEW ENGLAND 7–10 (2001).

⁴³ Development pressure can often be a double-edged sword. Although it presents challenges for attracting investment, it also encourages the retention of the buildings, as development is not directed as intensely toward these structures for redevelopment for a more intensive use. See HOOGERP, *supra* note 30, at 4–5. This is not just a problem in rural areas, however, as many industrial cities are facing similar challenges. See generally ADVISORY COUNCIL FOR HISTORIC PRES., MANAGING CHANGE: PRESERVATION AND RIGHTSIZING IN AMERICA (2012).

⁴⁴ J. MYRICK HOWARD, BUYING TIME FOR HERITAGE: HOW TO SAVE AN ENDANGERED HISTORIC PROPERTY 117 (2007) (discussing the challenges of protecting rural properties where the market value is not clear or is non-existent).

⁴⁵ HEMALATA C. DANDEKAR & ERIC A. MACDONALD, *Preserving the Midwestern Barn*, in BARNES OF THE MIDWEST 259, 261 (Allen G. Noble ed., 1995).

⁴⁶ HOOGERP, *supra* note 30, at 4–5.

⁴⁷ See, e.g., PRESERVATION MD., ADAPTIVE REUSE OF TOBACCO BARN 5–6 (2010) (providing case studies of successful adaptive reuses of barn structures).

⁴⁸ See AUER, *supra* note 24, at 1 (noting the potential pitfalls of converting a barn to a more intensive use through adaptive reuse); but see Jean A. Follett, *Rural Preservation Strategies: Save a Place, Save a Story*, FORUM J., Winter 2010, at 15, 15 (providing as an illustrative example that “private owners may acquire and adapt [these structures] for economically available new uses, such as for small-scale organic farming”).

reduced.⁴⁹ Moreover, the value of land, particularly nearer to urban areas, may make subdivision of the site practically impossible, further limiting the array of available adaptive reuse options.⁵⁰

C. Lack of Density and Expertise

Beyond the unique nature of the resources under threat, agricultural historic resources present additional issues for the preservation community. For one, the lack of population density can make these efforts challenging.⁵¹ With notable exceptions, there often is not broad based support for preserving individual resources, at least through regulatory mechanisms.⁵² Preservation of historic resources normally takes either individual will or financial resources and often both.⁵³ When a structure is in an isolated context, the public benefit of preserving the structure is arguably less than if it is a more densely populated area, as fewer individuals are able to experience or value the resource—which may impact fundraising through private or grant sources, and the ability of preservationists to justify the creation of local historic districts.⁵⁴ Beyond perception problems, it is also simply more difficult to regulate rural districts because larger areas of land render these efforts less

⁴⁹ HOUS. ASSISTANCE COUNCIL, TURNING CHALLENGES INTO OPPORTUNITIES: HOUSING AND COMMUNITY DEVELOPMENT STRATEGIES IN RURAL POPULATION LOSS COUNTIES 14–17 (2007).

⁵⁰ See, e.g., Meg Barone, *Demolition Pending for Two Westport Barns, but One Might Be Saved*, WESTPORT NEWS, Dec. 13, 2013, <http://www.westport-news.com/news/article/Demolition-pending-for-two-Westport-barns-but-5061337.php>.

⁵¹ See, e.g., Follett, *supra* note 48, at 15 (noting these challenges).

⁵² Albert H. Manwaring, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291 (1990). Landmark regulations, focused on single properties, are the less frequent form of historic preservation regulation, while local historic districts, focused on historic neighborhoods, are the regulatory form adopted by most communities interested in this form of land use control. See Mark D. Brookstein, *When History is History: Maxwell Street, Integrity and the Failure of Preservation Law*, 76 CHI-KENT L. REV. 1848–51 (2001).

⁵³ Thompson M. Mayes & Ross Bradford, *Combining Preservation and Conservation Values: Six Illustrative Examples*, FORUM J., Fall 2010, at 24, 24–26 (providing several case studies of successful preservation efforts).

⁵⁴ James L. Karp, *The Evolving Meaning of Aesthetics in Land Use Regulation*, 15 COLUM. J. ENVTL L. 307, 310 (1990). This is not an issue with historic significance, but public benefit. Non-visible historic properties often face similar issues. If the building is not visible from a public way, regulatory districts will normally exclude the resource from the protections of the district. This stems from the aesthetic motivations behind historic districts—focused on the mutual reciprocity of benefit aesthetic regulations provide to owners of properties within the regulated area. See David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 289 (2004).

efficient or feasible.⁵⁵ Last, in some areas, it may be difficult to even have access to preservation expertise to advise on projects or to find traditional craftspeople to take on often complicated rehabilitation work.⁵⁶ “Not many people today, for example, are experienced in building stone walls or split-rail fences.”⁵⁷ This form of rehabilitation is not without substantial cost, which further discourages potential owners from taking on these projects.⁵⁸ In sum, these issues combine to make the geographic imperatives involved in rural preservation at least different than those faced in urban centers.

D. Current Market Challenges

Last, the changing nature of farming practices also presents market-based threats to agricultural historic resources. “[A]s farms consolidate, farmers frequently remove fences and hedgerows that are no longer useful as boundary markers and make the efficient use of large machinery more difficult.”⁵⁹ This trend includes the demolition of surplus agricultural homesteads—often lacking a market alternative to their demolition.⁶⁰ Historic agricultural structures “may [also] have difficulty meeting sanitation and safety requirements for livestock operations, and electrical and plumbing systems are often inadequate.”⁶¹ Maintenance and energy costs may be seen as a barrier to the continued use of these legacy resources.⁶² Real estate taxes and liability insurance may also be too high to justify the retention of these structures as “[b]arns were left to rot, were burned down to save costs, or were sold to lumber recyclers.”⁶³ Just as changing farming practices have left many historic structures vulnerable, the practical day to day imperatives of running an efficient business also has impacted the character of the rural landscape.

While agricultural historic resources present a layered view of the nation’s past and evolving history, real threats and challenges that

⁵⁵ MURTAGH, *supra* note 7, at 135; *see also* STOKES ET AL., *supra* note 20, at 204–05 (explaining that while a few small towns have local historic districts, few exist in unincorporated agricultural communities).

⁵⁶ Pres. Ky., *Partner Profile: Bowling Green, Warren County Historic Preservation Board*, PK NEWS, Winter 2012, at 2 (noting the challenges).

⁵⁷ STOKES ET AL., *supra* note 20, at 47.

⁵⁸ *Rural Preservation*, ADIRONDACK ARCH. HERITAGE, <http://www.aarch.org/learn/additional-resources/rural-preservation/> (last visited Jan. 23, 2015).

⁵⁹ STOKES ET AL., *supra* note 20, at 46.

⁶⁰ DANDEKAR & MACDONALD, *supra* note 45, at 263.

⁶¹ *Id.* at 263.

⁶² STOKES ET AL., *supra* note 20, at 47.

⁶³ Follett, *supra* note 48, at 16.

differentiate efforts to preserve this category of structures from their urban counterparts need to be better understood in developing meaningful preservation strategies.⁶⁴

III. THE CONTEMPORARY PRESERVATION FRAMEWORK AND THE CHALLENGE OF AGRICULTURAL HISTORIC RESOURCES

Despite the clear significance of agricultural historic resources, preservationists have struggled to meaningfully address this built form.⁶⁵ Although “[o]ne can no longer analyze contemporary urban development and urban redevelopment without regard to historic preservation,” this is not necessarily true of development in rural areas.⁶⁶ To understand the issues in reaching agricultural historic resources, it is necessary to quickly review the array of laws currently designed to protect the built environment. Contemporary historic preservation law and policy in the United States exists at each of the primary levels of government—local, state, and federal—and differs significantly as far as the goals and tools that are available at each level.⁶⁷ This section will also address the evolution of preservation efforts and, in particular, their overall effectiveness in preserving rural historic structures, historic landscapes, and the associated rural context.

A. Local Preservation Law

Local preservation law, in a large sense, has some of its earliest roots in protecting urban districts and neighborhoods with significant concentrations of historic structures.⁶⁸ The first preservation efforts focused on protecting individual landmarks, typically through outright purchase and subsequent operation of these historic properties as house

⁶⁴ James M. Lindgren, *Preserving the Illusion of Being Transported Back into the Past*, in *A LANDSCAPE HISTORY OF NEW ENGLAND* 284, 299 (Blake Harrison & Richard W. Judd eds., 2011) (noting that the “preserved landscape is an imperfect lens on the past . . . [however,] [w]hat is important to remember is what is preserved is open to interpretation . . .”).

⁶⁵ NAT’L TRUST FOR HISTORIC PRESERVATION, *AMERICA’S FORGOTTEN ARCHITECTURE* 95–96 (1976). Efforts to fill this gap have been somewhat successful over the past few decades in addressing this issue. See STOKES ET AL., *supra* note 20, at xxi (profiling efforts in this vein).

⁶⁶ J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 *GEO. MASON L. REV.* 665, 666 (2012).

⁶⁷ NAT’L TRUST FOR HISTORIC PRESERVATION, *BASIC PRESERVATION* 1–3 (2006).

⁶⁸ Julia H. Miller, *Historic and Cultural Resource Protection under Historic Preservation Law*, in *HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT* 17, 25 (Sherry Hutt et al. eds., 1999); see also JACOB H. MORRISON, *HISTORIC PRESERVATION LAW* 6–9 (1957).

museums.⁶⁹ These efforts, however, could not typically address larger contexts or groups of historic properties, which led to a drive to expand the regulatory tools available to the preservation community.⁷⁰

To fill this gap, local historic districts were designed to prevent the demolition or insensitive alteration of historic properties and to recognize the collective significance of these areas as a whole or entities, rather than their constituent components.⁷¹ Authorized under state enabling legislation, local historic districts operate through a preservation ordinance and are administered by local commissions tasked with evaluating the appropriateness of any proposed modifications of buildings within the regulated district that fall under the ordinance.⁷² Local historic district authority can vary widely depending on the nature of the state enabling legislation and the local support for the regulatory control.⁷³ Enforcement can also have a profound influence on the effectiveness of this form of local land use regulation.⁷⁴ Local historic districts currently protect approximately 2,300 neighborhoods, are found in all fifty states, and have been successful in protecting some of the nation's most important assemblages of historic properties.⁷⁵

Despite this success, local historic districts retain a largely urban character—perhaps as a function of the motivations behind their creation.⁷⁶ Even a cursory listing of the early communities adopting

⁶⁹ Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708, 708–10 (1963) (exploring the origins of the modern preservation movement); see also DONNA ANN HARRIS, *NEW SOLUTIONS FOR HOUSE MUSEUMS* 4 (2007).

⁷⁰ *Restoring Colonial Villages*, HOUSE BEAUTIFUL, Oct. 1911, at 147, 147 (noting the need for collective preservation, not just efforts for individual landmarks); *Area Preservation and the Beacon Hill Bill*, 46 OLD TIME NEW ENG. 106, 108 (1956) (noting the early roots of preservation districts and the drive to expand this within Massachusetts).

⁷¹ Elizabeth A. Lunday, *Who's In Control Here?*, PLANNING, June 2005, at 18, 19–20 (noting the role of local historic districts); Kristan E. Curry, *Historic Districts: A Look at the Mechanics in Kentucky and a Comparative Study of State Enabling Legislation*, 11 J. NAT. RES. & ENVTL. L. 229, 233–34 (1996) (discussing the creation of local historic districts under state enabling legislation).

⁷² SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 268–71 (2012); see also JULIA H. MILLER, *A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION* 9–10 (1997) (summarizing the major components of a local historic district).

⁷³ MILLER, *supra* note 72, at 9.

⁷⁴ Chuck McShane, *Neighbors Fear Lax Oversight Imperils Dilworth Historic District*, PLAN CHARLOTTE (June 6, 2014), <http://ui.uncc.edu/story/neighbors-fear-lax-oversight-imperils-dilworth-historic-district>.

⁷⁵ CONSTANCE E. BEAUMONT, NAT'L TRUST FOR HISTORIC PRES., *A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES* 1 (2002).

⁷⁶ Mass. Dep't of Conservation & Recreation, *supra* note 10, at 16 (noting that while this tool is most commonly applied in urban settings, it can be adopted for rural use).

local historic districts indicates this urban focus —New Orleans (Vieux Carre), Charleston (the Battery), Boston (Beacon Hill), and New York (Brooklyn Heights).⁷⁷ This is perhaps not surprising as one of the primary justifications of preservation ordinances has been reciprocity of benefit, or in short, insuring that no compensable taking occurs because an impacted property owner will receive a corresponding benefit from similar restrictions burdening adjacent owners in kind.⁷⁸

After the early campaigns to protect important urban contexts, a secondary driver of these efforts flowed from a negative backlash to urban renewal efforts of the 1950s and 1960s.⁷⁹ An offshoot of post-war urban planning, some proponents of urban renewal focused on “slum-clearing” or reducing the density of population in urban cores and replacing these areas with modern construction designed to accommodate the then current planning ideal.⁸⁰ Considerable numbers of historic resources were lost in urban renewal campaigns—including large swaths of Boston, New York, Providence, and many other large cities nationally.⁸¹ The late twentieth century preservation movement congealed around opposition to these large scale demolition projects and began to take advantage of local historic district ordinances to protect historic resources from private development while also rallying for more of a voice in governmental project planning.⁸²

⁷⁷ See MORRISON, *supra* note 68, at 7–8 (listing the first cities to adopt preservation ordinances).

⁷⁸ John Nivala, *The Future for Our Past: Preserving Landmark Protection*, 5 N.Y.U. ENVTL. L.J. 82, 82–83 (1996); see also ADVISORY COUNCIL ON HISTORIC PRES., AN OVERVIEW OF HISTORIC PRESERVATION LAW, 1966–1996 (1996) (charting the development of preservation law as a discipline).

⁷⁹ Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L.J. 676 (2007).

⁸⁰ Mehmed Ali, *To Save a City: From Urban Renewal to Historic Preservation in Lowell, Massachusetts 1920–1978*, at 133–34 (January 2006) (unpublished Ph.D. dissertation, University of Connecticut) (on file with the University of Connecticut). Urban renewal was not always a negative for historic preservation efforts as the U.S. Department of Housing and Urban Development funds were occasionally used in innovative ways to preserve historic context. See Paul J. McGinley, *Newburyport and a New Kind of Urban Renewal*, 61 OLD TIME NEW ENG. 111, 111–15 (1971) (discussing urban renewal efforts in this North Shore community).

⁸¹ Steven L. Kass, *Historic Preservation Litigation: A Case Study*, 1 PACE L. REV. 723 (1981) (profiling an urban renewal battle over a significant historic resource); see also THOMAS H. O’CONNOR, *BUILDING A NEW BOSTON: POLITICS AND URBAN RENEWAL 1950–1970*, at 123–39 (1991).

⁸² Diane Lea, *America’s Preservation Ethos: A Tribute to Enduring Ideals*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 1, 8–11 (Robert E. Stipe ed., 2003).

Within the rural context, the role of local historic districts has been limited for a variety of reasons.⁸³ For one, the reciprocity of benefit is perhaps not as pronounced as rural properties often do not have the same degree of direct visual relationship with neighboring properties, which increases or even isolates the burden on individual owners.⁸⁴ Additionally, within the rural countryside, the loss of historic resources has not been as dramatic as the slum-clearing examples that spawned the modern preservation movement.⁸⁵ Beyond first principles, the nature of the threats has also been different.⁸⁶ There has been less development pressure and more available space for new construction—which has somewhat reduced the need to demolish existing structures for more intensive use.⁸⁷ In many instances, the greater threat is neglect, rather than affirmative development pressure, which is less dramatic and more difficult to address through regulation.⁸⁸ Another potential factor leading to an underutilization of this tool within rural communities relates to a potential lack of preservation expertise.⁸⁹ The architectural-centric nature of local historic district design review typically requires certain skills or professional engagement in order to be successfully administered.⁹⁰ Even in urban areas it can be difficult to find enough qualified volunteers, and in rural areas, this can be an acute challenge.⁹¹

Within the preservation arena, local control or regulation in the form of local historic districts is the strongest and most effective preservation tool to protect the built environment—at least as far as historic areas or neighborhoods are concerned.⁹² To date, this tool and similar

⁸³ *Id.*

⁸⁴ David J. Kohtz, *Improving Tax Incentives for Historic Preservation*, 90 TEX. L. REV. 1041, 1054–55 (2012); see also Andrew Gold, *The Welfare Economics of Historic Preservation*, 8 CONN. L. REV. 348, 352 (1978).

⁸⁵ See generally, George Zabriskie, *Window to the Past*, in WITH HERITAGE SO RICH 57–63 (1966) (charting the loss of historic resources during this period).

⁸⁶ Keller & Keller, *supra* note 14, at 206–10.

⁸⁷ MURTAGH, *supra* note 7, at 135.

⁸⁸ Follett, *supra* note 48, at 16–17.

⁸⁹ Donovan Rypkema, Address at the Forum Luncheon, Making Preservation Relevant for the Next 50 Years, at 5 (Oct. 17, 2009), <http://www.placeeconomics.com/wp-content/uploads/2011/04/making-historic-preservation-relevant-for-the-next-50-years.pdf>.

⁹⁰ Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 URB. LAW. 405, 408–09 (1998).

⁹¹ JAMES K. REAP & MELVIN B. HILL, JR., LAW AND THE HISTORIC DISTRICT COMMISSION: WHAT EVERY MEMBER NEEDS TO KNOW (2007), http://www.historycolorado.org/sites/default/files/files/OAHP/crforms_edumat/pdfs/814.pdf; see, e.g., Memorandum from Janice Lew, Senior Planner, Salt Lake City Planning Div., to the Historic Landmark Comm'n 2 (Dec. 27, 2012).

⁹² Christopher J. Duerksen, *Local Preservation Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 29, 29 (Christopher J. Duerksen ed., 1983) (noting that “the real responsibility and legal power to protect landmarks rest[s] at home, at the local level.”); Lina

mechanisms, such as demolition delay bylaws, have not been broadly utilized to protect agricultural historic resources.⁹³ As a result, local efforts have focused on non-regulatory actions—such as general awareness building, educational efforts, and other forms of advocacy—and while local preservationists certainly have not been absent, their ability to protect historic sites has been somewhat incomplete.⁹⁴

B. State Preservation Law

State preservation efforts have also had a difficult time moving beyond urban limits. Generally, the role of state preservation programs is one of support—or more appropriately, serving as an intermediary between local and federal preservation efforts, which happens in a few important ways.⁹⁵ First, states have to provide enabling legislation for local historic districts to even exist—so the states fundamentally shape the character of local preservation efforts at a foundational level.⁹⁶ Second, state historic preservation officers (“SHPOs”) provide a meaningful degree of technical oversight over preservation work throughout their jurisdiction.⁹⁷ This oversight can be informational or can even be mandated in some instances—for example, with regard to compliance with the requirements of the federal and state historic rehabilitation tax credits.⁹⁸ Third, the states provide a substantial amount

Confresi & Rosetta Radtke, *Local Government Programs: Preservation Where It Counts*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 117, 117–18 (Robert E. Stipe ed., 2003).

⁹³ See, e.g., Eric Curl, *Pin Point to be First Unincorporated Historic District*, SAVANNAH MORNING NEWS, Feb. 10, 2009, <http://savannahnow.com/intown/2009-02-09/pin-point-be-first-unincorporated-historic-district> (discussing the creation of the first rural historic district in the Savannah area—protecting a rural community founded by freed slaves in the 1890s).

⁹⁴ MARK BRENNAN ET AL., *THE IMPORTANCE OF INCORPORATING LOCAL CULTURE INTO COMMUNITY DEVELOPMENT* 1–2 (Univ. of Fla. Inst. of Food & Agric. Scis. Ext., Paper No. FCS9232, 2005), <http://edis.ifas.ufl.edu/pdf/files/FY/FY77300.pdf>. This form of soft advocacy should not be discounted as educational efforts can encourage property owners to take individual action to preserve a historic resource once its value is appreciated. See *Telling the Stories: Historic Preservation and Education*, NAT’L PARK SERV., <http://www.nps.gov/nr/publications/bulletins/interp/int2.htm> (last visited Jan. 23, 2015).

⁹⁵ Elizabeth A. Lyon & David L. S. Brook, *The States: The Backbone of Preservation*, in *A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY* 81, 81–83 (Robert E. Stipe ed., 2003).

⁹⁶ George B. Abney, *Florida’s Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims*, 25 FLA. ST. U. L. REV. 1017, 1021–22 (1998).

⁹⁷ See, e.g., *Welcome to the State Historic Preservation Office*, ST. HISTORICAL SOC’Y IOWA, <http://www.iowahistory.org/historic-preservation/> (last visited Jan. 23, 2015) (detailing the SHPO’s role).

⁹⁸ David F. Schon & Megan K. Palmer, *Historic Tax Credits Bring Needed Equity Financing to Urban Revitalization*, PROB. & PROP., Sept./Oct. 2012, at 46 (discussing the state role within the tax credit process).

of financial support to preservation projects through grant programs or through state tax credits.⁹⁹ The state tax credits are a very effective tool for encouraging direct investment as they are often tailored to be combined with the federal rehabilitation tax credit and other financial incentives to maximize investment in important local projects.¹⁰⁰ Additionally, many state historic preservation programs serve an important function by administering state registers of historic places, serving as a liaison for the National Register of Historic Places, and working within the various administrative review paradigms.¹⁰¹ In short, the state's primary role is largely not regulatory but rather consists of providing its expertise and funding to project proponents.¹⁰²

Within the rural context, states have been effective advocates for certain resource types. Grant funding serves as an important tool utilized to accomplish rural preservation, particularly in barn restoration projects.¹⁰³ These grants recognize the significance of these buildings and the particular challenges they present their owners, as they have often have no real continuing business use and present a limited universe of adaptive use options.¹⁰⁴ In providing a funding stream, some state barn grant programs have been effective in supporting private rehabilitation efforts.¹⁰⁵ In many states, tax credits have also played a

⁹⁹ HARRY K. SCHWARTZ, NAT'L TRUST FOR HISTORIC PRES., STATE TAX CREDITS FOR HISTORIC PRESERVATION 1 (2014), <http://www.preservationnation.org/take-action/advocacy-center/additional-resources/historic-tax-credit-maps/Chart-July-2014.pdf>.

¹⁰⁰ BRONIN & BYRNE, *supra* note 72, at 615–16 (discussing the process of combining various tax credits—particularly low income housing tax credits—to accomplish multiple objectives).

¹⁰¹ NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 55–56 (2009).

¹⁰² *Id.* at 56; Lyon & Brook, *supra* note 95, at 83–85.

¹⁰³ See, e.g., *Heritage Barn Grants*, WASH. ST. DEP'T ARCHEOLOGY & HISTORIC PRESERVATION, <http://www.dahp.wa.gov/heritage-barn-grants> (last visited Jan. 23, 2015); see also *State-by-State Barn Survey: Agricultural Study Guide*, NAT'L BARN ALLIANCE, <http://barnalliance.org/resources/barn-survey/state-by-state-barn-survey-agricultural-study-guide/> (last visited Jan. 23, 2015) (providing a state by state survey of state barn programs—including the availability of grant funding). The impact of barn grants goes beyond brick and mortar work. It provides barn owners access to professional expertise to advise barn owners on the preservation issues they are facing with regard to the preservation of their property. See Wendy Carlson, *Saving the Barns Before they Vanish*, N.Y. TIMES, Mar. 6, 2009, http://www.nytimes.com/2009/03/08/nyregion/connecticut/08barnsct.html?pagewanted=2&_r=2& (exploring state barn grants and their role in preserving these fading resources).

¹⁰⁴ See, e.g., *Barn Grants*, VT. AGENCY COM. & COMMUNITY DEV., http://accd.vermont.gov/s trong_communities/preservation/grants/barn (last visited Jan. 23, 2015) (discussing the rationale for the state barn grant program).

¹⁰⁵ *20 Historic Vermont Barns, Buildings Get Preservation Grants*, PRAIRIE FARMER, <http://farmprogress.com/story-20-historic-vermont-barns-buildings-gain-preservation-grants-9-109451> (last visited Jan. 23, 2015) [hereinafter *20 Historic Vermont Barns*] (detailing the success of the Vermont barn grant program in “elevating the profile of agricultural-based preservation”);

role, particularly in those states designing targeted credits to promote the specific preservation of agricultural historic resources.¹⁰⁶ Other state actions also impact agricultural historic resources.¹⁰⁷ Some are listed within state registers of historic places (or are officially recognized for their historic significance) and could potentially become regulated under state environmental protection acts.¹⁰⁸ Under these state acts, a range of specified state actions or undertakings trigger review—which requires state actors to determine the extent of these impacts and whether there are appropriate ways to avoid or mitigate the harm.¹⁰⁹ Overall, this range of initiatives, while important, leaves considerable room for increased action to protect agricultural historic resources.

C. Federal Preservation Law

Federal preservation efforts also center largely on urban areas.¹¹⁰ While federal preservation law and policy exists within a range of contexts, this section will limit its focus to four areas: (1) the National Register of Historic Places, (2) federal procedural laws, (3) the historic rehabilitation tax credit, and (4) federally incentivized conservation easements.¹¹¹

1. National Register of Historic Places

The most well-known federal role in the preservation movement is its administration of the National Register of Historic Places, or the official listing of those historic resources (individually or by district) designated

see also *Tax Credits for Barn Preservation*, NAT'L BARN ALLIANCE, <http://barnalliance.org/tax-credits-for-barn-preservation/> (last visited Jan. 23, 2015).

¹⁰⁶ 20 *Historic Vermont Barns*, *supra* note 105; *Income Tax Credits for Barns*, ST. HISTORICAL SOC'Y IOWA, <http://www.iowahistory.org/historic-preservation/statewide-inventory-and-collections/barns/rehabilitation-tax-credits.html> (last visited Jan. 23, 2015).

¹⁰⁷ *What is a State Historic Preservation Officer (SHPO)?*, NAT'L CONF. ST. HISTORIC PRESERVATION OFFICERS, <http://www.ncshpo.org/whatisashpo.shtml> (last visited Jan. 23, 2015).

¹⁰⁸ See MASS. GEN. L. ch. 30, §§ 61–62I (2010). Under the Massachusetts Environmental Policy Act (“MEPA”), impacts to historic properties require consideration. *Mass. Historical Comm'n*, SECRETARY COMMONWEALTH MASS., <http://www.sec.state.ma.us/mhc/mhcidx.htm> (last visited Jan. 23, 2015) [hereinafter *Mass. Historical Comm'n*].

¹⁰⁹ See MASS. GEN. L. ch. 9, §§ 26–27C (2010); *Mass. Historical Comm'n*, *supra* note 108.

¹¹⁰ See, e.g., NAT'L PARK SERV., DEP'T OF THE INTERIOR, FEDERAL TAX INCENTIVES FOR REHABILITATING HISTORIC BUILDINGS: 35TH ANNIVERSARY 2 (2013); Mass. Dep't of Conservation & Recreation, *supra* note 10, at 13 (noting that only one farm to date has taken advantage of the federal income tax credits).

¹¹¹ Leonard A. Zax, *Protection of the Built Environment: A Washington D.C. Case Study in Historic Preservation*, 19 ENV'T'L AFF. 651, 651–52 (1991).

as having historic significance and integrity.¹¹² The National Register of Historic Places, established by the National Historic Preservation Act of 1966 and managed by the National Park Service, serves as a clearinghouse for evaluating historic properties.¹¹³ Importantly, the National Register provides standards for ascertaining a property's significance.¹¹⁴ A property has to qualify under at least one of the four following categories in order to be eligible: (a) relationship to an event that made a significant contribution to the broad patterns of history; (b) association with the lives of significant historical figures; (c) demonstration of the distinctive characteristics of a particular architectural style or movement; or (d) yielding or having the potential to yield information about the past.¹¹⁵ The resource must also have integrity, typically defined, "as the [property's] ability to convey its significance," which is based upon the property remaining sufficiently intact or unaltered.¹¹⁶

Despite the associated cachet, designation often has relatively little direct influence on whether a property will actually be preserved.¹¹⁷ Designation does not impose affirmative preservation obligations upon property owners, contrary to persistent and widespread popular belief.¹¹⁸ The real impact of designation is to force consideration of the effect of specified federal actions.¹¹⁹ Short of triggering this review, the National Register of Historic Places has little direct effect other than identifying the property's significance and potentially allowing the property owner to utilize tax benefits for restoring or perpetually protecting the designated resource.¹²⁰

The National Register of Historic Places remains one way agricultural historic resources are represented in federal preservation

¹¹² *National Register of Historic Places*, NAT'L PARK SERV., <http://www.nps.gov/history/nr/> (last visited Jan. 23, 2015).

¹¹³ National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470 et. seq. (2012).

¹¹⁴ BRONIN & BYRNE, *supra* note 72, at 58–61.

¹¹⁵ 16 U.S.C. § 470a(a)(1)(A) (2012); 30 C.F.R. § 60.4 (2014).

¹¹⁶ PAUL W. ANDRUS, NAT'L PARK SERV., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 44–45 (1990).

¹¹⁷ *National Register: Frequently Asked Questions*, ME. HISTORIC PRESERVATION COMMISSION, <http://www.maine.gov/mhpc/faq/> (last visited Jan. 23, 2015).

¹¹⁸ MASS. HISTORICAL COMM'N, THERE'S A DIFFERENCE! 2 (2014) (addressing the confusion between the protections afforded within the National Register and local historic districts).

¹¹⁹ Donald Dworsky et al., *Federal Law*, in A HANDBOOK ON HISTORIC PRESERVATION LAW 191, 207–09 (Christopher J. Duerksen ed., 1983).

¹²⁰ John W. Fowler, *The Federal Preservation Program*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 35, 41–45 (Robert E. Stipe ed., 2003).

policy as many properties have been designated.¹²¹ To take one example, “one of the very first listings was the home and shop of John Deere in Illinois.”¹²² Even with limited substantive effect, these listings have had an important impact in showcasing the significance of agricultural historic resources.¹²³ Rightly or wrongly, the task of completing a National Register nomination has become a relatively costly and complex undertaking, often taking several years, which has undoubtedly deterred some individual owners from pursuing this status.¹²⁴ Unfortunately, a local support mechanism, other than passionate owners, is often not present within rural communities to make designation a more common occurrence.¹²⁵

2. Federal Procedural Laws

Beyond the National Register, several regulations require consideration of the impact of federal projects on historic resources.¹²⁶ Three primary regulations can apply: (1) Section 106 of the National Historic Preservation Act; (2) the National Environmental Policy Act; and (3) Section (f) of the Department of Transportation Act.¹²⁷

¹²¹ See *National Register of Historic Places Program: Sample Nominations*, NAT'L PARK SERV., http://www.nps.gov/nr/sample_nominations.htm (last visited Jan. 23, 2015) (providing sample nominations of listed properties including a rural farmhouse and barn); see also HISTORIC FARMS AND RURAL RETREATS OF TOPSFIELD, MASSACHUSETTS, DRAFT NATIONAL REGISTER NOMINATION (1992), http://topsfeld-ma.gov/documents/historic/documents/Topsfield_MRA%20-%20Rural%20Development%20in%20Topsfield,%20ca%201670-1955.pdf (providing a sample rural resource nomination).

¹²² Follett, *supra* note 48, at 15, 17.

¹²³ *Id.*

¹²⁴ Carol Shull, *The Future of the National Register*, PRESERVATION F., Fall 1987, at 8, 11–13. Another factor that has potentially led to the underrepresentation of historic rural structures within the National Register of Historic Places has been the success of federal rehabilitation tax credits. To be eligible for these credits, a structure must be first listed on the National Register or contained within a National Register Historic District. Since the majority of this tax credit work has been centered on the redevelopment of urban structures, this incentive has fueled a rise in the nomination of urban structures without a corresponding rise in rural buildings. *Id.*

¹²⁵ The National Park Service has, however, tried to provide information to advocates to help survey and evaluate these resources. See generally LINDA MCCLELLAND ET AL., NAT'L PARK SERV., GUIDELINES FOR EVALUATING AND DOCUMENTING RURAL HISTORIC LANDSCAPES 1 (1999). Although states make efforts to list properties and to encourage nominations, typically though the preparation of a thematic multiple resource nomination, most nominations still come from individual property owners. See *Thematic Nominations*, KAN. HISTORICAL SOC'Y, <http://www.kshs.org/p/thematic-nominations/14634> (last visited Jan. 23, 2015) (listing thematic nominations in the state, including for agricultural-related resources).

¹²⁶ SHERRY HUTT ET AL., HERITAGE RESOURCES LAW: PROTECTING THE ARCHEOLOGICAL AND CULTURE ENVIRONMENT 31–32 (1999).

¹²⁷ MILLER, *supra* note 72, at 6–7.

a. Section 106 of the National Historic Preservation Act

Section 106 of the National Historic Preservation Act (“NHPA”) requires federal projects that qualify as “undertakings” to consider their impact on properties listed on, or eligible for listing on, the National Register.¹²⁸ This requirement does not impose an affirmative obligation on project proponents to actually avoid impact—it only requires consultation before funding, licensing or otherwise commencing a project that could potentially have an impact.¹²⁹ Section 106 “will not prevent a federal agency from funding a . . . project that entails demolishing a complex of historic buildings. It does, however, require the agency to identify historic resources and explore alternative measures . . . that may mitigate or avoid whatever harm the project would have on the buildings.”¹³⁰ Despite these meaningful limitations, Section 106 review provides preservationists a seat at the table in project planning and has led to many surprising successes.¹³¹ Thus, if a federal undertaking threatens an agricultural historic resource, preservationists can consult regarding the design of a project, and propose alternatives or mitigation, but they will not necessarily be able to stop an adverse result.

b. The National Environmental Policy Act

The impact of the National Environmental Policy Act (“NEPA”) goes beyond the natural environment to include “cultural resources, including properties listed on the National Register of Historic Places.”¹³² Under NEPA, federal agencies must assess if a project’s impacts constitute a “major federal action significantly affecting the quality of the human environment.”¹³³ If this threshold is triggered, the project proponent will need to provide a detailed statement regarding its conclusions.¹³⁴ The

¹²⁸ 16 U.S.C. § 470(f) (2012). The statute also requires federal agencies to take responsibility for historic properties it owns, which is not a small task given the large number of properties under federal control. See Melissa A. McGill, *Old Stuff is Good Stuff: Federal Agency Responsibilities under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L. REV. AM. U. 697 (1994).

¹²⁹ Dworsky et al., *supra* note 119, at 256–59; see also Barbara Miller, *Department of Transportation’s Section 4(f): Paving the Way Toward Preservation*, 36 AM. U. L. REV. 633 (1987).

¹³⁰ MILLER, *supra* note 72, at 5.

¹³¹ THOMAS F. KING, *FEDERAL PLANNING AND HISTORIC PLACES: THE SECTION 106 PROCESS* (2000).

¹³² 42 U.S.C. § 4321 et seq. (2006); MILLER, *supra* note 72, at 5.

¹³³ 42 U.S.C. § 4332 (2006).

¹³⁴ Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1508 (2012).

agency's obligations under NEPA are typically met by preparing either an environmental assessment or an environmental impact statement, depending on the extent of the project's impacts.¹³⁵ The net result of NEPA on agricultural historic resources is similar to that of the NHPA as it allows preservationists to review an agency's conclusions and it ideally informs the project's design.¹³⁶ NEPA can play a role, but only with regard to a relatively finite subset of threats involving "major federal actions" but even then, no affirmative protection for agricultural historic resources will be provided.

c. Section 4(f) of the Department of Transportation Act

The last federal compliance statute, Section 4(f) of the Department of Transportation Act goes somewhat further.¹³⁷ Section 4(f) is not just a procedural statute, but is intended to have a substantive impact.¹³⁸ Section 4(f) prohibits the funding or approval of federal transportation projects that result in the "use" of historic resources unless there is no feasible alternative to the project.¹³⁹ If the project still goes forward, it must involve all possible planning to minimize the harm to the resource.¹⁴⁰ The definition of "use" includes not only the physical taking of a historic resource but also projects that impact these sites.¹⁴¹ "For example, the effect of a proposed highway on the economic vitality of a nearby historic district that would isolate the district from nearby commercial activity would probably require assessment under Section 4(f)."¹⁴² Within the rural context, Section 4(f) is the most powerful of the federal compliance laws; but it only applies to federal transportation projects that threaten to "use" agricultural historic resources, which limits its application.¹⁴³

To briefly summarize, the federal compliance statutes provide rural preservationists with a variety of tools to intervene when federal

¹³⁵ Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law*, 20 J. LAND RESOURCES & ENVTL. L. 245, 245 (2000).

¹³⁶ Daniel R. Mandelker, *Thoughts on NEPA at 40*, 39 ENVTL. L. REP. 10640, 10641 (2009); see also KING, *supra* note 131.

¹³⁷ 49 U.S.C. § 303 (2006).

¹³⁸ D. J. Gerken, *Loopholes You Could Drive a Truck through: Systemic Circumvention of Section 4(f) Protection of Parklands and Historic Resources*, 32 URB. LAW. 121, 124–26 (1999).

¹³⁹ HUTT ET AL., *supra* note 126, at 108–10.

¹⁴⁰ *Id.*

¹⁴¹ See STOKES ET AL., *supra* note 20, at 304, 324–26.

¹⁴² MILLER, *supra* note 72, at 6.

¹⁴³ THOMAS F. KING, *CULTURAL RESOURCES LAWS & PRACTICE* 243–46 (4th ed. 2013).

projects threaten an agricultural historic resource.¹⁴⁴ These statutes implicate a wide number of potential threats but will generally not provide proactive protection for agricultural historic resources—particularly those resources where the greatest threat is continued neglect.

3. *The Historic Rehabilitation Tax Credit*

Beyond designation and compliance statutes, federal preservation law recognizes that redevelopment of historic properties can be a powerful catalyst for reinvigorating depressed or underutilized areas.¹⁴⁵ To this end, since the mid-1970s, federal tax policy has provided a strong incentive for the development of historic properties through the historic rehabilitation tax credit.¹⁴⁶ These credits were designed to diminish the incentives in favor of demolition of historic properties and to encourage adaptive reuse and urban reinvestment.¹⁴⁷ Under the federal tax credit, if a property is a certified historic structure, a developer will be allowed a tax credit for twenty percent of their qualified expenditures.¹⁴⁸ The amount of the credit is “based on the amount spent to rehabilitate the property and provides a dollar-for-dollar reduction of the amount of income tax due.”¹⁴⁹ Qualified expenditures include walls, windows, stairs, and a wide variety of other “components related to the operation or maintenance of the building.”¹⁵⁰ The rehabilitation of the historic property must also be “substantial” in its scope—exceeding the owner’s basis in the property or \$5,000.¹⁵¹

¹⁴⁴ While the scope of the three principal federal compliance statutes seems to be largely repetitive or duplicative, there are important distinctions in when each of the various statutes is triggered, which can have an impact. *See* *Merritt Parkway Conservancy v. Mineta*, 424 F. Supp. 2d 396 (D. Conn. 2006) (raising NEPA, NHPA and Section 4(f) claims with varying results).

¹⁴⁵ STEWART BRAND, *HOW BUILDINGS LEARN: WHAT HAPPENS AFTER THEY’RE BUILT* 96–97 (1994).

¹⁴⁶ I.R.C. § 47 (2006); 36 C.F.R. § 67 (2014); 26 C.F.R. § 1.48-12 (2014); *see also* NAT’L TRUST FOR HISTORIC PRES., *THE FEDERAL HISTORIC TAX CREDIT: TRANSFORMING COMMUNITIES* 20 (2014) (charting the impact of this powerful financial tool).

¹⁴⁷ Carolyn E. Chervine & Charlotte Hayes, Note, *Rehabilitation Tax Credit: Does it Still Provide Incentives?*, 10 VA. TAX REV. 167, 180–82 (1990); David Listokin & Siona Listokin-Smith, *Response: Improving the Incentives for Historic Preservation—A Reply to David Kohtz*, 90 TEX. L. REV. 285, 288 (2012) (noting that the “public finance and tax system . . . has traditionally been antithetical to preservation”).

¹⁴⁸ I.R.C. § 47(a)(2) (2012). Prior to the 1986 tax act, the incentives were actually even higher (twenty-five percent). Note, *The Impact of ERTA and TEFRA on Tax Credits for Historic Preservation*, LAW & CONTEMP. PROBS. 259, 262 (1985).

¹⁴⁹ Fowler, *supra* note 120, at 41–42.

¹⁵⁰ *Incentives: Some Eligible and Ineligible Project Expenses*, NAT’L PARK SERV., http://www.nps.gov/tps/tax-incentives/incentives/essentials_8.htm (last visited Jan. 23, 2015).

¹⁵¹ I.R.C. §§ 47(c)(1)(A), 47(c)(1)(C) (2006).

The National Park Service (“NPS”) and the Internal Revenue Service (“IRS”) jointly administer the historic rehabilitation tax credit program and rely on state historic preservation officers (“SHPOs”) to evaluate resources and proposed work.¹⁵² The actual application consists of three parts.¹⁵³ Part I addresses the property’s eligibility as a certified historic structure.¹⁵⁴ If the property is listed on the National Register, it automatically qualifies.¹⁵⁵ If not already designated, the property owner must prepare and submit a nomination to enable a determination as to whether the property qualifies for designation either individually or as a contributing structure to a registered historic district.¹⁵⁶ If determined eligible, the project proponent will proceed to Part 2 of the application process, which involves review of the rehabilitation work proposed on site.¹⁵⁷ The project proponent is then required to provide sufficient documentation, photographs, architectural plans and additional information to allow the SHPO to review the work.¹⁵⁸ To constitute a qualified rehabilitation, the work must comply with the Secretary of the Interior’s Standards for Rehabilitation, which requires the scope of the work proposed to be consistent with the resource’s historic character.¹⁵⁹ Last, Part 3 is submitted after completion of the work to document and confirm the rehabilitation.¹⁶⁰

Where available and economically feasible, the historic rehabilitation tax credit serves as one of the most effective preservation tools and provides a strong financial incentive in promoting the rehabilitation of historic properties, particularly the adaptive reuse of former industrial buildings.¹⁶¹ This tool had a transformational impact on many urban

¹⁵² *Technical Preservation Services*, NAT’L PARK SERV., <http://www.nps.gov/tps/tax-incentives.htm> (last visited Jan. 23, 2015); see, e.g., *Federal Investment Tax Credits*, MINN. HISTORICAL SOC’Y, <http://www.mnhs.org/shpo/grants/tax.php> (last visited Jan. 23, 2015).

¹⁵³ BRONIN & BYRNE, *supra* note 72, at 599–600.

¹⁵⁴ *Incentives: Basic Eligibility Requirements*, NAT’L PARK SERV., http://www.nps.gov/tps/tax-incentives/incentives/essentials_5.htm (last visited Jan. 23, 2015).

¹⁵⁵ I.R.C. § 47(c)(3)(a) (2012).

¹⁵⁶ *Id.* If a property does not meet this standard, but was built before 1936, it can receive a lesser ten percent credit. I.R.C. §§ 47(a)(1), 47(c)(1)(B) (2012).

¹⁵⁷ MILLER, *supra* note 72, at 29.

¹⁵⁸ *Technical Pres. Servs., Application Process*, NAT’L PARK SERV., <http://www.nps.gov/tps/tax-incentives/application-process.htm> (last visited Jan. 23, 2015); *Technical Pres. Servs., Documentation Requirements*, NAT’L PARK SERV., <http://www.nps.gov/tps/tax-incentives/app-process/documentation.htm> (last visited Jan. 23, 2015).

¹⁵⁹ 36 C.F.R. § 67.7. (2014).

¹⁶⁰ BRONIN & BYRNE, *supra* note 72, at 600.

¹⁶¹ Steven J. Day, *An Overview of the Opportunities (and Pitfalls) of the Federal Preservation Tax Credits Program*, L. TRENDS & NEWS: REAL EST., May 2005, available at https://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/preservationtaxcred.html.

areas by directing investment into historic resources and urban centers that otherwise may not have attracted the attention of developers.¹⁶² In attracting this level of investment, the rehabilitation tax credit has preserved literally thousands of historic resources.¹⁶³

The historic rehabilitation tax credit often, however, remains unavailable or unrealistic for properties within the rural context. For one, the tax credit can only be utilized on income producing properties and does not encompass owner-occupied historic residences, which limits the possible universe of projects.¹⁶⁴ Typically, the rehabilitation tax credit has created large rental or commercial space.¹⁶⁵ Demand for this type of space and use is less common as development in rural areas is not typically driven by density concerns.¹⁶⁶ This leads to the perception that they cannot adapt to other economic uses, as they no longer serve their original productive function.¹⁶⁷ Second, utilizing the federal historic rehabilitation tax credit requires considerable expertise, which increases the transaction costs and makes the credit difficult to utilize for smaller-scale projects.¹⁶⁸ The nature of the tax code itself makes it difficult to utilize for smaller projects, as the developer may not have taxable income to offset, especially in the early years of a project.¹⁶⁹ The fact that the non-transferrable credit must be utilized by project investors or syndicated to a third party with sufficient tax

¹⁶² *Tax Incentives for Rehabilitation*, ST. HISTORICAL SOC'Y IOWA, <http://www.iowahistory.org/historic-preservation/tax-incentives-for-rehabilitation/> (last visited Jan. 23, 2015) (profiling the state impact of the historic tax credits from 2001 through 2014, \$177 million in federal tax credits contributed to 283 buildings, which involved \$890 million in total rehabilitation expenses). Importantly, the federal tax credits are often coupled with state credits or low income housing credits to provide additional project funding. See Lauren K. Shores, Comment, *Defending the Historic Preservation Tax Credit*, 77 MO. L. REV. 199 (2012) (exploring the impact of the Missouri state tax credit).

¹⁶³ NAT'L PARK SERV., FEDERAL PRESERVATION PROGRAM NOTES: FEDERAL HISTORIC PRESERVATION TAX INCENTIVE PROGRAM (2006), http://www.achp.gov/docs/BRAC/Federal_Historic_Preservation_Tax_Incentives_Program-June_06.pdf (noting that over 32,000 buildings as of 2006 had been rehabilitated under the federal credit).

¹⁶⁴ I.R.C. § 47(c)(1)(A)(iii)(III) (2012).

¹⁶⁵ See, e.g., *503 5th St. Tax Credits*, HISTORIC MACON, <http://www.historicmacon.org/503-fifth-st-tax-credits/> (last visited Jan. 23, 2015).

¹⁶⁶ James Hite, *The Thunen Model as a Paradigm for Rural Development*, 19 REV. AGRIC. ECON. 230 (1997).

¹⁶⁷ Joseph S. Harrington, *Spotlight: Farm & Ranch*, INS. J. (Feb. 5, 2006), <http://www.insurancejournal.com/magazines/features/2006/02/05/151442.htm>.

¹⁶⁸ NAT'L TRUST FOR HISTORIC PRES., LEGISLATIVE SUMMARY: PROPOSED CHANGES TO THE FEDERAL REHABILITATION TAX CREDIT (2009), http://www.preservationnation.org/information-center/economics-of-revitalization/rehabilitation-tax-credits/additional-resources/nthp_federal_tax_credit.pdf (explaining the difficulties small businesses and individuals face in using the credits).

¹⁶⁹ BRONIN & BYRNE, *supra* note 72, at 615.

exposure further adds to this complication.¹⁷⁰ In many instances, developers have successfully structured or syndicated the credits “with other individuals and entities seeking to reduce their tax burden. Although owners cannot transfer tax credits, investors can participate in the project and earn tax credits under complex rules” regarding passive investment.¹⁷¹ Structuring a smaller project to utilize the credits may not always be feasible.¹⁷² Thus, while the tax credit is a powerful tool, its application to agricultural historic resources, has been somewhat limited.¹⁷³

4. Donations of Federally-Incentivized Conservation Easements

Last, another important incentive supporting preservation efforts at the federal level is the charitable deduction for qualified conservation easement donations.¹⁷⁴ In the last few decades, conservation and preservation advocates have grown to rely on federally-incentivized conservation easements as one of the most effective ways to accomplish their objectives.¹⁷⁵ Conservation easements allow governmental or non-profit entities to expand their protective efforts to an increasing array of privately-owned resources—allowing these organizations to accomplish their objectives without having to own or maintain the parcels in fee.¹⁷⁶ To briefly summarize, the conveyance of a conservation easement involves the transfer of a limited property interest from a conservation-minded owner to a qualified easement holder.¹⁷⁷ “Using the traditional ‘bundle of sticks’ metaphor for property, we can describe the landowner

¹⁷⁰ See Shores, *supra* note 162, at 207–09 (exploring the impact of the Missouri state tax credit).

¹⁷¹ BRONIN & BYRNE, *supra* note 72, at 615. Passive investment rules have become an issue in recent years and the Internal Revenue Service recently issued new guidance on requirements in this area. Rev. Proc 2014-12 (Jan. 13, 2014), <http://www.irs.gov/pub/irs-drop/rp-14-12.pdf>. This follows extended litigation regarding the structure of a substantial historic tax credit project in New Jersey. Historic Boardwalk Hall, L.L.C. v. Comm’r, 694 F.3d 425, 428–29 (3d Cir. 2012).

¹⁷² Mass. Dep’t of Conservation & Recreation, *supra* note 10, at 2 (noting the small number of agricultural structures utilizing this investment tool).

¹⁷³ *Id.*

¹⁷⁴ I.R.C. § 170(h) (2006).

¹⁷⁵ RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 37–40 (2003) (documenting the rapid post-1981 growth of land trusts, which gained ascendancy during this period); see also ELIZABETH BYERS & KARIN M. PONTE, THE CONSERVATION EASEMENT HANDBOOK 1 (2005) (explaining that by 2003, “land trusts had used easements to protect an astounding amount of land—5 million acres”).

¹⁷⁶ Justin R. Ward & Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. ENVTL. L.J. 271, 271 (1989).

¹⁷⁷ Jessica Owley, *The Future of the Past: Historic Preservation Easements*, 35 ZONING & PLAN. L. REP. 1, 1–2 (2012) (providing a working definition for this legal mechanism).

as losing one of the sticks in her bundle. A[n] . . . easement is in essence taking a stick out of the bundle and giving it to someone else,” typically a non-profit or governmental holder.¹⁷⁸ Through this device, the property owner will forego the right to modify their property in certain ways to ensure the property’s long-term preservation.¹⁷⁹ After an easement is placed on a historic property or landscape, any proposed changes or alterations to the buildings or land will need approval by the easement-holder to verify compliance with the terms of the easement.¹⁸⁰ In taking on this obligation, the easement-holder commits to monitoring the protected property and enforcing the terms of the restriction if its requirements are violated.¹⁸¹

At the federal level, Section 170 of the Internal Revenue Code governs all charitable giving, including donations of qualified conservation easements.¹⁸² To qualify as a charitable donation, it must involve a qualified real property interest and a qualified easement-holding organization and be made exclusively for conservation purposes.¹⁸³ As to the first prong, a conservation easement qualifies only if the donation is perpetual in term.¹⁸⁴ The second prong allows easement donations to be made to non-profit organizations committed to protecting the conservation values being advanced by the donation.¹⁸⁵ Last, the donation must be exclusively for conservation purposes.¹⁸⁶ Protection of a historically important land area or a certified historic structure is a permissible conservation value under the Internal Revenue

¹⁷⁸ Jessica O. Lippman, *Exacted Conservation Easements: The Hard Case of Endangered Species Protection*, 19 J. ENVTL. L. & LITIG. 293, 298 (2004).

¹⁷⁹ Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002).

¹⁸⁰ NAT’L TRUST FOR HISTORIC PRES., BEST PRACTICES FOR PRESERVATION ORGANIZATIONS INVOLVED IN EASEMENT AND LAND STEWARDSHIP 39–40 (2009) (noting the importance of easement monitoring to the successful administration of an easement program).

¹⁸¹ Shea B. Airey, *Conservation Easements in Private Practice*, 44 REAL PROP. TR. & EST. L.J. 745, 765–66 (2010).

¹⁸² I.R.C. § 170 (2006); *see also* Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements*, 45 REAL PROP. TR. & EST. L.J. 473 (2011).

¹⁸³ Treas. Reg. § 1.170A–14(a) (as amended in 2009).

¹⁸⁴ *Id.*

¹⁸⁵ Timothy C. Lindstrom, *A Guide to the Tax Aspects of Conservation Easement Contributions*, 7 WYO. L. REV. 441, 450 (2007).

¹⁸⁶ Treas. Reg. § 1.170A–14(d)(1) (as amended in 2009).

Code.¹⁸⁷ If all three requirements are met, the donor of a perpetual conservation easement will potentially qualify for the tax deduction.¹⁸⁸

The Internal Revenue Service allows donors to claim as a charitable donation any loss in value associated with a qualifying easement donation.¹⁸⁹ For example, if a historic property is valued at \$1,000,000 prior to a qualifying easement donation and the appraiser determines the property is only worth \$900,000 after, the donor has made a \$100,000 non-cash charitable donation. Depending on the value of the property and the owner's income, the federal tax incentive can be a powerful tool for encouraging easement donations.¹⁹⁰ This tool has not, however, been without its share of controversy.¹⁹¹ Criticism of preservation easements has been particularly acute.¹⁹² The main target of this scrutiny has been a subset of preservation easements designed to protect only exterior facades in local historic districts, which were already protected and therefore unlikely to be altered ("facade easements").¹⁹³ In the view of the IRS and other commentators, many facade easements were of questionable value, particularly in light of the often large tax deductions being claimed.¹⁹⁴ In response to this criticism, in 2006, Congress enacted reforms to restrict the form of conservation easements entitled to receive the benefit of the charitable donation.¹⁹⁵ Additionally, the IRS has focused on this category of easement donations in increasing its audit activity to curb abuse.¹⁹⁶

¹⁸⁷ I.R.C. §§ 170(h)(1)(c), 170(h)(4)(A)(iv), 170(h)(4)(B) (2012).

¹⁸⁸ NAT'L PARK SERV., EASEMENTS TO PROTECT HISTORIC PROPERTIES: A USEFUL HISTORIC PRESERVATION TOOL WITH POTENTIAL TAX BENEFITS 5–6 (2010), <http://www.nps.gov/tps/tax-incentives/taxdocs/easements-historic-properties.pdf>.

¹⁸⁹ Owley, *supra* note 177, at 1 (explaining that "[s]ince 1964, the federal tax code has allowed deductions for historic preservation easements").

¹⁹⁰ Nancy A. McLaughlin, *Conservation Easements—A Troubled Adolescence*, 26 J. LAND RESOURCES & ENVTL L. REV. 47, 51–53 (2005).

¹⁹¹ Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL L. REV. 119, 119–21 (2010) (discussing these controversies).

¹⁹² RICHARD J. RODDEWIG, APPRAISING CONSERVATION AND HISTORIC PRESERVATION EASEMENTS xv–xviii (2011).

¹⁹³ *An End to Easements?*, CONN. TRUST FOR HISTORIC PRESERVATION, <http://ctrust.org/ctrust/page/an-end-to-easements1> (last visited Jan. 23, 2015) (calling this form of easements 'double-dipping' and evaluating the issues).

¹⁹⁴ Press Release, Internal Revenue Serv., IRS Announces the 2005 Dirty Dozen (Feb. 28, 2005), available at <http://www.irs.gov/uac/IRS-Announces-the-2005-Dirty-Dozen>.

¹⁹⁵ Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 783 (codified in scattered sections of 26 and 29 U.S.C.).

¹⁹⁶ Roger Colinvaux, *The Conservation Easement Tax Expenditure, In Search of Conservation Value*, 37 COLUM. J. ENVTL. L. 1, 5–7 (2012); see also BRONIN & BYRNE, *supra* note 72, at 569–70.

Despite the controversy, the tax incentives associated with easement donations have been successful in advancing projects to protect open space and the land trust movement has become one of the most powerful strains of the modern environmental movement.¹⁹⁷ Similar efforts have successfully preserved agricultural working lands.¹⁹⁸ The traditional conservation easement structure has not, however, always addressed agricultural historic resources.¹⁹⁹ There are several reasons for this. In many agreements protecting larger parcels, the structures might simply be divided off and carved out of the agreement's protective scope to limit the agreement's financial impact.²⁰⁰ Additionally, land trusts have not traditionally focused on the built environment and are not always comfortable protecting these resources.²⁰¹ Monitoring buildings presents a completely different set of issues and requires different expertise than monitoring conservation or agricultural working lands.²⁰² Conservation organizations have deep experience in monitoring lands to ensure that the ecological or other protected values remain intact and, not surprisingly, their staff and volunteers typically come from the conservation and biological fields.²⁰³ Preserving historic resources requires specialized expertise from preservation professionals

¹⁹⁷ BREWER, *supra* note 175, at 1–5 (charting the rapid growth of the land trust movement).

¹⁹⁸ For example, in Maryland, the state's agricultural easement program has been very effective. Recent pushback, however, has resulted in doubts regarding the continuation of this state's agricultural land program because the program left open the question of whether owners could withdraw from the program to potentially develop the farmland in question upon a demonstration that they cannot profitably continue to farm the land. See Timothy B. Wheeler, *Farmland Preservation Effort Faces Defections*, BALT. SUN, Nov. 10, 2012, http://articles.baltimoresun.com/2012-11-10/features/bs-gr-farmland-preservation-20121110_1_mullinix-development-rights-farmland-preservation.

¹⁹⁹ Nicholas, *supra* note 15, at 7 (explaining the National Trust for Historic Preservation's Northeast Office's unsuccessful campaign to save a 1740s farmhouse on Massachusetts's South Coast, where the family had preserved the land (over eight hundred acres) with the Audubon Society, but neglected to protect the built structures, which were demolished upon a change of ownership). But see MASS. LAND CONSERVATION TRUST, REQUESTS FOR PROPOSALS: SALE OF OSCAR PALMER FARM, http://www.thetrustees.org/assets/documents/what-we-care-about/Request-For-Proposals_12-1-10.pdf (last visited Jan. 23, 2015) (discussing a land trust's efforts to promote preservation of conservation land, agricultural working land, and historic preservation objectives on a single historic site located in Westport, Massachusetts).

²⁰⁰ Nicholas, *supra* note 15, at 9 (explaining that "conservation transactions omit consideration of buildings and miss the opportunity to protect them also.").

²⁰¹ *Id.* This is not always true, however, as many land trusts are becoming increasingly aware of the value of protecting whole places. See, e.g., Elisabeth Ptak, *Time and Place: Historic Preservation and Land Conservation*, SAVING LAND, Winter 2015, at 24, 24–27 (discussing recent efforts in this vein).

²⁰² ELIZABETH WATSON & STEFAN NAGEL, ESTABLISHING AN EASEMENT PROGRAM TO PROTECT HISTORIC, SCENIC, AND NATURAL RESOURCES 1, 4 (1981).

²⁰³ BYERS & PONTE, *supra* note 175, at 144–46.

familiar with the challenges of adapting historic resources for contemporary living or use.²⁰⁴

Additionally, a motivated property owner may not protect the property's built resources because it may not materially increase the value of their charitable donation.²⁰⁵ For example, take a hypothetical one hundred acre farm with a historic farmhouse and outbuildings. The farm is composed of a building complex on five acres with the remaining ninety-five acres consisting of farm fields. In the process of making the donation, the farmer has the property appraised. The farmland is appraised at \$10,000 an acre or \$950,000. The house and buildings are assessed at \$250,000 for a total value of \$1,200,000. The appraiser, utilizing before and after valuation methodology, values the farmland at \$2,000 an acre (or an eighty percent loss), and the farmstead at \$225,000 (or a ten percent loss) after the donation. A substantial charitable donation of \$760,000 could potentially be claimed on the acreage restrictions. Restricting the buildings would only add an additional \$25,000 deduction. When weighed against the day to day concerns of living with the restrictions and the perceived complications of selling encumbered structures,²⁰⁶ this additional deduction might not provide enough of a financial inducement to extend the scope of the easement.²⁰⁷

In sum, while agricultural historic resources have benefited from local, state, and federal preservation programming—it has generally been through incentives designed to promote targeted outcomes, and less from more regulatory forms.²⁰⁸ More often than not, rural

²⁰⁴ Nicholas, *supra* note 15, at 9 (Even if a land trust looks to partner with a preservation organization willing to hold the restriction, “the truth is that if and when land trusts do look around . . . they oftentimes are at a loss.”).

²⁰⁵ RODDEWIG, *supra* note 192, at xv-xviii.

²⁰⁶ There may also be a qualitative difference between these restrictions in the eyes of the donor community. Land restrictions are often seen as not actually changing the current owner's use of the property, but restrictions on modifying a historic property might have a more direct impact on the current owner's use of the property. See Josh Eagle, *Notational Generosity: Explaining Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENVTL L. REV. 47, 47, 79, 89–90 (2011) (discussing this willingness to restrict open space).

²⁰⁷ This assumes that the donor is primarily motivated by the financial incentives, which is not always the case. These donations are often wholly voluntary without financial support. See, e.g., *Historic New England Protects Historic Chadwick House*, HISTORIC NEW ENG., <http://www.historicnewengland.org/about-us/press-media/news-releases/expired-releases/historic-new-englandprotects-samuel-chadwick-house-in-cambridge> (last visited Jan. 23, 2015).

²⁰⁸ A few hidden factors have also assisted efforts to preserve rural structures—including a lack of economic pressure. An example of this is the community of Ipswich, Massachusetts. Ipswich has the largest concentration of First Period (houses constructed before 1720) that have survived into the modern era. This high instance of survival is largely because Ipswich was an early and prosperous settlement, which later fell on hard economic times, essentially allowing the

preservation has relied on individual efforts to preserve family structures with which they often have a long association.²⁰⁹ This is not entirely different than the urban setting as individuals, regardless of setting, are responsible for most preservation activity, but it certainly demonstrates that substantial improvements can be made in designing a more effective structure of policies to provide protection to this important subcategory of historic resources.²¹⁰

IV. THE NEED FOR INCREASED INTEGRATION OF HISTORIC PRESERVATION CONSIDERATIONS WITHIN U.S. AGRICULTURAL AND PRESERVATION POLICY

At the current time, agricultural historic resources remain comparatively unreached by the current mix of preservation laws and policies.²¹¹ Given the unique nature of agricultural historic resources and the particular threats they face, new approaches or ideas need to be advanced to provide these resources the level of protection they clearly merit.²¹² There are different possible pathways for improving rural preservation efforts at the local, state and federal levels, as all have their potential part to play.²¹³ This Article, however, will focus on the federal level given the adaptability of existing incentive structures to promote additional positive impacts in the rural countryside. Utilizing the existing federal preservation and agricultural policy framework to address rural preservation concerns could allow the preservation

earlier housing stock to survive. IPSWICH HISTORICAL COMM'N, SOMETHING TO PRESERVE 3–11 (1975) (describing this post-colonial period as “economic quietude”); *see also* ABBOTT L. CUMMINGS, THE FRAMED HOUSES OF MASSACHUSETTS BAY COLONY 1625–1725, at 2 (1979) (explaining that while “[s]ettled by some of the most influential men in the colony, Ipswich had nevertheless been foreordained to a role of diminishing importance. With an unsatisfactory harbor and largely bypassed by industry . . . the town tended to stagnate.”).

²⁰⁹ Pantry Brook Farm, in Sudbury, Massachusetts illustrates this phenomenon. Pantry Brook Farm, consisting of one hundred acres and a c.1820 farmstead, remained preserved as a result of the voluntary efforts of its owner. In 2012, a variety of non-profit and governmental entities were able to raise sufficient funds to purchase the development rights and preserve the land through a conservation easement. It is planned that the buildings will be protected by a preservation easement. *Preserving Pantry Brook Farm*, SUDBURY FOUND. (Apr. 30, 2012 4:33 PM), <http://www.sudburyfoundation.org/2213/preserving-pantry-brook-farm>.

²¹⁰ Hillary Rodham Clinton, *Foreword* to HERITAGE PRES., CARING FOR YOUR HISTORIC HOUSE (1998) (discussing the challenges of maintaining a historic house generally).

²¹¹ TYLER ET AL., *supra* note 101, at 208 (discussing the relative late shift to rural and vernacular resources within the preservation movement); *see also* STOKES ET AL., *supra* note 20, at 48 (noting that “[h]istoric preservation in rural areas . . . has often lagged behind such work in cities.”).

²¹² James Lindberg, *Rural Development Trends and Opportunities for Historic Preservation*, FORUM J., Summer 2006, at 6, 7–8.

²¹³ STOKES ET AL., *supra* note 20, at 1–5.

community to more meaningfully address agricultural historic resources. This section explores ways to improve the existing federal incentive programs to accomplish this goal. To this end, this section will examine: (1) using or tailoring the existing conservation easement incentives to address both working lands and historic resources; (2) modifying the historic rehabilitation tax credits to cover more of the costs of the qualified rehabilitations for agricultural historic resources; and (3) incorporating consideration for rural historic resources into existing cross-compliance schemes.²¹⁴

A. Conservation Easements

At the current time, as discussed in Section III.C.4., significant federal tax incentives already exist to encourage property owners to grant perpetual conservation easements protecting properties with significant conservation value.²¹⁵ While preservation easements protect a significant number of historic properties nationally, most have been within urban communities.²¹⁶ There are potential solutions to address this disconnect. Modifications to existing practice as well as improving the incentives for conservation easements could provide for more utilization in rural areas. To improve the effectiveness of this tool, this section will review three possible options for progress on this front: (1) encouraging voluntary partnerships between land trust and preservation non-profit organizations; (2) modifying the structure of the charitable deduction to promote protection of whole places; and (3) incorporating consideration for agricultural historic resources within the existing set of federal-level easement acquisition programs.

1. Encouraging Voluntary Partnerships between Conservation and Preservation Organizations

The first and perhaps simplest solution is to encourage or promote partnerships between preservation and land trust communities.²¹⁷ It is

²¹⁴ There are many other indirect ways to promote rural preservation, for example, agritourism. For an overview of agritourism efforts, see Elizabeth Dooley, *Watch Where You're Steppin' Out Here: Why States Should Promote the Diversified Agricultural Farming Practice of Agritourism*, 15 *DRAKE J. AGRIC. L.* 456 (2010).

²¹⁵ *Conservation Donation Rules*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/rules/conservation-donation-rules> (last visited Jan. 23, 2015) (profiling these tax incentives).

²¹⁶ RODDEWIG, *supra* note 192, at 5–6 (noting that there may be as many 15,000 easement encumbered historic properties nationally, the majority of which are in urban communities).

²¹⁷ See, e.g., Trs. of Reservations, *Conservation in Boxborough—Steele Farm CR and Historic Preservation Restriction Protects a Beloved Landscape*, ON LAND BLOG (Aug. 5, 2013),

unlikely that many land trusts, given their expertise and mission will realistically alter course to protect agricultural historic resources, at least without some incentive or inducement to do so.²¹⁸ Their constituency is for the protection of land and conservation values, not necessarily historic structures.²¹⁹ Land trusts may even advocate for the removal of some historic structures if they are perceived as competing or conflicting with important underlying natural values or are perceived as too difficult to maintain.²²⁰ Despite the facial potential for conflict, there may be a real opportunity to partner with land trusts if approached early on in the planning process as there are many reasons why a land trust would be interested in this form of partnership.²²¹ One reason is to extend the constituency in favor of a project.²²² Connecting with a wider audience and having greater public awareness for a project can be a powerful inducement.²²³ If the preservation group is also able to commit capital to the project, this changes the land trust's financial calculus and funding model.²²⁴ There may not even be an objection as the scope of the project can be clearly demarcated between the twin objectives depending on the receptivity of the landowner and the project's transactional structure.²²⁵ Increasing the level of collaboration between land trusts and preservation-easement holding organizations is perhaps the most straightforward way to protect additional agricultural historic structures.²²⁶

<http://walkontheland.blogspot.com/2013/08/conservation-in-boxborough-and-buzzards.html> (discussing a partnership between land trust and local historical society to protect a significant historic farm).

²¹⁸ Roe, *supra* note 8, at 238–39; *but see* Ptak, *supra* note 201 (exploring a number of recent land trust projects designed to protect both natural and historic resources).

²¹⁹ Roe, *supra* note 8, at 238–39.

²²⁰ See, e.g., NAT'L PARK SERV. & AM. RIVERS, AMERICAN RIVERS, DAM REMOVAL AND HISTORIC PRESERVATION: RECONCILING DUAL OBJECTIVES 2 (2008) (noting the tensions between the removal of historic dams and environmental objectives); *see also* *Protecting Human Stories in Natural Environments*, NAT'L TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/information-center/saving-a-place/public-lands/resources/protecting-human-stories-in-1.html#.U7XRQpgdrao> (last visited Jan. 23, 2015) (discussing this tension).

²²¹ Roe, *supra* note 8, at 239 (citing the example of the Maryland Historical Trust and the Maryland Environmental Trust in coordinating joint donations).

²²² Roberta Lane, *Make No Little Plans: Community Planning for Whole Places*, FORUM J., Fall 2010, at 42.

²²³ *Preservation and Land Conservation: Saving America's Natural and Cultural Legacy*, NAT'L TRUST FOR HISTORIC PRESERVATION, http://www.preservationnation.org/information-center/saving-a-place/land-conservation/#.VGkbnFff_VQ (last visited Jan. 23, 2015).

²²⁴ Talmage, *supra* note 14, at 13.

²²⁵ Roe, *supra* note 8, at 239.

²²⁶ STOKES ET AL., *supra* note 20, at 227.

It will require a commitment of time to reach out and build the relationships necessary to make this possible.²²⁷ It will also potentially require preservation groups to go outside of their current comfort zone and raise capital.²²⁸ To be truly effective, preservation-easement holding organizations may be required to think strategically about the most important historic farm complexes in their area and approach land trusts after having identified their priorities to see how their priorities align.²²⁹ At the federal level, agencies involved in preservation and agricultural policy could further these partnerships by promoting successes through case studies and by facilitating or giving priority to projects with multiple components or values—in short, by focusing on, promoting, and prioritizing those projects designed to protect whole places, both built and natural environments.

2. Improving the Incentives to Promote Expanded Protections

Another possible solution is to alter the incentives at play. In a typical conservation easement donation, agricultural historic structures, particularly more modest structures such as barns and other outbuildings, may fall outside of the scope of coverage.²³⁰ Two forms of policy adjustments could allow this tool to reach additional agricultural historic resources: (1) by simplifying the donation process to reduce transaction costs; and (2) by enhancing the charitable deduction to provide additional incentives.

a. Reducing Transaction Costs

By necessity, federally-incentivized easement donations are often complicated transactions requiring a professional appraisal and diligent legal counsel to ensure accuracy and compliance with all applicable

²²⁷ Talmage, *supra* note 14, at 13.

²²⁸ *Id.*

²²⁹ Determining the protective scope of an agreement will likely require close discussion. For example, protection of historic rural interiors can be a thorny issue. Land trusts, and even many preservation groups, are leery of taking on this degree of a commitment to a given property—given the monitoring and liability issues this additional protection entails. The interiors of such structures, however, are vitally important to understanding how these structures were utilized in agricultural use and are certainly worthy of such protection should the opportunity to negotiate this arise. *See, e.g.,* Will Cook, *The Future of the Past: A New Frontier Called Interior Easements*, PRESERVATION PROGRESS, Spring 2005, at 8, 8 (discussing interior preservation easements and noting that “[m]any preservationists believe that protecting the interior of a historic structure is just as important as preserving the exterior” and detailing the reasons why).

²³⁰ JULIA H. MILLER ET AL., ESTABLISHING AND OPERATING AN EASEMENT PROGRAM TO PROTECT HISTORIC RESOURCES 1, 20 (2007); *see, e.g.,* Nicholas, *supra* note 15.

requirements.²³¹ Appraising the value of preservation easements is particularly complex.²³² Also, the recent level of IRS scrutiny has discouraged some donations of this type of property interest.²³³ It is certainly not a costless procedure to complete an easement donation, which provides a further disincentive to property owners as the transaction costs could quickly outweigh the benefits to the donor from the available tax deduction.²³⁴

Simplifying or streamlining the easement transaction process would promote greater utilization. There are a variety of ways to accomplish this objective. For example, allowing as an option a fixed deduction for any easement protecting an agricultural historic resource would reduce transaction costs and audit risk.²³⁵ If a donor could claim a five percent deduction for a qualifying donation, perhaps some of the audit risk would be mitigated and transaction costs would be reduced, at least on the all important issue of valuation.²³⁶

Another option would be to lower the eligibility requirements. Under the current tax code, the property must be a “certified historic structure,” either listed on the National Register of Historic Places or found to be a contributing structure to a registered historic district to qualify for the federal deduction.²³⁷ This requires a landowner to prepare a National Register nomination before they can qualify, which can often take several years to complete and can potentially block a project from

²³¹ *Preservation Easements*, NAT'L TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/easements/#.U7XSh5gdrao> (last visited Jan. 23, 2015).

²³² Deborah R. Huso, *This Old Write-Off*, VALUATION MAG., Fall 2012, at 18, 19–21 (exploring the complex issues associated with properly appraising preservation easement donations).

²³³ See, e.g., Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL L.J. 121 (2011).

²³⁴ COLO. CATTLEMAN'S AGRIC. LAND TRUST, PROCESS FOR EASEMENT DONATIONS, <http://www.ccalt.org/Portals/0/Images/forms/2012ProcessforEasementDonations.pdf> (last visited Jan. 23, 2015). Beyond the transaction costs, in many donations, the easement-holder requests or requires a financial contribution to endow the ongoing monitoring expenses associated with protecting the parcel of land, which adds further cost. See Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL L. REV. 421 (2005).

²³⁵ Talmage, *supra* note 14, at 13–14.

²³⁶ Roger Colinvaux, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 3 UTAH L. REV. 755, 764–766 (2013). An appraisal would still be required under a flat deduction, but it would be substantially simpler—a before value of the property would likely suffice.

²³⁷ I.R.C. § 170(h) (2006).

the outset.²³⁸ Lowering the eligibility requirements would allow for expedited protection of a greater number of agricultural historic resources. A plausible alternative standard would be to allow properties deemed eligible for the National Register by the applicable SHPO to qualify. This would not lower the significance threshold for properties seeking the deduction, but it would address the existing shortfall in designating rural properties and significantly expedite the easement donation process overall for many properties.²³⁹ Eligibility for the National Register is a standard SHPOs are well familiar with as it is a determination of eligibility, not formal designation, that triggers consultation under Section 106.²⁴⁰ Since transaction costs are a barrier to some rural easement donations, reducing these costs could materially assist rural preservationists in accomplishing their protective goals.

b. Increasing the Financial Incentives

Enhancing the potential charitable deduction allowed for donations relating to the preservation of agricultural historic resources would also induce more property owners to preserve these resources. As discussed, under current charitable giving rules, a donor is able to claim a non-cash charitable deduction for the value lost through the easement donation.²⁴¹ The applicable landowner will then have a specified period of time in which to utilize this deduction—originally up to thirty percent of the donor's annual income for up to six years.²⁴² In 2006, an enhanced incentive was enacted to further encourage farmers and ranchers interested in protecting working lands.²⁴³ The enhanced charitable deduction was specifically targeted at farmers and ranchers—recognizing that these landowners might not have sufficient annual income to allow them to fully take advantage of their charitable deductions over such a relatively short window of time.²⁴⁴ Many farmers

²³⁸ *National Register Questions & Answers*, St. R.I. HISTORIC PRESERVATION & HERITAGE COMMISSION, <http://www.preservation.ri.gov/register/q-and-a.php> (last visited Jan. 23, 2015) (explaining that the time to complete a National Register designation can be “lengthy”).

²³⁹ Talmage, *supra* note 14, at 13. The downside to this streamlined approach, however, would be the potential loss of the information normally developed in preparing National Register nominations. See Follett, *supra* note 48, at 16–17.

²⁴⁰ MILLER, *supra* note 72, at 7.

²⁴¹ BYERS & PONTE, *supra* note 175, at 82.

²⁴² *Id.*

²⁴³ Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 783 (codified in scattered sections of 26 and 29 U.S.C.).

²⁴⁴ *How the Easement Incentive Works*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/how-the-easement-incentive-works> (last visited Jan. 23, 2015) (explaining that before the enhanced incentive, a hypothetical donor of an easement valued at

and ranchers have substantial net worth based upon the value of their land, but may not generate a sufficient annual income to fully benefit from a conservation easement donation under the current tax code.²⁴⁵ To address this situation, qualified farmers and ranchers²⁴⁶ were given the ability to deduct up to one hundred percent of their adjusted base income annually for donations that permanently restrict the use of the encumbered property to agricultural purposes.²⁴⁷ This restriction is focused on use and must apply to the entire parcel in order to qualify for the one hundred percent limitation allowed under I.R.C. § 170.²⁴⁸ The nature of this “enhanced” conservation easement incentive has been somewhat in flux; it recently expired on December 31, 2014, but land trusts are working to have it reinstated and made permanent.²⁴⁹

A similar enhanced incentive could be designed for donations permanently restricting agricultural historic resources. For example, a heightened incentive could be offered allowing similar incentives for restrictions placed upon rural historic structures not restricted to agricultural use. The heightened incentives could be even more tailored and allow for the protection of agricultural resources, broadly defined as either eligible or listed on the National Register of Historic Places. Adjusting the form of this significant incentive would provide more of a financial imperative in favor of agricultural historic resources than currently exists and allow more farmers to protect these important heritage assets.

3. Integration into the Existing Agricultural Conservation Easement Program

Last, incorporating consideration of historic agricultural resources into the already well-established federal easement programs could play an important role in agricultural resource preservation. Not all easements acquired by non-profits and governmental entities are a result

\$1,000,000 with an income of \$50,000 would only be allowed an annual deduction of \$90,000, and now could theoretically claim up to \$800,000).

²⁴⁵ *Frequently Asked Questions About the Enhanced Easement Incentive*, LAND TRUST ALLIANCE, <http://www.landtrustalliance.org/policy/tax-matters/campaigns/incentive-faqs> (last visited Jan. 23, 2015).

²⁴⁶ I.R.C. § 170(b)(1)(E)(v) (2012) (defining a qualified farmer or rancher as one whose gross income from farming exceeds fifty percent of gross income for the taxable year).

²⁴⁷ Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 783 (codified in scattered sections of 26 and 29 U.S.C.).

²⁴⁸ *How the Easement Incentive Works*, *supra* note 244.

²⁴⁹ LAND TRUST ALLIANCE, FACTSHEET: TAX INCENTIVE FOR CONSERVATION EASEMENT (2014) (on file with author) (promoting adoption of the Rural Heritage Conservation Act, which would make this enhanced incentive permanent).

of the tax incentive; a considerable number are acquired through direct purchase.²⁵⁰ At the federal level, programs have been developed to advance the preservation of working lands.²⁵¹ For example, the Agricultural Conservation Easement Program (“ACEP”) currently provides matching funds to enable entities to protect significant targeted properties to keep important working lands in farm or ranch use through the acquisition of Agricultural Land Easements (“ALE”).²⁵² Within this area, this easement program has become an important source of project support to qualified land trusts and governmental actors.²⁵³ Under ACEP-ALE, a qualified conservation organization can receive up to fifty percent of the purchase price for acquisitions of working lands, in either fee or through easement protection, and up to seventy-five percent for grasslands of significant environmental importance.²⁵⁴

This program could, however, be altered to allow for increased funding or to even provide priority for those projects that preserve agricultural historic resources. Such a shift would complement, or at least not conflict, with the ACEP-ALE’s current purpose of keeping these lands in production, and would provide an increased public benefit as the historic buildings are an important visual element of the lands being protected.²⁵⁵ While ACEP-ALE is being rolled out, its predecessor

²⁵⁰ *All About Easements*, NATURE CONSERVANCY, <http://www.nature.org/about-us/private-lands-conservation/conservation-easements/all-about-conservation-easements.xml> (last visited Jan. 23, 2015). Other easements are acquired through governmental exaction, or as a condition of a project approval. See Jessica O. Lippman, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 279 (2011).

²⁵¹ Before the 2014 Farm Bill, two distinct programs promoted these goals: (1) the Farm and Ranch Protection Program; and (2) the Grasslands Reserve Program. See Mary Shinn, *Farm Bill Merges Two Land Programs*, CORTEZ J. (Mar. 3, 2014 5:50 PM), <http://www.cortezjournal.com/article/20140303/News05/140309998/Farm-bill-merges-2-land-programs>. The Wetlands Reserve Program was also combined within the new Agricultural Conservation Easement Program. See *Wetlands Reserve Program*, U.S. DEP’T AGRICULTURE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/wetlands/> (last visited Jan. 23, 2015) (explaining this reorganization under the 2014 Farm Bill).

²⁵² *Agricultural Conservation Easement Program*, U.S. DEP’T AGRICULTURE, <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/easements/acep/?cid=stelprdb1242695> (last visited Jan. 23, 2015). Until recently, the Farm and Ranch Lands Protection Program was responsible for encouraging this form of resource protection. *Farm and Ranch Lands Protection Program*, U.S. DEP’T AGRICULTURE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/farmranch/> (last visited Jan. 23, 2015).

²⁵³ *Agricultural Conservation Easement Program*, *supra* note 252.

²⁵⁴ Agricultural Act of 2014, Pub. L. No. 113-79, § 2301, 128 Stat. 649 (2014); see also David C. Levy & Rachel P. Melliar-Smith, *The Race for the Future: Farmland Preservation Tools*, 18 NAT. RESOURCES & ENVTL. L. 15 (2003).

²⁵⁵ Notably, the current fact sheet for the program already notes that historic preservation is a value that agricultural conservation easements can promote. See U.S. DEP’T AGRIC., AGRICULTURAL CONSERVATION EASEMENT PROGRAM FACT SHEET (2014), <http://www.nrcs.usd>

the Farm and Ranch Lands Preservation Program, did allow for consideration of historic resources within its funding mix, but it is unclear how effective this program was in promoting the preservation of this resource form.²⁵⁶ To promote greater utilization under the new ACEP-ALE, an increased incentive could be structured in a similar manner to the existing seventy-five percent of funding that the program will potentially contribute to acquisitions involving sensitive environmental grasslands. This increased incentive could be a substantial inducement for inclusion of the built environment in designing the structure of a given rural conservation project.

Overall, the greater utilization of conservation easements to protect agricultural historic resources could potentially be achieved through voluntary partnerships, adjustments in the existing structure of the federal tax deduction, or by integrating these resources into the federal programs that fund conservation easement purchases. Each pathway would be a relatively straightforward way to reach additional rural historic resources vulnerable to insensitive alteration or outright demolition.

B. Historic Rehabilitation Tax Credits

Modifying the requirements associated with the federal rehabilitation tax credits to make the credits more easily utilized by rural communities is another possible option for preserving additional agricultural historic resources.²⁵⁷ As discussed in Section III.C.3., these historic tax credits have most often been utilized for large-scale commercial projects.²⁵⁸ This is a function of the market and the nature of where this degree of large-scale investment makes the most financial sense.²⁵⁹ Applying this tool to agricultural historic resources often presents real challenges as agricultural communities lack the population density that is normally required to make these projects economically viable. Additionally, the fabric of some threatened historic farm resources, with the exception of some barn forms, may not have the scale or size which would

a.gov/wps/PA_NRCSCconsumption/download?cid=stelprdb1247880&ext=pdf.

²⁵⁶ 7 C.F.R. § 1491.6 (2014).

²⁵⁷ NAT'L PARK SERV., INTRODUCTION TO FEDERAL TAX CREDITS FOR REHABILITATING HISTORIC BUILDINGS: BARNS (2008) [hereinafter NPS INTRODUCTION TO FEDERAL TAX CREDITS].

²⁵⁸ See, e.g., Robert Verrier, *Human Energy (and Historic Tax Credits) Help "Re-Boot" Historic New England Mill*, PRESERVATIONNATION BLOG (Mar. 1, 2013), http://blog.preservationnation.org/2013/03/01/human-energy-and-historic-tax-credits-help-re-boott-historic-new-england-mill/#.U7fs_5gdrao.

²⁵⁹ MURTAGH, *supra* note 7, at 117–20.

potentially allow for a successful adaptive reuse project.²⁶⁰ In order to allow owners of agricultural historic resources to take advantage of historic rehabilitation tax credits, the eligibility requirements could be altered to facilitate smaller scale projects. Based on state experimentation in crafting state historic tax credits, three changes have particular potential at the federal level: (1) reducing transaction costs; (2) broadening the resources eligible to benefit from the tax credit; and (3) increasing the incentive for qualifying agricultural historic resources.

1. Reducing Transaction Costs

As with federally-incentivized conservation easements, transaction costs also impede the expanded rural use of the historic rehabilitation tax credit.²⁶¹ Reducing these costs is critical if rural preservationists are to gain access to the financing power of this preservation tool. One straightforward way to do this would be to alter the National Register requirement. As noted, the National Register nomination process can take considerable time and effort to complete, and presents a meaningful barrier to entry.²⁶² Allowing a SHPO's determination of eligibility to qualify a resource for the credit would not lower the eligibility threshold, but would expedite the completion of Part I of the tax credit application. If desired, this threshold could even be decoupled from the National Register framework by the adoption of a brightline rule, for example, Iowa's state historic tax credit allows work on barns built before 1937 to qualify for state tax credits.²⁶³ Adopting a fixed standard would theoretically streamline the predevelopment review process and avoid costly delays, but admittedly may present other challenges and unanticipated consequences.²⁶⁴

Another way transaction costs could be substantially reduced is by allowing transferrable or refundable credits. Under the federal tax code, credits are restricted to the project proponent.²⁶⁵ To benefit from the credit, the project proponent will either need to have sufficient taxable income to benefit from the credits directly or to syndicate the credits to

²⁶⁰ BRONIN & BYRNE, *supra* note 72, at 614–15 (discussing the scale of historic rehabilitation projects).

²⁶¹ Day, *supra* note 161, at 4.

²⁶² See *supra* p. 75.

²⁶³ IOWA CODE § 404A(1)(d) (2000).

²⁶⁴ If this standard is adopted, it does present a risk as the barn may have been altered inappropriately in the past—rendering the investment from the tax credit potentially less valuable.

²⁶⁵ Shores, *supra* note 162, at 201 (noting this limitation and the passive investment rules on the utilization of the credit).

involve outside investors with sufficient tax liability.²⁶⁶ For smaller scale projects, this often leads to an impasse as outside investment complicates the process more than the value of the rehabilitation credits would merit.²⁶⁷ Some states have recognized this fact and have developed credits that can be transferred directly to third party investors without syndication.²⁶⁸ Under these state credits, a project developer who lacks sufficient taxable income can sell the credits directly to a third party on the secondary market and use the proceeds for their project financing.²⁶⁹ The value of these credits varies from state to state, but they generally retain a high degree of value, normally more than eighty-five cents to the dollar, which has directly benefited the financing model of eligible projects.²⁷⁰

Although less common, a few states have adopted refundable tax credits.²⁷¹ When a tax credit is refundable, any amount not used to offset the current year's tax liability is actually paid out to the developer.²⁷² For example, if a project developer had qualified rehabilitation expenses of \$100,000, was entitled to a credit of \$20,000, but only had a tax burden of \$17,500, the developer would then be entitled to a \$2,500 payment. Iowa, Louisiana, Maryland, and Ohio currently utilize refundable tax credits.²⁷³ A refundable tax credit would eliminate the secondary market and allow project investors to directly benefit without additional transaction costs. Overall, "there needs to be a workable mechanism to put the credit in the hands of the party that can use it" in order to make this an effective funding stream to support preservation investment in rural communities.²⁷⁴ Looking to state innovations in this area could help provide incentives to motivated property owners and allow them to recoup some of their investment in rehabilitating these resources.

²⁶⁶ HOUS. ASSISTANCE COUNCIL, UTILIZING THE LOW INCOME HOUSING TAX CREDIT: A GUIDE FOR NONPROFIT DEVELOPERS 22 (1997); Bowers, *supra* note 90, at 421.

²⁶⁷ STEPHEN L. KASS, REHABILITATING OLDER AND HISTORIC BUILDINGS 12-13 (1985).

²⁶⁸ SCHWARTZ, *supra* note 99, at 3, 5-10 (listing the states—31 as of 2010—that offer a state tax credit and the incentive structures).

²⁶⁹ Shores, *supra* note 162, at 201.

²⁷⁰ *Id.* at 211 (noting that Missouri's credit typically has sold for around ninety-two cents per dollar and noting other states allowing for this form of credit).

²⁷¹ SCHWARTZ, *supra* note 99, at 3.

²⁷² *Id.* at 3.

²⁷³ *Id.* at 5-11.

²⁷⁴ *Id.* at 3.

2. Broadening the List of Eligible Resources

Beyond lowering transaction costs, more substantive alterations could assist in opening up this incentive to additional types of agricultural historic structures. Two significant forms of resources are currently not eligible: (1) non-income producing properties; and (2) other farm structures.

a. Non-Income Producing Properties

Under the existing historic rehabilitation tax credit, in order to qualify for favorable tax treatment, the resource must be income-producing.²⁷⁵ While a large number of agricultural historic resources would qualify, a large number are not eligible based upon this requirement, including owner-occupied farm houses. The rationale for this limitation is to prevent property owners from making repairs to their own homes and qualifying for a tax credit for these expenses.²⁷⁶ The merits of this limitation have been the subject of debates both inside and outside the preservation community.²⁷⁷ On its face, it might make sense to limit financial exposure as expansion to individual homeowners could lead to a considerable loss of tax revenue and political pushback depending on the level of utilization and cost.²⁷⁸ However, the significance of a historic resource does not hinge upon whether or not it is being used as a private residence. The owners of these historic properties, often at great financial expense, provide societal value in maintaining and caring for these resources. In recognition of this fact, some states have implemented tax credits to allow homeowners to recoup some of their expenses in maintaining designated types of historic resources including rural or income disadvantaged areas.²⁷⁹ Expanding the federal tax credit to incentivize investment in non-income producing structures, in particular rural farm houses, would be a valuable way to further promote their long-term preservation.

²⁷⁵ I.R.C. § 47(c)(2)(A)(1) (2006).

²⁷⁶ Kathryn W. Howe, *Private Sector Involvement in Historic Preservation*, in A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 279, 292–93 (Robert E. Stipe ed., 2003).

²⁷⁷ *Id.*

²⁷⁸ BRONIN & BYRNE, *supra* note 72, at 614.

²⁷⁹ SCHWARTZ, *supra* note 99, at 5–11 (providing a chart of all state tax credits and the resources eligible for the tax credits).

b. Other Farm Structures

Under the current tax code, some agricultural historic resources are not eligible for the tax credit. For example, structures such as “grain silos and corn cribs do not qualify for the tax credits, because they are not considered ‘buildings’ by the IRS.”²⁸⁰ Despite the IRS definition, many agricultural historic resources are custom-built for a specific purpose and are important to understanding the property’s history as an economic entity.²⁸¹ Expanding the eligibility for the tax credits to this resource type would allow additional examples to potentially be rehabilitated.

3. Increasing the Credit for Qualified Rehabilitations of Agricultural Historic Resources

A last option for improving rural preservation outcomes would be to simply increase the credit for qualified agricultural historic resources. Under the current rehabilitation tax credit, a property owner is allowed a twenty percent credit for qualified historic rehabilitation costs.²⁸² Increasing this percentage for agricultural-related historic resources would incentivize the owners of these resources to take on more uncertain rehabilitations. It would also take into consideration the lower financial value of the agricultural historic resources, which would further incentivize property owners to invest in substantial rehabilitation of threatened resources.²⁸³ This step is not unprecedented as New York’s state tax credit currently allows the owners of qualified agricultural historic resources to deduct a higher percentage of their qualified rehabilitation expenses than other types of historic resources.²⁸⁴ Moving away from a one size fits all tax credit structure would potentially provide enough of an incentive to allow property owners to justify making critically important and often deferred investments in their

²⁸⁰ NPS INTRODUCTION TO FEDERAL TAX CREDITS, *supra* note 257, at 6; INTERNAL REVENUE SERV., PUBLICATION 225: FARMER’S TAX GUIDE 56 (2013) (discussing the treatment of function-based resources not as buildings, but section 1245 property).

²⁸¹ CONKIN, *supra* note 22, at 31–35.

²⁸² I.R.C. § 47(a)–(b) (2006).

²⁸³ In 2009, the National Trust for Historic Preservation proposed changes to the Federal Rehabilitation Tax Credit for smaller projects—raising the credit from twenty percent to thirty percent for projects below \$5,000,000 in recognition of the fact that the federal credit is difficult “for individuals and small businesses to use.” See NAT’L TRUST FOR HISTORIC PRES., LEGISLATIVE SUMMARY: PROPOSED CHANGES TO THE FEDERAL REHABILITATION TAX CREDIT (2009), http://www.preservationnation.org/information-center/economics-of-revitalization/rehabilitation-tax-credits/additional-resources/nthp_federal_tax_credit.pdf.

²⁸⁴ N.Y. TAX LAW § 606(a)(12) (2012) (allowing barn owners a credit of up to twenty-five percent of their qualified rehabilitation costs).

threatened historic structures. Whether this would be feasible within the current policy framework and environment, however, is a different question.

C. Integration into Agricultural Policy

Another possible direction for encouraging the preservation of rural structures is to consider greater incorporation of rural historic structures within the multifunctional framework provided by the farm bill, particularly under the Conservation Title.²⁸⁵ Multifunctionality refers to policies that promote multiple policy interests in the agricultural policy arena, such as supporting commodity prices as well as environmentally-sensitive practices.²⁸⁶ The idea of multifunctionality has, in one form or another, long played a role in thinking regarding agricultural policy. Conservation has been the primary example of this. For several decades, a farmer's ability to receive farm payments and other USDA benefits, and even more recently, federally subsidized crop insurance, has hinged upon compliance with baseline conservation practices.²⁸⁷ There are varying levels at which historic preservation considerations could be made a greater part of this mix, including voluntary incentive programs such as the Conservation Stewardship Program, and the more traditional conservation compliance scheme. The most likely avenue for expansion into the agricultural policy framework, however, given funding and resource constraints is within the voluntary context.

Farmers and farm organizations not surprisingly prefer (and have traditionally lobbied for) voluntary compliance, rather than mandatory programs.²⁸⁸ The Conservation Stewardship Program represents the current iteration of this voluntary form.²⁸⁹ Under the Conservation

²⁸⁵ MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 1–4 (2012) (discussing the current U.S. scheme of cross compliance).

²⁸⁶ Jesse Ratcliff, *A Small Step Forward: Environmental Provisions in the 2002 Farm Bill*, 30 *ECOLOGY L.Q.* 637 (2002).

²⁸⁷ ECON. RESEARCH SERV., U.S. DEP'T AGRIC., *THE FUTURE OF ENVIRONMENTAL COMPLIANCE INCENTIVES IN U.S. AGRICULTURE* 1, 1–3 (2012) (discussing the history and future prospects for this form of policy requirement).

²⁸⁸ STUBBS, *supra* note 285, at 1, 14.

²⁸⁹ 16 U.S.C. § 3838e (2012). Although the Conservation Stewardship Program (“CSP”) was chosen as the model program for inclusion within voluntary farm programming, other USDA conservation programs could also be so expanded. For example, the Environmental Quality Incentives Program (“EQIP”), a program where USDA provides funds to carry out components of projects advancing targeted conservation objectives, would also be a possible candidate for this treatment. CSP was chosen for focused attention as it applies on a per acre basis for compliance, rather than concentrating on a specific projects, which is an interesting model that is more divergent from the role played by the tax credit. In some ways, however, EQIP may be the more realistic model for improving the delivery of support for agricultural preservation efforts. *See*

Stewardship Program, farmers are entitled to receive additional payments for carrying out projects with targeted environmental benefits “including [projects that promote] soil quality, water quality, water quantity, air quality, and habitat quality, as well as energy efficiency.”²⁹⁰ To qualify for the Conservation Stewardship Program, a farmer’s land must have two “resources of priority concern,” which are designed to maximize the environmental benefits flowing from these payments to properties with the potential to provide measurable benefits.²⁹¹ If an applicant is successful, the landowner will sign a five-year agreement to provide the desired environmental benefits, and can receive up to \$200,000 over the term of the contract.²⁹² The landowner must exceed at least one of the designated stewardship goals over the payment term in order to retain the benefits, which adds an affirmative mechanism to ensure compliance and the intended societal benefit.²⁹³

The Conservation Stewardship Program and similar voluntary programs could potentially be expanded to include consideration of the built environment. Stewardship of historic agricultural resources should be worthy of consideration and financial support. Potentially historic agricultural structures could be added to the list of “resources of primary concern” and be considered for funding under this program. Including qualified agricultural historic structures in such a fashion could allow properties eligible or listed on the National Register of Historic Places to be more readily considered in the funding mix and thus would remove artificial barriers between the built and natural environment.

V. CONCLUSION

Agricultural historic resources represent critically important components of the very concept of the rural countryside in our collective memory as well as contemporary thinking regarding the

Environmental Quality Incentives Program, NAT. RESOURCE CONSERVATION SERVICE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/> (last visited Jan. 23, 2015).

²⁹⁰ *Conservation Stewardship Program*, NAT. RESOURCE CONSERVATION SERVICE, <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/csp/> (last visited Jan. 23, 2015).

²⁹¹ 7 C.F.R. § 1470.22 (2014).

²⁹² *Conservation Stewardship Program*, *supra* note 290.

²⁹³ 7 C.F.R. §§ 1470.3, 1470.24(a)(1)(i) (2014).

future of our rural amenities.²⁹⁴ These resources merit protection as they promote multiple societal objectives—from preserving historic fabric, fostering rural development, and generally promoting a collective sense of place.²⁹⁵ While there is wide recognition of this significance, it is harder to transform this into direct action owing to features of the traditional historic preservation paradigm that are not necessarily scalable or tailored to resources on this level.²⁹⁶ The fact that the current mix of agricultural and preservation laws and policies struggle to provide needed support and protection to agricultural historic resources does not mean that these efforts lack importance or even the potential to succeed.

While there are certainly challenges associated with protecting agricultural historic resources, there are a few primary ways existing preservation and agricultural laws and policies could play a larger role. A few options include: adjusting incentive programs to allow for the increased use of easements to protect agricultural historic resources, expanding historic rehabilitation tax credits to address more modest structures, and utilizing the agricultural policy framework to incorporate more meaningful consideration of heritage assets. If such an effort is made, greater numbers of agricultural historic resources could be preserved, and not just as isolated historic relics, but as vital contributors to the economic and cultural vibrancy of the rural countryside and their surrounding communities.

²⁹⁴ Paige M. Gentry, Note, *Applying the Private Benefit Doctrine to Farmland Conservation Easements*, 62 DUKE L.J. 1388 (2013); Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707 (2012).

²⁹⁵ Judy Anderson & Jerry Cosgrove, *Agricultural Easements: Allowing a Working Landscape to Work*, EXCHANGE, Fall 1998, at 9.

²⁹⁶ Mary Means, *What if “the Next” Happens Without Us?*, FORUM J., Winter 2011, at 3, 7 (explaining that “[t]here are many huge issues impacting large-scale landscapes and rural areas.”).