To: **House Judiciary Committee**

From: **Jeanie McIntyre, Upper Valley Land Trust**

Date: **February 28, 2014**

Regarding S.119: This memo provides clarification for several points raised in Darby Bradley's February 11, 2014 response to my memorandum of February 5, 2014.

1. Federal Tax Requirements

DB: "There is no consensus about the statement appearing near the beginning of UVLT's memo: *"Judicial proceedings are required for amendments that extinguish/terminate all or part of the easement."* (emphasis added) and,

"….The Regulations are silent on the subject of amendments that maintain or enhance the conservation purposes of the easement" and,

"Commentators even disagree on whether judicial review is a requirement or simply a 'safe harbor'."

UVLT: Our statement refers to and relies on three tax court decisions in 2013.

- **Carpenter v. Commissioner, T.C. Memo 2013-172, July 25, 2013**
  "To make our position clear, extinguishment by judicial proceedings is mandatory… We reject petitioners' argument that section 1.170A-14(g)(6), Income Tax Regs., contemplates any alternative to judicial extinguishment."
- **Belk v. Commissioner, 140 T.C. No. 1, January 28, 2013**
  "*Section 170(h)(2)(C) requires that the interest in real property donated by taxpayers be subject to a use restriction in perpetuity…"*
  " There is nothing to suggest that section 170(h)(2)(C) should be read to mean that the restriction granted on the use which may be made of the real property does not need to be in perpetuity if the conservation purpose is protected."
- **Mitchell v. Commissioner, T.C. Memo. 2013-204, August 29, 2013**
  *"Petitioner also argues that 'the regulation in paragraph (g)(6) merely creates a safe harbor,' and that 'the entire regulation could and should be read as a safe harbor.' We rejected a similar argument in Carpenter v. Commissioner, T.C. Memo. 2013-172, at *21, in which we found that the specific provisions of section 1.170A-14(g), Income Tax Regs., such as paragraph (g)(6), are mandatory and may not be ignored."*

2. Retroactivity

DB: "S.119 is not retroactive in the sense that amendments already completed under existing law will continue in effect."

UVLT: S.119 is retroactive in the sense that the new legislation will apply to gifts made prior to the adoption of the law. Until now, donors and their advisors and attorneys have commonly understood conservation easements to be a permanent restriction on a specific parcel of land. They could not have anticipated that additional specific language or documentation would be required to clarify donor expectations and assure they would be honored by land trusts.

3. New Rights

DB: "S.119 does not give land trusts any new right or authority to amend conservation easements beyond what is required by the easement itself or the authority existing under current law."

UVLT: The effect of S.119 is to reduce the land trust's obligation to uphold the donor's purpose to protect a specific parcel of land. The Attorney General has indicated that the law will replace common law. In several important ways, common law pertaining to the modification of gifts conveyed to charities for restricted purposes is more stringent than the standards proposed in S.119. I have previously detailed the differences between common law and S.119 (see Attachment B to my testimony of January 29, 2014).

4. Adding New Limitations to Existing Easements

DB: "Land trusts and owners of conserved land are free to negotiate at any time new provisions that place additional limitations on amendments, which then will be recognized in the S.119 process."

UVLT: We agree that land trusts should be able, if they wish, to upgrade existing easements to embed the limitations that presently exist in common law and would otherwise be erased. However, under the new law, these amendments could only occur with the agreement of the landowner. In many cases, the current landowner is not the party who made the donation, and the landowner may be unwilling to allow the land trust to take steps to protect the expectations that the donor had when the gift was granted. We have proposed that S.119 should provide a window of time within which land trusts could make the necessary changes unilaterally, if they choose.

Alternatively, S.119 could be revised to be applicable only to easement deeds executed after the law takes effect.

5. Restitution

DB: "If a donor feels aggrieved that a land trust has acquired an easement through misrepresentation or has breached its contract by amending an easement, the donor may seek restitution under Section 6334 of the legislation."

UVLT: Section 6334 allows persons who "personally or directly contributed to the holder's acquisition of the easement" to seek restitution based upon misrepresentation or breach of contract, but restitution is limited only to the amount contributed or granted, and does not include interest, damages, attorney's fees, or other costs. It does not allow a child to seek damages for the conversion of a parent's estate, nor consider that the value of the extinguished easement deed may be far greater than at the time it was entrusted to the holder. This would not be as worrisome if S.119 were not also weakening the standard required to justify a conversion and applying the new standard to conservation easements that have already been completed.