Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements

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TAX INCENTIVES FOR LAND CONSERVATION: THE CHARITABLE CONTRIBUTION DEDUCTION FOR GIFTS OF CONSERVATION EASEMENTS

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I. INTRODUCTION

There is an increasing public interest in the conservation of open space and the preservation of historical structures. Until recently, the approach taken by the government to effectuate conservation and preservation has been to purchase outright the particular parcel of land or historic building in question.[1] Given the expense of such an approach, however, it is impractical to continue this practice effectively, as there are clear limits on how much property a government can afford to buy and maintain.[2] The more reasonable and effective approach is for the government to take a less-than-full interest in the land, with the private owner retaining most of the rights incident to land ownership.[3]

Although there are a few types of less-than-full interests in land, the easement appears to have emerged as the most practicial conservation tool. This is due to the relatively few common law restrictions on the transferability and enforceability of easements, as well as a growing recognition by the states of the validity of easements

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1. The government may also effectuate conservation and preservation goals through regulation. This method, however, is beyond the scope of this article.

2. *See infra* text at notes 31-32.

3. Some of the rights incident to land ownership are rights to airspace above the property, rights to minerals and water in the earth below the surface, and the right to use water such as lakes and streams which are on or touch the property. A possessory interest in real property can be conveyed by deed, or devised by will and upon intestacy will descend from ancestor to heir. *See generally,* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 155-57 (2d ed. 1971).

created for conservation purposes.[4] The conservation easement advances at least two important fuctions: (1) the government is able to further conservation interests without a heavy financial burden and (2) due to certain recently enacted provisions of the Internal Revenue Code,[5] a landowner can donate such an easement for the good of the general populace while enjoying what could be a sizeable tax break.[6]

The tax break takes the form of a deduction which is allowed for charitable contributions of conservation easements.[7] As with all charitable donations under section 170 of the Internal Revenue Code, the value of the contribution is subtracted from the taxpayer's adjusted gross income. Adjusted gross income is a midpoint between that which is considered to be *all* of the taxpayer's income (gross income) and the taxpayer's final taxable income. The amount which the taxpayer is entitled to deduct may not exceed fifty percent of his or her adjusted gross income.[8] This limit applies to conservation easements. If, however, the value of the conservation easement exceeds this limit, the taxpayer may "carry over" the excess and apply the deduction to subsequent years for up to five years.[9] To determine how much this tax break is actually worth to a taxpayer, the deduction is multiplied by the taxpayer's marginal rate.[10] For example, one dollar deducted at fifty percent marginal rate is of more value than one dollar deducted at twenty percent marginal rate. Consequently, the deduction resulting from a gift of a conservation easement is "worth" much more to the higher-income bracket taxpayer.

It took about sixteen years of reworking the tax law to come to where we are today on the deductibility of conservation easement contributions. The final amendments of 1980 to section 170 of the Internal Revenue Code represent a legislative ratification of the charitable deduction for gifts of easements intended to conserve open space and preserve historic structures.[11] The tax code allows a deduction for a "qualified conservation contribution." The 1980 amendments defined "qualified conservation contribution" in

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4. *See infra* text and notes at notes 41-90.
5. I.R.C. § 170(h) (1982).
6. I.R.C. § 170 (1982).
7. I.R.C. § 170(h) (1982).
8. I.R.C. § 170(b)(1)(A) (1982).
9. I.R.C. § 170(d) (1982). *See also infra* text at notes 113-115.
10. Marginal rate is the applicable rate of tax at each tax bracket level. CHIRELSTEIN, FEDERAL INCOME TAXATION 3 (2d ed. 1982).
11. I.R.C. § 170(h) (1982). *See infra* text and notes at notes 155-190.

language broad enough to bring the tax code in line with the substantive property laws of the states, thereby removing certain ambiguities which previously may have prevented a taxpayer from donating a conservation easement.[12] The amendments also expanded the range of permissible conservation purposes,[13] and emphasized the requirement that the subject of the conservation easement be protected in perpetuity, that is, for an indefinite duration.[14]

Although these recent enactments in the Internal Revenue Code represent affirmative steps toward providing statutory authorization of the charitable deduction for gifts of conservation easements, two significant problems still exist. The first of these concerns the valuation of such easements for the purposes of determining the actual dollar amount of the charitable deduction.[15] Although the Internal Revenue Service appears to have settled on an approach to the valuation of easements, the Service has nevertheless expressed its concern over the practical and conceptual difficulties inherent in placing a value on a conservation easement—difficulties which might lead to aggressive and abusive valuations.[16] There are, however, significant external factors, such as zoning, existing conservation and historic preservation laws, architectural controls, and the ability of the property to produce income,[17] which tend to reduce speculation and keep aggressive valuation in check.

The second problem that exists even after the 1980 amendments arises from a conflict between the prerequisite to a deduction under the Code that the conservation easement must be granted in perpetuity, and state recording statutes that require restrictions on the use of property to be re-recorded at periodic intervals by the holder of the easement.[18] In some states, exceptions are made for easements granted for charitable purposes.[19] Where this is not the case, however, easements which are subject to the re-recording requirement are incapable of being made perpetual, thus presenting an

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12. I.R.C. § 170(h) (1982).
13. I.R.C. § 170(h)(4) (1982).
14. I.R.C. § 170(h)(5)(A) (1982).
15. *See infra* text and notes at notes 191-214.
16. *Hearings on H.R. 7318 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 20 (June 26, 1980) (statement of Daniel I. Halperin, Dpty. Ass't. Sec'y of Treas.).
17. *See infra* text and notes at notes 198-203.
18. *See infra* note 97.
19. *Id.*

obstacle to the taxpayer who wishes to take advantage of the charitable deduction for a gift of a conservation easement.

While conservation goals can be achieved through many means, this article focuses on the tax incentive for land conservation. In analyzing the charitable deduction allowed for gifts of conservation easements, the first section of this article will examine the property law underpinnings of the easement. In doing so, this section will illustrate why the easement appears to be the most effective conservation tool. Furthermore, this section will suggest that the reasons underlying the common law's hostility toward the transferability and enforceability of less-than-full interests may no longer be valid in light of special recording statutes enacted by various states. The next section will illustrate how national tax policy has endorsed the use of conservation easements by providing a charitable deduction for their contribution. By way of introduction, this section will review the historical development of provisions in the federal tax law allowing deductions for gifts of conservation easements. A detailed examination of the relevant current provisions in the Internal Revenue Code will then be made. The article will then take a closer look at the problems of valuation and of the statutory requirement that the conservation easement be granted in perpetuity. The third, and final section of this article will examine the effectiveness of the charitable deduction in achieving conservation objectives when compared to two alternative methods: (1) the exercise of the government's power of eminent domain and (2) the use of a comprehensive tax credit. The article concludes by suggesting that while the charitable deduction is more effective than eminent domain, the use of a comprehensive tax credit would be the most effective and equitable incentive to conserve land.

II. Property Law and Conservation Interests

Conservation and preservation objectives could be pursued by means of acquiring full (fee simple)[20] title in land, or, alternatively, by acquiring a partial (less-than-fee)[21] interest in the desired property. Due to common law restraints on the establishment, transferability and enforceability of less-than-fee interests, however, the traditional choice of public agencies and charitable organizations respon-

20. The fee simple estate is the most unrestricted estate and that of longest duration known to Anglo-American law. C. Moynihan, Introduction to the Law of Real Property 29 (1962).

21. *See* C. Smith & R. Boyer, Survey of the Law of Property 4-6 (2d ed. 1971).

sible for conservation and preservation programs has been to acquire fee title through purchase or condemnation.[22] The notion that full ownership of the land in question is the only basis for effective conservation or preservation has prevailed with only a few notable exceptions.[23]

Full ownership of land is achieved by acquiring what is called the estate in fee simple.[24] This estate denotes the maximum amount of legal ownership and the greatest possible aggregate of rights, powers, privileges and immunities which a person may have in land.[25] It is an estate of potentially infinite duration and one of general inheritance.[26]

While the estate in fee simple represents the ultimate ownership of land, the right of an owner in fee simple to make *any* use of his or her property is, in modern times, considerably curtailed by governmental controls in the form of zoning and subdivision laws, as well as by urban redevelopment programs.[27] Moreover, the uses to which an estate in fee simple can be put may be limited by restrictions that have been imposed on the land by a former landowner.[28] Nevertheless, the universal recognition and free transferability of the estate in fee simple are important factors to an agency or organization interested in controlling the use of the land for conservation purposes. When compared to the common law restraints on the establishment, transferability, and enforceability of less-than-fee interest,[29] restrictions on the estate in fee simple are relatively few.

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22. Condemnation is the process of taking private property for public use through the power of eminent domain.

23. The Great River Road, envisioning a scenic and recreational corridor on both banks along the full length of the Missouri River, is perhaps the most ambitious plan relying on easements and similar agreements. Today, several hundred miles of the river's banks are covered by terms of easements. The same technique has been used for other major scenic parkways, such as the Blue Ridge Parkway and Natchez Trace Parkway. Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. AND TRUST J., 540, 540-42 (1979).

24. *See supra* note 20.

25. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 29 (1962).

26. The inheritability of the estate in fee simple is not restricted to the owner's lineal descendents. If the owner of a fee simple estate dies without any direct descendants and without a will, then the owner's collateral relatives will inherit the property. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 35 (1962).

27. Though zoning and other governmental regulations on land use constitute significant restrictions on the estate in fee simple, it is not within the scope of this article to discuss their impact. For a general discussion on such governmental regulations, see A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 983 (1969).

28. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 35 (1962).

29. *See infra* text at notes 33-40.

Consequently, public agencies and charitable organizations have traditionally chosen to accomplish their conservation goals by acquiring fee simple title in land.[30]

There are, however, clear limits on the amount of land a government can afford to buy.[31] When the same space is sought by several competing users, the price of property is bound to be high. Even if the price of the land was not a factor, there are other considerations which militate against government ownership of fee simple. Publicly owned property is off the tax rolls; it is generally not put to its fullest potential of multiple use and often is not as well maintained as it would be if privately owned.[32] Yet, the case for reconsidering common law restraints on less-than-fee interests for conservation and preservation purposes is not based entirely on the unacceptability of purchasing property in fee simple. In their own right, less-than-fee interests represent an opportunity to encourage public-private sector cooperation which may promote conservation programs by public agencies.

This is not to say that the acquisition of less-than-fee interests is not without its problems. The common law has imposed restrictions on less-than-fee interests (including easements) which impede their use for conservation purposes. An analysis of the common law restrictions on easements suggests, however, that the policy reasons for creating such restrictions are no longer valid. The following section will examine the various common law restrictions on three less-than-fee interests.

A. Less-Than-Fee Interests

There are basically three classes of rights which one may have in the land of another which constitute a less-than-fee interest and which are useful for conservation and preservation purposes: (1) legal restrictive covenants; (2) equitable servitudes; and (3) easements.[33] Unlike the estate in fee simple, it is not always clear whether a less-than-fee interest will be transferable. This is especially true where the benefit of the interest is in gross. Where the benefit of a less-than-fee interest is said to be in gross, it is a benefit that is personal to the holder of the interest as opposed to a benefit to a particular parcel of land (benefit appurtenant). In light of the fact

30. Netherton, *supra* note 23, at 556.
31. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 109, n.6 (1977).
32. *Id.*; Netherton, *supra* note 23, at 542.
33. Netherton, *supra* note 23, at 543.

that the benefit derived from an agreement to achieve a conservation purpose is generally said to be a benefit in gross,[34] a restriction of transferability is of great importance to the agency or organization in developing a strategy to protect the environment.

1. Legal Restrictive Covenants

Legal restrictive covenants typically involve a promise to pay for certain benefits received by the promisor's land or a promise by the promisor that he or she will or will not do certain things with the land. An example of a legal restrictive covenant is where a developer, D, sells a parcel of land to O, and as part of the sales transaction O promises to pay D $100 a year to maintain a private road and recreational facilities for the benefit of O's land and other land in the subdivision. Since the benefit here accrues to O's land and is not strictly personal to O, it would be classified as a benefit appurtenant as opposed to a benefit in gross. A simple example of a benefit in gross is where the landowner gives a neighbor the right to use a stream on the owner's land for recreational purposes. Here, the benefit derived from the use of the stream is not one that benefits the neighbor's land, rather it is personal—a benefit that is only available to the neighbor.

When the benefit of a legal restrictive covenant is in gross, a majority of American courts deny transferability by the holder of the interest.[35] This is an important restriction to the organization that wishes to conserve land in that it presents a potential threat to the continuation of a conservation agreement with the landowner. An additional problem with the legal restrictive covenant which is of great significance to an agency or organization in controlling land use is that the party in whose favor the agreement runs may feel poorly protected since pecuniary damage is the only available remedy in law for breach of the agreement.[36] Consider the case where the promise made is a negative one, such as a building restriction. In such a case specific performance of the agreement, not money damages, is generally the desired relief to ensure against the forbidden construction. The inconvenience of being able to recover only money damages and the majority rule against transferability by

34. Hambrick, *Charitable Donations of Conservation Easements: Valuation, Enforcement and Public Benefit,* 59 TAXES 347, 348 (1981).

35. 2 AMER. LAW OF PROPERTY § 9.13, at 375 (A. Casner, ed. 1952).

36. Netherton, *supra* note 23, at 550.

the holder of the interest, where the benefit is in gross, combine to discourage the use of legal restrictive covenants for environmental protection efforts.[37]

2. Equitable Servitudes

The equitable servitude is similar to the legal restrictive covenant in that it is a covenant specifying permissible or impermissible uses to which land may be put.[38] Unlike the legal restrictive covenant, however, the equitable servitude may be enforced in equity and specific performance of the covenant may be granted. The equitable servitude is not a very practical tool for protecting the environment, however, as a majority of the states take the position that the burden, or that which is promised by the promisor, will not run with the land when the benefit is in gross.[39] The ramifications of this prevailing rule with regard to conservation agreements is that if the landowner were to sell the property in question, the new landowner would not have to abide by the agreement. Regarding the assignability of an equitable servitude where the benefit is in gross, the number of cases addressing the question is small; yet, they agree that the benefit cannot be assigned.[40]

3. Easements

In contrast with legal restrictive covenants and equitable servitudes, easements are less burdened with common law restrictions. Consequently, easements are the most suitable and useful option available to public agencies and charitable organizations for effectively controlling land use in order to achieve conservation and preservation objectives. Indeed, American decisions recognize several situations in which easements in gross are enforceable.[41] In ad-

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37. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND 107-11 (2d ed. 1947).

38. Netherton, *supra* note 23, at 550-52.

39. *See, e.g.*, Smith v. Gulf Refining Co., 162 Ga. 191, 134 S.E. 446 (1926); VanSant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913); Storey v. Brush, 256 Mass. 101, 152 N.E. 225 (1926); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955); Huber v. Guglielmi, 29 Ohio App. 290, 163 N.E. 571 (1928).

40. Netherton, *supra* note 23, at 553.

41. *See, e.g.*, Los Angeles University v. Swarth, 107 F. 798 (9th Cir. 1901); Bramwell v. Kuhle, 183 Cal. App.2d 767, 6 Cal. Rptr. 839 (1960); Kent v. Koch, 166 Cal. App.2d 579, 333 P.2d 411 (1958); Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677 (1911); Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906); Peabody Heights Co. v. Willson, 82 Md. 186, 32 A. 386 (1895); Orenberg v. Johnston, 269 Mass. 312, 168 N.E. 794 (1929); Lin-

dition, arguments favoring increased assignability of easements in gross have been more persistent than arguments favoring increased assignability of restrictive covenants and equitable servitudes.[42] Although the use of easements for conservation purposes is not free from problems, modern courts are much more willing to allow assignment and transfer of this property interest where the benefit is in gross as opposed to legal restrictive covenants and equitable servitudes.[43] Since the easement has emerged as the less-than-fee interest with the greatest potential as an effective conservation tool, an in-depth examination of the easement is appropriate and necessary.

B. Easements and Conservation

At the most fundamental level, an easement is "a less-than-fee interest in land in possession of one other than the owner which limits or restricts the possessory rights of the owner and is enforceable at law."[44] It is evidenced by a legal document between the property owner and the holder of the easement which contains either affirmative or negative obligations that are binding, in contract, on the property owner.[45]

An easement can be characterized as either positive or negative. Positive easements enable the holder to enter the servient estate,

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coln v. Burrage, 177 Mass. 378, 59 N.E. 67 (1901); Walsh v. Packard, 165 Mass. 189, 42 N.E. 577 (1896); Dana v. Wentworth, 111 Mass. 291 (1873); Caullett v. Stanley Stilwell & Sons, Inc., 67 N.J. Super 111, 170 A.2d 52 (1961); Jennings v. Baroff, 104 N.J. Eq. 132, 147 A. 390 (1929); Wilmurt v. McGrane, 16 App. Div. 412, 45 N.Y.S. 32 (1897); Grussi v. Eighth Church of Christ Scientist, 116 Ore. 336, 241 P. 66 (1925).

42. Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROB. 416, 419 (1971).

43. Courts that do allow assignment and transfer of easements in gross tend to distinguish between easements that are primarily commercial and those that are primarily personal. In the case of a personal easement, the creator probably granted the easement because he or she was friendly with the beneficiary, or for other social purposes; the grantor probably did not intend that it would be transferable. This would be true, for example, if A gave his or her friend B, who lived a few blocks away, the right to swim in A's pool; A probably does not intend B to have a right to transfer this privilege. In the commercial context, by contrast, alienability is much more likely to be considered to be intended by the parties. For example, one who gives a telephone company the right to string phone wires over one's property probably intends that this right should pass to any other company that takes over the telephone operations. See Restatement of Property § 489 (1944), making commercial easements in gross automatically alienable.

44. Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVT'L AFF. L. REV. 513 (1981).

45. Teitell & Johnson, *Subcommittee Report of the Committee on Charitable Gifts, Trusts and Foundations, Probate and Trust Division, Tax Incentives for Sensible Land Use Through*

which is the land burdened by the easement, and do affirmative acts which, but for the easement, would have been unauthorized. For example, a positive easement might give the covenant holder a right of way across neighboring land.[46] Negative easements give the holder veto powers to prevent the owner of the servient estate from making certain uses of that land, which he or she would ordinarily be privileged to do.[47] For example, O owns shorefront property and B owns property which is separated from the ocean by O's land. O grants B an easement of "light and air" which assures B that O will refrain from building a structure on the shorefront property that would obstruct B's view of the ocean. The easement confers a legal right in B to restrict O from putting the shorefront property (servient estate) to a particular use.

Another important characterization distinguishes appurtenant easements from easements in gross. An appurtenant easement is one created for the purpose of benefitting the nearby land of the easement holder (the dominant estate).[48] For example, O grants B the right to pass over a defined portion of O's land, enabling B to get from his land to the road. Here, O's land (the servient estate) is benefitting B's land (the dominant estate).

In contrast to the appurtenant easement, the easement in gross provides a benefit which inures to the holder of the interest rather than to a particular parcel of land. The following is an illustration of this type of easement: an individual grants an easement to a charitable foundation which provides for the creation and maintenance of a recreation trail for the general public. The owner of the property covenants not to use the land subject to the easement for any purposes inconsistent with the grant. Here, the easement holder does not own a parcel of land which is benefitted by the easement; rather the charitable foundation receives a personal right to use a portion of the property owner's land and to restrict the owner from interfering with that use.[49] This type of easement is most useful for conservation purposes because an agency or organization does not have to own land to receive an easement in gross, as it would to receive an appurtenant easement. Thus, the easement in

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Gifts of Conservation Easements, 15 REAL PROP. PROB. AND TRUST J. 1, 2 (1980).

46. *See* 3 POWELL, REAL PROPERTY § 405 (1981); RESTATEMENT OF PROPERTY §§ 451, 452 (1944).

47. *See* 3 POWELL, REAL PROPERTY § 405 (1981); RESTATEMENT OF PROPERTY §§ 451, 452 (1944).

48. Hambrick, *supra* note 34, at 348.

49. Rev. Rul. 74-583, 1974-2 C.B. 80.

gross is the most attractive for achieving conservation of land because it permits preservation without the difficulties and drawbacks of owner and management costs.

The distinction between appurtenant easements and easements in gross is important because historically English common law courts favored appurtenant easements over easements in gross.[50] Consequently, at common law, the benefits of appurtenant easements have been freely assignable by the holder while considerable uncertainty has prevailed regarding the extent to which the benefit of an easement in gross may be assigned.[51]

Historical and economic factors explain the difference in treatment of the two types of easements. Prior to England's industrialization, easements were almost always appurtenant and were employed among neighboring owners of farms, grazing lands and streams.[52] Courts did not hesitate to enforce these easements or allow their benefits and burdens to run with the land because it was felt that they fostered orderly development of the types of land use on which the economy of the times depended.[53] As industrialization began and economic uses of land became more diversified, easements in gross began to appear. Common law rules for assuring that a dominant estate be benefitted proved too rigid to accommodate many of the land use arrangements that were desired.[54] Thus, the courts were forced to adapt to the changing times.

By the early 1800's, English courts permitted the creation of easements in gross where the holder's rights were accompanied by a profit,[55] such as the right to enter upon the servient estate and remove oil and minerals.[56] This, perhaps, reflected the prevailing belief that increased commercial use of land and natural resources stimulated and sustained national growth.[57] Easements in gross without a profit could not be justified on these grounds, for they merely provided a personal benefit to the holder while burdening the marketability and use of the servient estate.[58] Consequently, the English common law persisted in the view that easements in gross

50. Netherton, *supra* note 23, at 544.
51. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 67 (3d ed. 1965).
52. Netherton, *supra* note 23, at 544.
53. *Id.*
54. *Id.* at 545.
55. This type of arrangement is called a profit a prendre.
56. *See* 3 POWELL, REAL PROPERTY § 405 at 34-36 (1975).
57. Netherton, *supra*, note 23, at 545.
58. *Id.*

would not be recognized, much less enforced, unless accompanied by a profit.[59]

Like the British courts, nineteenth century American courts regularly permitted the creation of easements in gross when coupled with a profit.[60] Beyond this, however, a broad diversity of decisions developed regarding assignability and inheritability of easements in gross.[61] The extent to which an interest or benefit was of a commercial nature was often cited as the decisive factor,[62] but the issue remained unclear well into the twentieth century.[63]

The present status of easements is relatively well-defined by the *Restatement of Property*. According to the *Restatement*, appurtenant easements are enforceable between the original parties and because the burdens may run with the land, their benefits may be assigned with relative ease.[64] Easements in gross are enforceable between the original holder and the original owner of the servient estate. Beyond these parties, the burden of an easement in gross runs to successive owners of the servient estate for the benefit of the original holder for as long as the successive owners retain the same estate held by the original owner at the time the easement was created.[65] Regarding the assignability of the benefit of an easement in gross, the *Restatement* has adopted the position that the benefit of a noncommercial easement in gross is alienable if made so by the terms of its creation.[66]

The case law on the question of the assignability of the benefit derived from an easement in gross is not as well defined as is the *Restatement*, as the cases are not in agreement.[67] Nevertheless, support for assignability of an easement in gross is more substantial than support for assignability of a personal benefit derived from legal restrictive covenants and equitable servitudes.[68]

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59. *Id.*

60. *Id.*

61. *Id.*; 3 POWELL, REAL PROPERTY § 419 (1975).

62. See *supra* note 44.

63. Netherton, *supra* note 23, at 545.

64. RESTATEMENT OF PROPERTY §§ 491, 492 (1944).

65. *See, e.g.*, Willoughby v. Lawrence, 116 Ill. 11, 4 N.E. 356 (1886); Cusack Co. v. Myers, 189 Iowa 190, 178 N.W. 401 (1920); Levy v. Louisville Gunning System, 121 Ky. 510, 89 S.W. 528 (1905); Baseball Pub. Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362 (1938); Smith v. Dennedy, 224 Mich. 378, 194 N.W. 998 (1923); Borough Bill Posting Co. v. Levy, 144 App. Div. 784, 129 N.Y.S. 740 (1911).

66. RESTATEMENT OF PROPERTY §§ 491, 492 (1944) and 3 POWELL, REAL PROPERTY § 419 (1975).

67. *See infra* notes 69-72.

68. *See supra* text at notes 33-43.

In only twelve states easements in gross are not assignable; in four more, dictum favors nonassignability.[69] In five states the cases clearly sustain assignability,[70] and in six others, assignability is based on statute.[71] In nine states the holdings appear to be in conflict.[72]

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69. The following cases illustrate the general rule that in the absence of something in the instrument indicating a contrary intention, an easement in gross is a right personal to the one to whom it was granted, and cannot be assigned or otherwise transmitted by him to another: Lynch v. White, 85 Conn. 545, 84 A. 326 (1912); Messenger v. Ritz, 345 Ill. 433, 178 N.E. 38 (1931); Lucas v. Rhodes, 48 Ind. App. 211, 94 N.E. 914 (1911); Williams v. Diederich, 359 Mo. 683, 223 S.W.2d 402 (1949); Boatman v. Lasley, 23 Ohio St. 614 (1873); Chase v. Cram, 39 R.I. 83, 97 A. 481 (1916); Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 143 S.E.2d 803 (1965).

70. Iowa: Baker v. Kenney, 145 Iowa 638, 124 N.W. 901 (1910).
Massachusetts: French v. Morris, 101 Mass. 68 (1869); Owen v. Field, 102 Mass. 90 (1869).
Vermont: Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1904); Percival v. Williams, 82 Vt. 531, 74 A. 321 (1909).
Virginia: City of Richmond v. Richmond Sand and Gravel Co., 123 Va. 1, 96 S.E. 204 (1918).
Wisconsin: Poull v. Mockley, 33 Wis. 482 (1873); Pinkum v. Eau Claire, 81 Wis. 301, 51 N.W. 550 (1892).

71. Netherton, *supra* note 23, at 547.

72. California, *Pro*: Fudickar v. East Riverside Irrigation Dist., 109 Cal. 29, 41 P. 1024 (1895); Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935).
California, *Contra*: Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354 (1869); Elliott v. McCombs, 100 P.2d 499 (Cal. App. 1940).
Georgia, *Pro*: Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Wright v. Hollywood Cemetery Corp., 112 Ga. 884, 38 S.E. 94 (1901).
Georgia, *Contra*: Stovall v. Coggins Granite Co., 116 Ga. 376, 42 S.E. 723 (1902); Mallet v. McCord, 127 Ga. 761, 56 S.E. 1015 (1907).
Kentucky, *Pro*: Hook v. Joyce, 94 Ky. 450, 22 S.W. 651 (1893).
Kentucky, *Contra*: Thomas v. Brooks, 188 Ky. 253, 221 S.W. 542 (1920).
New Hampshire, *Pro*: Cross v. Berlin Mills Co., 79 N.H. 116, 105 A. 411 (1918).
New Hampshire, *Contra*: Wilder v. Wheeler, 60 N.H. 351 (1880); Beach v. Morgan, 67 N.H. 529, 41 A. 349 (1894).
New Jersey, *Pro*: Goldman v. Beach Front Realty Co., 83 N.J.L. 97, 83 A. 777 (1912); Standard Oil Co. v. Buchi, 72 N.J. Eq. 492, 66 A. 427 (1907).
New Jersey, *Contra*: Joachim v. Belfus, 108 N.J. Eq. 622, 156 A. 121 (1931).
New York, *Pro*: Coatsworth v. Hayward, 78 Misc. Rep. 194, 139 N.Y.S. 331 (1912); Gould v. Wilson, 115 N.Y.S.2d 177 (1952).
New York, *Contra*: Banach v. Home Gas Co., 23 Misc. 2d 556, 199 N.Y.S.2d 858, *aff'd*, 12 App. Div. 2d 373, 211 N.Y. S.2d 443 (1961), motion for leave to appeal *den.*, 10 N.Y.2d 707, 178 N.E.2d 191 (1961); Antonopulos v. Postal Telegraph Cable Co., 261 App. Div. 564, 26 N.Y.S.2d 403 (1941), *aff'd without opinion*, 287 N.Y. 712, 39 N.E.2d 931 (1942).
Oregon, *Pro*: Salene v. Isherwood, 55 Or. 263, 106 P. 18 (1910); Talbot v. Joseph, 79 Or. 308, 155 P. 184 (1916).
Oregon, *Contra*: Houston v. Zahm, 44 Or. 610, 76 P. 641 (1904).
Pennsylvania, *Pro*: Dalton Street Railway Co. v. Scranton, 326 Pa. 6, 191 A. 133 (1937); Rusciolelli v. Smith, 195 Pa. Super. 562, 171 A.2d 802 (1961).
Pennsylvania, *Contra*: Lindenmuth v. Safe Harbor Water Power Corp., 309 Pa. 58, 163 A. 159 (1932).
Texas, *Pro*: Thew v. Lower Colorado River Authority, 259 S.W.2d 939 (Tex. Civ. App. 1953).
Texas, *Contra*: Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1963).

Although the case law may not provide overwhelming support for easements in gross, it does suggest that where one wishes to ensure enforceability and transferability of a benefit in gross—as public agencies and charitable organizations responsible for conservation and preservation generally wish to do—the easement is the most sensible choice.

Having examined the three less-than-fee interests which may be used to control land use as an alternative to acquiring fee simple title and the various restraints imposed upon their enforceability and transferability, it appears that the easement is the most useful conservation tool. The next section specifically turns to the conservation easement which is derived from the easement in gross.[73]

C. The Conservation Easement

A property owner who desires to preserve the land in its present condition may be unwilling or financially unable to make an outright gift of the fee to a government agency or publicly supported charitable organization in an attempt to achieve preservation of the land. The reasons why a landowner would want to part with the land in order to preserve it are varied. He or she may have purely altruistic motives or may feel that an agency has better resources to achieve preservation of the property. By making a charitable donation of a conservation easement which restricts the owner's rights to develop the land and gives the grantee the legal right to enforce such restrictions, the landowner can retain ownership of the property and ensure against destruction by future development of the land.[74]

A conservation easement is a nonpossessory interest in real property which imposes limitations or affirmative obligations on the landowner, the purposes of which are the protection, maintenance or enhancement of land, air, water, or historic structures.[75] Conservation easements are usually negative—that is, the grantor promises to refrain from developing the parcel in question—although they typically involved a grant of affirmative enforcement rights, such as the right to periodically enter the land and inspect for violations.[76]

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73. Hambrick, *supra* note 34, at 348.

74. By making a charitable contribution of a conservation easement, the landowner also receives what may prove to be a substantial income tax deduction. *See infra* text at notes 111-118.

75. *See* UNIFORM CONSERVATION EASEMENT ACT 1 (National Conference of Commissioners on Uniform State Laws Proposed Draft 1981).

76. Hambrick, *supra* note 34, at 348.

That the conservation easement derives from the concept of an easement in gross, in that it does not depend on benefit to a parcel of land, presents a problem concerning its enforceability. As discussed above,[77] although there appears to be more support for the assignability of an easement in gross than there is for the other less-than-fee interests, common law precedents may well oppose the running of the burden of the agreement to successors of the original easement grantor.[78] A similar result may occur where an assignee of the original easement holder (the grantee) attempts to enforce it on the theory that the benefit ran to him or her. Unless state law mandates the enforcement and assignment of an easement in gross to a subsequent purchaser or assignee of the grantor or grantee, courts may well consider conservation easements to be mere personal agreements as opposed to allowing the benefit in gross to run in perpetuity.[79]

A handful of cases in which enforcement of interests in gross have been upheld[80] suggests that the state of the law is changing. Chief among these is *United States v. Albrecht*, [81] which sustained the right to enforce a restriction in gross pursuant to public policies underlying the Migratory Bird Hunting Stamp Act.[82] In this case, the United States brought an action against certain landowners to fill drainage ditches and to permanently refrain from further drainage or ditching of land subject to the United States easement for waterfowl production purposes. The interest acquired by the federal government was in the form of a recorded agreement for environmental protection and its enforcement was alleged to be barred by hostile state law.[83] The circuit court ruled, however, that the government's interest was a reasonable property right which "effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by possible North Dakota law barring the conveyance of this property right."[84]

The decision of *United States v. Albrecht* may point the way to a liberalization of the rules of assignability and enforceability, at least

77. *See infra* text at notes 33-42.
78. Hambrick, *supra* note 34, at 350.
79. *Id.*
80. *See* Goetsch, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383, 399-402 (1976).
81. 364 F. Supp. 1349 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).
82. 16 U.S.C. § 718d(c) (1976).
83. 496 F.2d 906, 911 (8th Cir. 1974).
84. *Id.*

in cases where the holder of an interest in gross is a public agency. Such agencies do not die or move away as natural persons do, and so their interests present no unusual complications to the task of documenting the marketability of the burdened property.[85] Indeed, it is this clouding of titles to property which is one of the fears underlying the common law's hostility towards easements in gross.[86]

Another indication that the state of the law is changing is that forty states have enacted legislation dealing with the creation, transfer, and enforcement of easements in gross which are granted for conservation or preservation purposes.[87] In twenty-two states these laws include provisions to facilitate the assignment and enforcement of interests in gross.[88] In all but three of these states—California, Michigan, and South Dakota—it is provided specifically that recorded agreements of the type covered by the statute shall be assignable whether or not they benefit a dominant estate, and that they shall not be unenforceable on account of failure to meet this requirement.[89]

While such legislation should promote the greater use of conservation easements in the near future, this less-than-fee interest has yet to receive uniform acceptance. This is no doubt due to the lingering hostility of the common law toward easements in gross.[90] Given the trend toward greater legislative recognition of the conservation easement concept, the reasons behind this historic hostility must be reexamined to determine whether they remain valid concerns.

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85. Middlefield v. Church Mills Knitting Co., 160 Mass. 267, 272, 35 N.E. 780, 782 (1894).

86. *See infra* text at notes 91-97.

87. Netherton, *supra* note 23, at 558.

88. ARK. STAT. ANN. § 9-1409 (Supp. 1981); CAL GOV'T CODE § 50281(5) (West's Supp. 1983); COLO. REV. STAT. §§ 38-30-1101 (1973, 1982 Replacement Vol.); CONN. GEN. STAT. ANN. § 47-42b (1978); DEL. CODE §§ 6811-6815 (Supp. 1982); FLA. STAT. ANN. § 704.06 (Supp. 1979); GA. CODE ANN. § 85-1408 (Supp. 1982); ILL. STAT. ANN. ch. 24, § 11-48. 2-1A (Smith Hurd 1982); IND. STAT. ANN. § 14-4-5.5-1 (Burns 1981 Replacement Vol.); LA. REV. STAT. Civil Code § 1252 (1952); ME. REV. STAT. ANN. tit. 33, § 668 (Supp. 1974); MD. [real property] CODE ANN. § 2-118 (1981) Replacement Vol.); MASS. GEN. LAWS ch. 184, § 32 (Supp. 1983); MICH. STAT. ANN. § 26-1287(2) (1982 Revised Vol.); MINN. STAT. § 84.65 (Supp. 1983); MONT. REV. CODE §§ 76-6-201 - 76-6-211 (1981); N.H. REV. STAT. ANN. § 477.46 (Supp. 1979); N.Y. GEN. MUN. LAW § 247 (1978); R.I. GEN. LAWS §§ 34-39-1 - 34-39-5 (Supp. 1982); S.C. CODE ANN. § 27-9-10 (1976); S.D. COMP. LAWS § 1-19A-11; 1-1913-16 (Supp. 1978); UTAH CODE ANN. §§ 63-18A-1-63-18A-6 (1976).

89. Netherton, *supra* note 23, at 559. In California, Michigan, and South Dakota the statutory authority for creation of conservation easements specifies that the instruments of the agreements shall contain convenants running with the land. *See* CAL. GOV'T CODE § 50281(5) (West Supp. 1978); MICH. STAT. ANN. § 26.1287(2) (Supp. 1975); S.D. COMP. LAWS §§ 1-19A-11; 1-19B-16.

90. *See supra* text and notes at notes 50-73.

The disfavor with which easements in gross have been viewed by the common law appears to be based on a fear of excessive encumbrances on land titles.[91] Excessive encumbrance, however, is a relative standard. The land use limitations which landowners accept in the twentieth century probably would have been unacceptable to landowners a century ago. Moreover, in areas where population and industry are concentrated, landowners in the future will likely be required to accept even more limitations on the use of their land.[92] Such limitations carry with them the necessary chore of noting or clearing encumbrances in the certification of marketable title.[93]

Encumbrances, in and of themselves, are not the problem. What courts cannot permit are hidden encumbrances of which a buyer of land will not be made aware. Because an appurtenant easement benefits a parcel of land, it is much more easily discoverable than an easement in gross which grants a personal right to the holder, regardless of the holder's ownership or possession of land. If easements in gross could be made more easily discoverable, there would be no reason for the reluctance to enforce them. In fact, recording systems could provide an answer to a major part of the common law's concern with protecting a purchaser of land from the surprise of a hidden easement in gross, which may have been granted by a previous landowner.

Recording statutes afford a means of giving notice of the existence of conditions or restrictions on land.[94] The usual method of recording an instrument is by presenting the original to the county recorder who makes a photocopy of it.[95] Each instrument is then indexed by both the grantor and the grantee.[96] Generally, all deeds, mortgages, and other instruments which relate to or affect title to land must be recorded.

This system can be adapted to make conservation easements more easily discoverable. Some states have embellished or modified their recording statutes to provide assurance that conservation easements will not go unnoticed or become lost to successive parties. These states have established mandatory procedures for review as well as

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91. Netherton, *supra* note 23, at 556.
92. *Id.*
93. *Id.*
94. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 324-35 (3rd ed. 1965).
95. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 795 (2d ed. 1969).
96. *Id.*

approval of such agreements by public bodies prior to recording.[97] Such provisions, which illustrate current practice in the scrutiny and screening of proposed land management arrangements for conservation and preservation purposes, strengthen the role that recording plays in meeting the traditional common law objections to the assignability and running of easements in gross. Indeed, increased use of such recording procedures to safeguard against hidden encumbrances that may result from easements in gross might eventually render the policies underlying the common law's hostility toward easements in gross entirely invalid.

Easements are the best less-than-fee interest to achieve conservation purposes. In fact, the conservation easement was established to do just that. Although the state of the law concerning the enforceability and transferability of conservation easements is somewhat uncertain, the trend is toward their acceptance. Much of the justification for traditional hostility is gone. With the proliferation of recording statutes, the hostility may be completely invalid. Therefore, the case for conservation easements is stronger than ever.

Although legal barriers appear to be disappearing, a landowner still needs some practical incentive to reliquish rights in his or her land. A major incentive is offered by the Federal Income Tax Code, which provides the landowner with a sizeable tax break upon granting a conservation easement.[98] Because of the importance of the Internal Revenue Code provision which provides this incentive, it is necessary to consider it in some detail.

III. The Income Tax Incentive for Conservation Easements

It is well established that Congress may exercise broad discretion in the use of its taxing power to further nonrevenue national objec-

97. Montana law requires that conservation easements be subject to review by the local planning authority of the county in which the burdened land is located. MONT. REV. CODE § 76-6-209 (1981). In Arkansas, proposed preservation restrictions must be accompanied by a certificate of approval from the state's Commemorative Commission when submitted for recording. ARK. STAT. ANN. § 9-1411 (Supp. 1981). South Carolina's Heritage Trust Program requires that when areas are dedicated as Heritage Preserves, a land management plan must be prepared for them, and all interested parties, public or private, shall have input into this plan. S.C. CODE ANN. § 27-9-10 (1976). The Massachusetts statute is unique in that it establishes a "public restriction tract index", and conservation or preservation agreements registered therein need not be re-recorded within the thirty-year period required by the state's marketable title act in order to retain their validity. MASS. GEN. LAWS ch. 184 § 27 (Supp. 1983). A prerequisite to registration of land in this index is approval by the Commissioner of Natural Resources (in the case of conservation restrictions) or the Massachusetts Historical Commission (in the case of preservation restrictions).

98. *See* I.R.C. § 170(f)(3)(B)(iii) (1982); *infra* text and notes at notes 99-190.

tives.[99] This principle was ably described by a former Commissioner of the Internal Revenue Service, who said that the tax system may be utilized to promote nonrevenue ends when two basic preconditions exist: (1) the particular goal must be of overriding importance to society; and (2) the determination must be made that the objective in question can be achieved most effectively through the tax system.[100] Presumably, Congress must have considered these conditions to be satisfied when it decided to encourage land conservation and historic preservation by including conservation contributions in section 170 of the Internal Revenue Code as a class of gifts for which a charitable deduction is properly allowed.[101]

It is now generally conceded that tax incentives are an important and appropriate stimulus for the preservation of unique natural and historical sites,[102] as well as for the prevention of undesirable development in agricultural or scenic areas.[103] As was seen in the previous section of this article,[104] the easement is a viable alternative to acquiring land in fee simple when the effectuation of conservation purposes is desired. The inclusion of conservation easements in the Internal Revenue Code as a class of gifts for which a charitable deduction is allowed[105] further enhances their use.

By way of introduction, this section will first briefly discuss charitable deductions in general and review the historical development of provisions in federal tax law allowing deductions for gifts of conservation easements. It will then turn to a detailed examination of the current provisions in the Internal Revenue Code regarding conservation easements and discuss some difficulties involved in valuation and in the statutory requirement that easements be granted in perpetuity.

A. The Charitable Deduction

On the surface, the federal income tax system is fairly simple in concept. It begins with a computation of total or "gross income,"

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99. *See, e.g.*, Deputy v. Dupont, 308 U.S. 488, 497 (1940); Welch v. Henry, 305 U.S. 134, 150 (1938); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Helvering v. Independent Life Insurance Co., 292 U.S. 371, 387 (1934).

100. Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVT'L. AFF. L. REV. 513, 516 (1981).

101. I.R.C. § 170(f)(3)(B)(iii) (1982); I.R.C. § 170(h) (1982).

102. Teitell and Johnson, *supra* note 45, at 1.

103. *Id.*

104. *See supra* text and notes at notes 33-73.

105. I.R.C. § 170(f)(3)(B)(iii) (1982).

which is an all-inclusive term. Except for specified exemptions,[106] practically anything which has the effect of increasing the taxpayer's net worth[107] constitutes gross income. From gross income, certain deductions are taken to reach a sort of mid-point that is extremely important for the purposes of charitable contribution deductions. This mid-point is called adjusted gross income (AGI), and is a way station between all of the income of the taxpayer and the final income, which is called taxable income.[108] AGI is important because it is a benchmark for the allowable charitable contribution deduction. In the case of an individual taxpayer, the allowable deduction is dependent upon the amount of AGI.[109] The charitable contribution itself is taken as an itemized deduction from AGI.[110]

The general or overall limitation on a charitable contribution deduction is fifty percent of adjusted gross income.[111] If, for example, AGI for a particular year is $60,000 and the charitable contribution is $50,000, then the overall limitation on the deduction for that year is $30,000 or fifty percent of AGI. On gifts of property that will yield long term capital gain if sold, the limit is thirty percent.[112] Thus, the fifty percent limit is reached only where a substantial part of the total contribution is made in cash or nonappreciated property. In the situation described above, for example, in order to reach a total deduction of $30,000, $12,000 would have to be contributions of cash or nonappreciated property because only $18,000 in appreciated property could be taken as a deduction.

The amount of the contribution in excess of the limits can be "carried over"[113] for five years or until it runs out, whichever comes first.[114] Therefore, in the case of a $50,000 land donation, the donor

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106. An example of an item that increases a taxpayer's net worth yet is not included in income is where meals and lodgings are furnished by an employer to his or her employees. *See* I.R.C. § 119 (1982).

107. Net worth is the total assets of a person or business less the total liabilities (amount due to creditors).

108. I.R.C. § 62 (1982).

109. I.R.C. § 170(b)(1)(B)(ii) (1982).

110. In 1981, the charitable contribution deduction was a "below-the-line" deduction, the "line" being adjusted gross income. Beginning in 1982, Congress has moved the charitable deduction above the line. For purposes of this article, this change makes no real difference because the article deals with the taxpayer who is able to make a sizeable contribution and, therefore, would get the tax benefit of it whether or not it is itemized.

111. I.R.C. § 170(b)(1)(A) (1982).

112. I.R.C. § 170(b)(1)(C) (1982).

113. "Carry over" means that unused deduction amounts can be applied to subsequent taxable years.

114. I.R.C. § 170(d) (1982).

would get a benefit in year one of $18,000 and carry over $32,000. If the donor's AGI is the same in the following year, he or she uses up another $18,000 and, finally, the remaining $14,000 is used in year three.[115] To obtain the positive dollar value of this deduction, the amount deducted is multiplied by the taxpayer's marginal rate.

In the case of a charitable gift contributed to a private foundation,[116] a third percentage limit, twenty percent, applies. Furthermore, if a charitable contribution is made to an organization other than a publicly-supported charity,[117] there is no carry-over of the excess.[118] These two limitations illustrate the disadvantage of giving to a private foundation as opposed to a publicly-supported one.

Having examined generally how the charitable deduction operates in the federal tax system,[119] this article now turns specifically to the charitable deduction which is allowed for gifts of conservation easements. An examination of the legislative history of the provision is crucial to an understanding of the underlying concerns which shaped the provision permitting a deduction for gifts of conservation easements.

B. Historical Development of the Conservation Easement Deduction

The first specific Internal Revenue Service statement on the deductability of conservation easements came in the form of a

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115. If the donor's AGI changes, the amount deducted in subsequent years is limited to whatever 50% of the new AGI is.

116. A private foundation for tax purposes is one that does not qualify under I.R.C. § 170(b)(1)(D) (1982).

117. I.R.C. § 170(b)(1)(A) (1982).

118. I.R.C. § 170(d)(1)(A) (1982).

119. Congress, in the Economic Recovery Tax Act, did not directly alter charitable incentives. It did, however, lower the maximum tax rate and so also lowered the tax benefit which will accrue to the taxpayer, as well as the government subsidy which results from the deduction. The maximum tax rate has been lowered from 70% to 50% in 1982 and rate reductions go on in 1983 and 1984. The taxpayer who has adjusted gross income of $200,000 and contributes property worth $50,000 has a charitable contribution deduction of $50,000. In 1981 this taxpayer's marginal rate was 70% — the maximum. Assume that the taxpayer's taxable income before the gift was $175,000. The $50,000 charitable contribution in 1981 would have reduced what would otherwise have been a taxable income of $175,000 to a taxable income of $125,000. The contribution produced a tax benefit of $35,000. For 1982, however, with the decline in rates to 50%, the government's tax expenditure similarly declines to $25,000 for exactly the same donation. There still is the same reduction in taxable income and there still is a $50,000 allowable contribution (note here, the contribution does not exceed the 50% limitation), but the government subsidy is only going to be $25,000.

revenue ruling in 1964.[120] There, the taxpayer owned a parcel of land that was part of a larger wooded area with a scenic view adjacent to a nearby federal highway. The government was interested in preserving the wooded character of the area to maintain the scenic view afforded to the highway. The taxpayer, along with other surrounding landowners, gratuitously conveyed to the government perpetual negative easements in the properties. The restrictions contained in the easements pertained to, among other things, the type and height of buildings which could be constructed on the land, the removal of trees, the dumping of trash, the use of signs, and the size of parcels which could be sold. The Internal Revenue Service, noting that restrictive easements in gross constituted a valuable and enforceable property right under state law, held that the easements in question, designed primarily to protect and preserve a scenic view, were sufficient to support a charitable deduction under section 170.[121]

Following that revenue ruling, in late 1965, an Internal Revenue Service news release advertised the availability of a charitable deduction for the donation to a qualified recipient of scenic easements designed for the preservation of natural beauty.[122] Even though there was no specific provision in the Internal Revenue Code allowing for a charitable donation deduction to be taken for a gift of a present, partial (less-than-fee) interest in property, the 1964 revenue ruling and the news release which followed that ruling provided significant freedom in making donations of a wide variety of partial interests in land for a section 170 charitable deduction.[123]

1. The Tax Reform Act of 1969

With the Tax Reform Act of 1969,[124] came a massive reworking of section 170 in an effort to limit the types of property interests which qualified for the charitable donation deduction.[125] The revisions were, in part, a response to perceived abuses involving gifts of partial interests in property; the most common being the gift of use.[126]

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120. Rev. Rul. 64-205, 1964-2 C. B. 62.

121. *Id.*

122. I.R.S. News Release No. 784, Nov. 15, 1965, noted in Teitell and Johnson, *supra*, note 45, at 4.

123. Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69, 69-72 (1975).

124. P.L. 91-172, 83 Stat. 642 (1969).

125. *Id.*

126. I.R.C. § 170(f)(3)(A) (1982). The following is an excerpt from a Senate report which describes how a gift of use might be abused:

In an attempt to close the loopholes in the area of charitable deductions, Congress sharply restricted the conservation easement incentive by enacting section 170(f)(3).[127] This section denied taxpayers a deduction for charitable gifts of partial property interests with two exceptions: (1) gifts constituting a remainder interest[128] in the taxpayer's property;[129] and (2) gifts of an undivided interest in the taxpayer's entire property interest, even if itself partial, in the underlying property.[130]

Since a conservation easement is a divided property interest,[131] section 170(f)(3) threatened to halt the availability of a deduction for its donation. The deduction was rescued, however, by a single statement in the Conference Committee Report on the Tax Reform Act of 1969,[132] which expressed a legislative intent to consider the gift of an open space easement in gross[133] to be the gift of an *undivided* in-

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> An individual receives what may be described as a double benefit by giving a charity the right to use property which he owns for a given period of time. For example, if the individual owns an office building, he may donate the use of 10% of its rental space to a charity for one year. As a result, he will report for tax purposes only 90% of the income which he otherwise would have had if the building were fully rented, and still may claim a charitable deduction (amounting to 10% of the rental value of the building) which offsets his already reduced rental income.

S. REP. NO. 552, 91st Cong., 1st Sess. 83 (1969).

127. Hambrick, *supra*, note 34, at 349.

128. A remainder interest is a future interest created in a transferee which can become a present possessory estate only on the expiration of a prior estate created in favor of another transferee by the same instrument.

129. Gifts of remainder interests are limited to farms and personal residences, but these two categories are very broad. I.R.C. § 170(f)(3)(B)(i) (1982). "Personal residence" does not have to be the taxpayer's primary residence and the "farm" can be a tenant farm. That is, it does not have to be one worked by the taxpayer. Treas. Reg. § 1.170A-7(b)(3) and (4) (1981).

130. Under Treas. Reg. § 1.170A-7(b)(1) (1981), an undivided portion of the donor's entire interest in property "must consist of a fraction or percentage of each and every substantial interest or right owned by the donor in such property and must extend over the entire term of the donor's interest." Where a prospective donor owns the fee, the donee must receive a fraction or percentage of that fee interest, that is, the donee must become a tenant in common. Where the donor's interest is for a term of years, the donee must take a co-terminous interest. Treas. Reg. § 1.170A-7(b)(1) (1981).

Note that gifts of undivided interests are present gifts. This exception, therefore, covers transfers of fractional interests in tangible personal property. In fact, many donors of works of art thus secure current deductions while retaining undivided interests.

The donor and donee will typically execute a use agreement at the time of the gift. Occasionally it may be feasible to share all rights of access and exploitation equally, but much more common is the agreement that allocates seasonally. The Regulations sanction such a division and a published ruling approved such a transaction where the donor reserved the most desireable season. Treas. Reg. § 1.170A-7(b)(1)(i) (1981); Rev. Rul. 75-420, 1975-2 C.B. 78.

131. A divided interest in property is one that does not include every substantial interest or right owned by the donor in the property. *See supra* note 130.

132. H.R. REP. NO. 782, 91st Cong., 1st Sess. 294 (1969).

133. Treas. Reg. § 1.170A-7(b)(1)(ii) (1981), adopted pursuant to § 170(f)(3) of the Internal

terest in property where the easement was granted in perpetuity.[134] As a matter of property law, an easement is not an undivided interest in property.[135] Nevertheless, the language of the Conference Committee Report enabled the Internal Revenue Service to preserve the deductibility of donations of conservation easements.[136] The phrase "open space easement" contained in the Committee Report referred to above received a broad interpretation through a series of IRS revenue rulings which expanded upon the kinds of easements which would qualify for tax deductible treatment.[137] Through such an expansive reading of that term, easements that, for example, granted affirmative rights for public outdoor recreation purposes[138] or protected historic structures[139] were held to qualify for the charitable donation deduction.

Revenue Code which refers to restrictions on the type and height of buildings which may be erected, implying that some building remained permissible. *See infra* n. 136. "Open" appears to mean not completely open but rather a degree of openness that is significant enough to serve a conservation purpose in the particular circumstances of the case.

134. CONF. COMM. REP. 91-782, 1969-3 C.B. 644, 685. The single statement in the Conference Committee Report provided: "The conferees on the part of both Houses intend that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity."

135. Teitell and Johnson, *supra* note 45, at 5.

136. Such resurrection is manifested in Treas. Reg. § 1.170A-7(b)(1)(ii) (1981), which was adopted under I.R.C. § 170(f)(3) (1976). The regulation provides:

> For purposes of this subparagraph a charitable contribution of an open space easement in gross in perpetuity shall be considered a contribution of an undivided portion of the donor's entire interest in property to which section 170(f)(3)(A) does not apply. For this purpose an easement in gross is a mere personal interest in, or right to use, the land of another; it is not supported by a dominant estate, but is attached to, and vested in, the person to whom it is granted. Thus, for example, a deduction is allowed under section 170 for the value of the restrictive easement gratuitously conveyed to the United States in perpetuity whereby the donor agrees to certain restriction on the use of his property, such as, restrictions on the type and height of buildings that may be erected, the removal of trees, the erection of utility lines, the dumping of trash, and the use of signs.

I.R.C. § 170(f)(3) (1982).

137. *See* Rev. Rul. 74-583, 1974-2 C.B. 80; Rev. Rul. 75-373, 1975-2 C.B. 77; Rev. Rul. 75-358, 1975-2 C.B. 76.

138. In Rev. Rul. 74-583, 1974-2 C.B. 80, a charitable deduction was allowed to a taxpayer who granted a 30-foot wide open space easement in gross in perpetuity along the edge of his property, to be used by the holders for the creation and maintenance of a recreation trail for the general public. In Rev. Rul. 75-373, 1975-2 C.B. 77, a charitable deduction was allowed to a taxpayer who contributed an easement in perpetuity in a 50-acre tract of vacant beach front property to a county, to be used solely as a public bathing area.

139. In Rev. Rul. 75-358, 1975-2 C.B. 76, the owner of a mansion declared to be a state landmark granted an easement in perpetuity to the state which restricted the owner's right to subdivide, mine or industrially develop his property, as well as his right to alter the appearance of or modify the architectural characteristics of the mansion. The easement was held to be a

The Conference Committee Report on the Tax Reform Act of 1969 effectively authorized a charitable deduction for the donation of conservation easements by creating a legal fiction that equated an open space easement in gross (granted in perpetuity) with an undivided property interest. There was still, however, no specific statutory authorization for a charitable deduction for the donation of conservation easements. This problem was finally addressed in the Tax Reform Act of 1976. One of the results of the 1976 act was the insertion of additional exceptions to section 170(f)(3)(B)—the section which generally denies a deduction for the donation of partial property interests. Under section 170(f)(3)(B) these additional exceptions to the general denial were for a "lease on, option to purchase, or easement with respect to real property of not less than 30 years' duration" and "a remainder interest in property."[140] In either case, the land had to be granted exclusively for conservation purposes.[141] "Conservation purposes" were defined in section 170(f)(3)(C) as:

> (i) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment;
> (ii) the preservation of historically important land areas or structures;[142] or
> (iii) the protection of natural environmental systems.[143]

2. 1977 Changes

In 1977, a conference committee report further refined the definition of "conservation purposes," indicating that the easement would qualify for a charitable deduction only where the conservation purpose would in practice be carried out. The report also stated that the reason for holding the easement must be related to the purpose of the donee organization, and that the donee must be able to enforce its rights as holder and secure the conservation purposes which the

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scenic or open space easement under Treas. Reg. § 1.170A-7(b)(1)(ii) (1981), and the owner was allowed to take a charitable deduction.

140. I.R.C. § 170(f)(3)(B) (1976).

141. *Id.*

142. *Id.*

143. It is significant that "the preservation of historically important land areas or structures" is included in the definition of "conservation purposes." Prior to the Tax Reform Act of 1976, the Internal Revenue Code contained numerous incentives for the demolition of older buildings and for the replacement of these older buildings with new ones. Through the enactment of section 2124, the 1976 act added to the Code tax incentives for taxpayers who rehabilitate income-producing or commercial historic structures. This section also disallowed a certain tax preference for an owner or lessee who demolished a certified historic structure and built a new structure in its place.

contribution was intended to advance.[144] This refinement was, perhaps, intended to be a safeguard against the taking of a charitable deduction for a contribution that would not really serve a conservation purpose.

The Tax Reduction and Simplification Act of 1977 effected a further change in section 170(f)(3)(B)(iii), thereby bringing this section to its present form.[145] The fear that conservation objectives would be frustrated by the granting of leases, options to purchase, and easements of a finite duration[146] resulted in amending the section to require that the property interest be granted in perpetuity, as opposed to a duration of not less than thirty years.

A "sunset" date[147] on the 1977 legislation allowing a charitable deduction for conservation easements was set for June 14, 1981. Approximately one year before the legislation was due to expire, the United States Treasury began to entertain lobbying for lifting the

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144. CONF. COMM. REP. 95-263, 1977-1 C.B. 519, 523.

145. A change was made in the date of effectiveness provided by the 1976 act to simply remedy an error. The 1976 act provided that the amendments were applicable to transfers made after June 13, 1976, and before June 14, 1977. The Act, however, was not signed into law until October 4, 1976, making it unlikely that the provisions would have any significant utility.

146. Teitell and Johnson, *supra* note 45, at 7.

The prospect of restoring the perpetuity requirement evoked a negative response from the historic preservationists and a positive one from the land conservationists. The disagreement between conservationists and historic preservationists emerged from the difference in focus between the two groups. Preservationists are concerned about what happens as urban environments change, while land conservationsts attempt to mitigate perceived threats to developing suburban and rural areas. It is due to this difference in focus that the "term easement," or the easement of finite duration, is more suitable to preservation interests than is the "perpetual easement."

Where an historic structure is threatened by demolition, the preservationist welcomes the availability of any tool that will keep the structure intact. The inherent flexibility of an easement of finite duration allows preservation of a building until pressures subside, yet does not have the effect of locking a building irretrievably into the past. This latter advantage is especially important to preservationists, who are generally interested in encouraging adaptive reuse.

To the conservationist, however, development pressures simply do not subside where prime land, protected by a term easement, lies in the path of growth. Additionally, there is the danger that term easements might afford developers sufficient time to devise an alternative plan. Ultimately, the Treasury happened to come out on the side of the conservationists, as the perpetuity requirement was restored to the Code by the Tax Reduction and Simplification Act of 1977.

For a detailed discussion of the clash between preservationists and conservationists regarding this change, see Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property,* 7 REAL EST. L. J. 304, 316-17 (1979).

147. The legislature will in some cases set a date in passing legislation at which time it will review and possibly reconsider such legislation. This is called a "sunset" date.

"sunset" date and for redefining conservation easements.[148] The problem of mineral interests provided the initial incentive for that redefinition.[149] Many donors attempted to give land for the charitable deduction yet retain their valuable mineral rights. In the view of the Internal Revenue Service, a mineral interest was part of the property and, therefore, donation of the fee subject to retained mineral interests was not permitted[150] because an undivided interest had not been given. The problem was addressed by the 1980 legislation,[151] which created an entirely new subsection of the Internal Revenue Code, section 170(h), designed to define the kinds of interests that qualify as conservation contributions.[152] Presently, all such gifts

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148. Hutton, *Income Tax Incentives for Land Conservation*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, 33, 50 (1982) (papers from two conferences organized by the Montana Land Reliance and the Land Trust Exchange).

149. *Id.*

150. *See* Rev. Rul. 76-331, 1976-2 C.B. 52.

151. Hutton, *supra*, note 148, at 50.

152. *See* P.L. 96-541. The text of I.R.C. § 170(h) (1982) appears below:

[SEC. 170(h)]

(h) QUALIFIED CONSERVATION CONTRIBUTION.—

(1) IN GENERAL.— For purposes of subsection (f)(3)(B)(iii), the term "qualified conservation contribution" means a contribution—

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) QUALIFIED REAL PROPERTY INTEREST.—For purposes of this subsection, the term "qualified real property interest" means any of the following interests in real property:

(A) the entire interest of the donor other than a qualified mineral interest,

(B) a remainder interest, and

(C) a restriction (granted in perpetuity) on the use which may be made of the real property.

(3) QUALIFIED ORGANIZATION.—For purposes of paragraph (1), the term "qualified organization" means an organization which—

(A) is described in clause (v) or (vi) of subsection (b)(1)(A), or

(B) is described in section 501(c)(3) and—

(i) meets the requirements of section 509(a)(2), or

(ii) meets the requirements of section 509(a)(3), and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) CONSERVATION PURPOSES DEFINED.

(A) IN GENERAL.—For purposes of this subsection, the term "conservation purpose" means—

(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,

(ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem.

must now fit within the new concept of a "qualified conservation contribution,"[153] a concept which replaces the former deduction allowed for "a lease on, option to purchase, or easement with respect to real property granted exclusively for conservation purposes."[154]

C. The 1980 Amendments to Section 170(f)(3) (P.L. 96-541)

Under the 1980 Economic Recovery Tax Act, "qualified conservation contribution" is defined in section 170(h)(1) and consists of three elements. The contribution must be: (1) a qualified real property interest;[155] (2) made to a qualified organization;[156] and (3) granted exclusively for conservation purposes.[157]

(iii) the preservation of open space (including farmland and forest land) where such preservation is—

(I) for the scenic enjoyment of the general public, or

(II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,

and will yield a significant public benefit, or

(iv) the preservation of an historically important land area or a certified historic structure.

(B) CERTIFIED HISTORIC STRUCTURE.—For purposes of subparagraph (A)(iv), the term "certified historic structure" means any building, structure, or land area which—

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 191(d)(2)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.

(5) EXCLUSIVELY FOR CONSERVATION PURPOSES.—For purposes of this subsection—

(A) CONSERVATION PURPOSE MUST BE PROTECTED.—A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) NO SURFACE MINING PERMITTED.—In the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(6) QUALIFIED MINERAL INTEREST.—For purposes of this subsection, the term "qualified mineral interest" means—

(A) subsurface oil, gas or other minerals, and

(B) the right to access to such minerals.

153. The fate of the "undivided interest" exception is not clear on the face of the statute. Although it is specifically retained, Committee reports indicate that it may no longer be relied on for donations of a conservation easement in gross. *See* S. REP. NO. 96-1007, 96th Cong., 2d Sess. 11 (1980).

154. I.R.C. § 170(f)(3)(B) (1976).

155. I.R.C. § 170(h)(1)(A) (1982).

156. I.R.C. § 170(h)(1)(B) (1982).

157. I.R.C. § 170(h)(1)(C) (1982).

The first element of the definition of "qualified conservation contribution" concerns the nature of the property interest donated. A qualified real property interest is defined in section 170(h)(2) as: (1) the entire interest of the donor other than a qualified mineral interest,[158] (2) a remainder interest,[159] or (3) a restriction (granted in perpetuity) on the use which may be made of the real property.[160]

The first category—the entire interest of the donor other than a qualified mineral interest—is a new type of partial interest that is eligible for a charitable deduction. It applies to a contribution of the taxpayer's entire interest in real property *other than* an interest in subsurface oil, gas, or other minerals and the right of access to such minerals.[161] Congress dealt with the mineral rights problems[162] by providing that a gift with retained mineral rights will be deductible, provided that conservation purposes are protected. Thus, only subsurface mining is permitted and only to the extent that the integrity of the surface attributes are preserved.[163]

The Committee Report on Public Law 96-541 ("P.L. 96-541") indicates that a contribution will not qualify for the charitable deduction if the donor reduces his or her entire interest in the property before making the contribution.[164] For example, the taxpayer may not transfer part of his or her interest in the real property to a relative in order to retain control of more than a qualified mineral interest.

The second category of qualified property interests—a remainder interest[165]—does not constitute a revision of the federal tax laws. A remainder interest was a partial property interest that qualified for a charitable contribution deduction prior to the 1980 amendments.[166]

The third category under qualified property interest—a restriction (granted in perpetuity) on the use which may be made of the real property[167]—embraces conservation easements. This category does not represent a significant change, as the former section 170(f)(3)(iii) contained the language "easements with respect to real property

158. I.R.C. § 170(h)(2)(A) (1982).
159. I.R.C. § 170(h)(2)(B) (1982).
160. I.R.C. § 170(h)(2)(C) (1982).
161. *Explanation of Charitable Contributions*, FED. TAX REP. (CCH) ¶1864.014 (1981) (abstracting the Committee Report on P.L. 96-541).
162. *See supra* text and note at note 149.
163. I.R.C. § 170(h)(5)(B) (1982); I.R.C. § 170(h)(6) (1982).
164. S. REP. NO. 96-1007, 96th Cong., 2d Sess. 10 (1980), citing Treas. Reg. § 1.170A-7 (a)(2)(i) (1981).
165. I.R.C. § 170(h)(2)(B) (1982).
166. *See supra* text and note at note 141.
167. I.R.C. § 170(h)(2)(C) (1982).

granted in perpetuity." Thus, it is only the first category of the definition of a qualified real property interest which adds a new property interest—the entire interest of the donor other than a qualified mineral interest—whose donation qualifies for a charitable deduction.

The second element of the definition of "qualified conservation contribution" is that the gift be made to a "qualified organization." Briefly, the donee organization must be either a public charity, a governmental entity, or an organization that is controlled by a public charity as a "satellite."[168]

The third element of the definition of "qualified conservation contribution" is that the contribution must be made "exclusively for conservation purposes." The definition of "conservation purposes" was also revised by the addition of section 170(h)(4).[169] Under this provision, a contribution is deemed to be made for a conservation purpose and thus qualifies for the charitable deduction if it satisfies one of the three definitions of a qualified property interest set out in section 170(h)(2), discussed above,[170] and is made for any of the following four purposes: (1) the preservation of land areas for outdoor recreation by, or the education of, the general public; (2) the protection of relatively natural habitat of fish, wildlife, or plants, or similar ecosystems; (3) the preservation of open space (including farmland and forest land) where such preservation is (a) for the scenic enjoyment of the general public, or (b) made pursuant to a clearly delineated Federal, State or local government conservation policy that will yield a significant public benefit; and (4) the preservation of an historically important or certified structure.[171]

In general the categories coincide with the bulk of conservation purposes. Category (1) above contemplates public access for recreation or education of the public. According to the Committee Report on P.L. 96-541, property preserved for a water area, boating or fishing, or a nature or hiking trail for use by the general public qualifies as a conservation purpose.[172]

Category (2), an ecologically oriented category, includes the preservation of areas where fish, wildlife, or plants exist in a

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168. I.R.C. § 509(a)(3) (1982).

169. I.R.C. § 170(h)(4) was added by P.L. 96-541.

170. *See supra* text and note at note 155-157.

171. I.R.C. §§ 170(h)(4)(A) (i)-(v) (1982).

172. *Explanation of Charitable Contributions,* FED. TAX REP. (CCH) ¶1864.014 (1981) (abstracting the Committee Report on P.L. 96-541).

relatively natural state. This includes areas which may be somewhat altered by human activities.[173]

The third category is, perhaps, the most controversial in that it is the first statutory recognition that preservation of farm and forest land may be a legitimate charitable purpose.[174] Significantly, the Internal Revenue Service does not recognize as exempt an organization that has its principal purpose the protection of open space or agricultural land.[175] In section 170, however, Congress has, at least implicitly, said that within the realm of charitable donation, there is a place for open space preservation. The requirement of scenic enjoyment by the public is met by visual, as opposed to physical, access to the property,[176] and this requirement cannot be satisfied if the development of the property would not interfere with a scenic view observable from a park, nature preserve, road, waterway, trail, or historic structure or land area which is open to or used by the general public.[177]

Furthermore, the gift of an open space easement that lacks any significant scenic value may nevertheless be deemed to satisfy a conservation purpose under the third category if the gift is made pursuant to a clearly delineated governmental policy, which produces a "significant public benefit."[178] Regarding the governmental policy, it is not the level of government implementing the policy which is of concern; rather it is the means by which the governmental policy is effectuated or declared.[179] The legislative history serves as some guidance. "Governmental conservation policy" is intended to mean only a "significant commitment" by the government with respect to a particular conservation project; more than a broad declaration by a single official but less than a certification program identifying particular parcels.[180] The program must involve a substantial commitment on the part of the government and the preservation of open space must yield a significant public benefit.[181] Category three thus represents a major expansion of permissible conservation purposes.

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173. This definition of conservation purposes may raise some interesting questions as to land that is not ecologically significant itself but that acts as a buffer to land which is.

174. Hutton, *supra* note 148, at 51.

175. *Id.*

176. I.R.C. § 170(h)(4)(iii)(I) (1982).

177. *Explanation of Charitable Contributions,* FED. TAX REP. (CCH) ¶1864.014 (1981) (abstracting the Committee Report on P.L. 96-541).

178. I.R.C. § 170(h)(4)(A) (iii) (1982).

179. S. REP. No. 96-1007, 96th Cong., 2d Sess. 11 (1980).

180. *Id.*

181. The Senate Finance Committee suggested that the following four factors be con-

Under the fourth category defining "conservation purposes" is the preservation of an historically important or certified historic structure. According to the Committee Report on P.L. 96-541, this may include independently significant land areas and historic sites, as well as land areas which contribute to the cultural importance of historic structures or districts.[182]

A final significant feature of the 1980 amendments to section 170(f)(3) is that the requirement of perpetual protection is incorporated into the definition of "exclusively for conservation purposes."[183] Section 170(h)(5) requires that contributions of property must be exclusively for conservation purposes.[184] It adds, however, that this requirement is met only if the conservation purpose is protected in perpetuity.[185] The Committee Report explains that "protected in perpetuity" means that the contribution must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of the retained interest which are inconsistent with the conservation purposes.[186] Furthermore, "in perpetuity" does not necessarily mean forever; rather, it is a concept in property law which actually means that an interest is

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sidered in determining whether a significant public benefit is conferred; 1) the uniqueness of the property, 2) the intensity of past, present and projected land development in the area, 3) the consistency of the proposed open space use with the public conservation programs, and 4) the opportunity for the general public to enjoy the use of the property or to appreciate its scenic value. The guidelines are intended to exclude ordinary tracts of land the conservation or preservation of which, absent the presence of other factors such as potential advancement of a public water resource management program, would not yield significant public benefit. What the guidelines do demonstrate is, perhaps, the difficulty of a mechanistic approach to environmental problems. *See* S. REP. No. 96-1007, 96th Cong., 2d Sess. 12 (1980).

182. The Secretary of Interior promulgates the standards for evaluating structures within registered historic districts. 36 C.F.R. §§ 67.3, 67.4 (1982). Requests for certification of structures, also known as requests for certification of significance, must comply with the procedures specified in the Secretary of Interior's regulations. 36 C.F.R. § 67.5 (1982). Briefly stated, a structure contributing to the historical significance of the district is one which by its location, design, setting, workmanship, feeling and association adds to the district's sense of time, place and historical development 36 C.F.R. § 67.5(a) (1982). A structure built within the last 50 years is presumed ineligible absent a strong justification concerning its historical or architectural merit; it may also be eligible if the historical attributes of the district are considerably less than fifty years old. 36 C.F.R. § 67.5(c) (1982).

For detailed discussion on tax incentives for historic preservation, see Lutz, *Federal Tax Reforms Affecting Historic Preservation,* 48 UMKC L. REV. 435 (1980).

183. I.R.C. § 170(h)(5)(A) (1982).

184. I.R.C. § 170(h)(5) (1982).

185. I.R.C. § 170(h)(5)(A) (1982).

186. *Explanation of Charitable Contributions,* FED. TAX REP. (CCH) ¶1864.014 (1981) (abstracting the Committee Report on P.L. 96-541).

donated for an indefinite duration as opposed to for a term of years.[187]

To summarize, the 1980 amendments to section 170(f)(3) represent a legislative ratification of charitable gifts of conservation easements. The amendments created the "qualified conservation contribution,"[188] which includes easements whether or not state property laws would afford such recognition of the term. The amendments also expanded the range of permissible conservation purposes by including open space easements on farmland and forest land, subject to certain guidelines to ensure a public benefit.[189] Finally, the requirement of perpetual protection was incorporated into the Code's definition of "exclusively for conservation purposes."[190]

Although Congress took affirmative steps toward providing specific statutory authorization of the charitable deduction for gifts of conservation easements through these recent enactments in the Internal Revenue Code, some problems still remain. One of the more crucial problems is how to value such easements for determining how much of a charitable deduction should be taken.

D. Valuation of Donated Easements and Computation of the Charitable Deduction

The deductible amount for the granting of a conservation easement is the fair market value of the donated property interest on the date of the contribution.[191] Fair market value is defined generally as what a willing buyer would pay to a willing seller absent duress or other exigency.[192] Fair market value is often determined by looking at sales of comparable property. Since there are no comparable "sales" with which to measure the fair market value of a conservation easement, the "before-and-after" approach is used.[193] The Internal Revenue Service view is that "open space easements in perpetuity may be valued separately and distinctly" and the "differ-

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187. Tiedt, *Conservation Easements*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION, 65, 66 (1982) (papers presented at two conferences organized by the Montana Land Reliance and the Land Trust Exchange, 1981).

188. *See supra* text at notes 155-187.

189. *See supra* text at notes 174-181.

190. *See supra* text at notes 183-187.

191. Rev. Rul. 73-339, 1973-2 C.B. 68.

192. Hutton, *supra* note 148, at 35.

193. Rev. Rul. 73-339, 1973-2 C.B. 68; Rev. Rul. 74-583, 1974-2 C.B. 80; Rev. Rul. 75-358, 1975-2 C.B. 76.

ence between the fair market value of the total property before the grant of the easement and the fair market value of the property after the grant is the fair market value of the easement given up."[194]

A problem with the "before-and-after" approach to valuation arises when the owner donates an easement on less than his or her entire property interest. Whereas the portion of the land subject to the easement may decline in value, that portion of the property which is restriction-free may be enhanced by use restrictions on adjacent land. In 1976, the Internal Revenue Service addressed this problem and ruled that the fair market value of a conservation easement granted in perpetuity on a portion of the taxpayer's land is the difference between the fair market value of *the entire tract* of the land before and after the granting of the easement.[195] This ruling requires that the value of the entire parcel, including any increase in value after the granting of the easement, be subtracted from the value of the entire parcel immediately before the gift was made.[196]

To illustrate, A owns fifty acres of land and grants an easement of forty acres to a government agency or qualifying organization for conservation purposes. If the fair market value of the entire fifty acres tract was $70,000 before the donation of the conservation easement (the forty acres being worth $56,000 and the remaining ten

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194. Rev. Rul. 73-339, 1973 C.B. 68. When a conservation easement is granted to a qualified organization, the question arises as to whether the basis of the property should be reduced by some amount deemed allocable to the restriction. Thus, in the case of property having a basis of 30 and a fair market value of 90, must the 30 of basis be reduced two-thirds to 10 when a conservation restriction is conveyed which reduces the value of the property by two-thirds? In Revenue Ruling 64-205, the Internal Revenue Service ruled that the basis of the property must be reduced in this manner. (Rev. Rul. 64-205, 1964-2 C.B. 62, cited with approval in Rev. Rul. 73-339,1973-2 C.B. 68). This seems to be the correct result if the easement is recognized as a separate property susceptible of valuation.

The value of the parcel of land before a restriction is imposed is generally said to be what the property will bring if sold for permissible development. Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes,* 29 TAX LAW 69, 86. Thus, the owner of parcel A, an undeveloped piece of shore-front property, is advised that the parcel will sell as a house lot for $20,000. If the same parcel is restricted against any development, it may sell for $2,000. The value of the conservation easement is thus $18,000.

The gift of the easement may enhance the value of contiguous parcels, but such enhancement is generally not recognized as a gift by the owner to his neighbors—the owner and neighbors being strangers and no gift having been intended. (The result would be less clear if one of the neighbors who benefitted from the easement was a relative of the owner.) Thus, parcel B which is separated by parcel A from the water may sell for $15,000 without the assurance of an unobstructed view, but will sell for $20,000 once parcel A is restricted against development if it is reasonably clear that the restriction will be enforced. In effect, a gift of $5,000 is made for the owner of parcel B's benefit and not taxed.

195. Rev. Rul. 76-376, 1976-2 C.B. 53.

196. *Id.*

acres being worth $14,000), and after the grant of the easement the forty acres subject to it were worth $40,000 but the ten acres unaffected by the easement increased in value to $24,000, A's charitable deduction would be $6,000, not $16,000. The ruling requires subtraction of the value of A's entire parcel after the granting of the easement ($64,000) from the value of the entire parcel immediately before the gift was made ($70,000). The focus is not on the $16,000 decline in value of the property subject to the easement alone. This approach is required, perhaps, to give a more accurate picture as to exactly what the donor has foregone in making the charitable contribution. If the granting of the easement increases the value of the unaffected portion of the property, the Internal Revenue Service requires that the appreciation should correspondingly be subtracted from the amount the donor is deemed to have given up.

The Internal Revenue Service has expressed concern that the valuation of conservation easements involves certain practical and conceptual difficulties which could lead to "aggressive and abusive valuations."[197] The Service has pointed out that as a practical matter, an appraiser seeking to value property encumbered by an easement must indulge in a great amount of speculation due to the lack of market guidelines.[198] This is especially true in areas where land is not widely subject to easements.[199]

There are, however, external factors which tend to reduce speculation and keep aggressive valuation in check. A conservation easement essentially represents development potential in that it involves a relinquishment by the donor of his or her rights to develop the land subject to the easement.[200] Development potential is a concept largely defined by reference to external factors affecting the "highest and best use"[201] of property. These factors include zoning, architectural controls, the ability of the property to produce income, and the character of the neighborhood.[202] The Committee Report on P.L. 96-541 suggests that where the "before-and-after" method of valuation is

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197. *Hearings on H.R. 7318 Before Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 20 (June 26, 1980) (statement of Daniel I. Halperin, Dpty. Ass't Sec'y of Treas.).

198. *Id.* at 21.

199. *Id.*

200. Hambrick, *supra* note 34, at 352.

201. *Id.* "Highest and best use" is the use of land which will bring the greatest economic return over a given time.

202. Hambrick, *supra* note 34, at 352, citing NATIONAL TRUST FOR HISTORIC PRESERVATION, FACTORS AFFECTING VALUATION OF HISTORIC PROPERTIES (1976).

used in determining the value of an easement, some factors to consider in valuing the property before the contribution are zoning and conservation or historic preservation laws that would restrict development of the property absent the easement.[203] Reference to these external factors would tend to reduce speculation in the valuation of conservation easements. Thus, the fears of the Internal Revenue Service may be unwarranted.

In the course of testimony before the House Ways and Means Subcommittee on Select Revenue Measures, the Internal Revenue Service not only expressed its fears regarding abuses resulting from the speculative nature of valuing easements; it also perceived the potential problem of creating an incentive to abuse charitable gifts of easements where the landowner's enjoyment of the land is essentially unaffected by the gift.[204] In other words, the taxpayer might receive a substantial tax benefit for refraining from doing something that he or she never intended to do. The Internal Revenue Service took the position that the charitable contribution deduction should not be allowed if the landowner's present enjoyment of the property was unimpaired by the granting of the conservation easement.[205]

There is, however, a strong argument that property value is *never* unimpaired when a conservation easement is given. When land is held in fee simple, the owner holds a variety of rights with respect to the property, one of which is the right to develop the land.[206] Regardless of whether the owner is currently engaged in development, an important and valuable incident of ownership is relinquished when the owner covenants not to develop the land.[207] Where the present use of land is residential, and zoning or other factors would permit commercial use, the easement grantor who covenants not to engage in commercial development gives up a substantial element of real property value—the present worth of future benefits.[208] Where the

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203. S. REP. No. 96-1007, 96th Cong., 2d Sess. 14-15 (1980).

204. *Hearings on H.R. 7318 Before Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 20 (June 26, 1980) (statement of Daniel I. Halperin, Dpty. Ass't Sec'y of Treas.).

205. In support of this proposition, the I.R.S. cited the Revenue Act of 1964, which added section 170(a)(3), which denies income tax deductions for gifts of certain future interests in tangible personal property, such as the gift of a painting which continued to hang in the taxpayer's home and would not be available for public viewing until after the taxpayer's death. *See Hearings on H.R. 4611 Before Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 7 (Nov. 9, 1979) (statement of Daniel I. Halperin, Dpty. Ass't Sec'y. of Treas.).

206. Hambrick, *supra* note 34, at 352.

207. *Id.* at 353.

208. *Id.*

owner's land is already being put to its highest use at the time the easement is granted, or where other factors such as location within an historic district inhibit development, the value of the easement will be correspondingly lower. Whether the owner actually intends to take advantage of development potential should be irrelevant; development rights are still part of the bundle of rights which constitute the fee.[209] Technically speaking, such rights are not a future interest. Rather, they are a significant element of present value.[210]

The Committee Report on P.L. 96-541, however, suggests a safeguard against a landowner receiving a tax benefit for refraining from what he or she never intended to do. The Report suggests that in using the "before-and-after" approach to valuation of conservation easements, the owner's intention regarding development should be a factor in determining the value of the property before the granting of the easement.[211] The Report includes among five factors, that the fair market value of the property before the contribution of the easement should, in part, be based on the current use of the property and on the likelihood that the property would be developed in the absence of the restriction.[212] Thus, although the intention of the owner need not technically be considered because development rights—exercised or not—constitute value relinquished by the owner in granting a conservation easement, the Committee Report appears to address the fear expressed by the Internal Revenue Service by indicating that the owner's intention to develop the property should ultimately affect the value of the conservation easement which in turn affects the amount of charitable deduction allowed.[213]

Since markets in easements and similar restrictions are not well established, it is difficult to determine the fair market value of conservation easements. As the use of conservation easements increases, however, the amounts paid for such interests could eventually be used as a basis for determining fair market value.

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209. *See* Randle, *The National Reserve System and Transferable Development Rights: Is the New Jersey Pinelands Plan an Unconstitutional "Taking"?*, B.C. ENVT'L AFF. L. REV. 183, 201 (1982).

210. Hambrick, *supra* note 34, at 353.

211. *Explanation of Charitable Contributions*, FED. TAX REP. (CCH) ¶1864.014 (1981) (abstracting the Committee Report on P.L. 96-541).

212. *Id.* A fair reading of the five factors given in the Report suggests that this "likelihood" refers to the intention of the owner, and not to external factors affecting the likelihood of development. Indeed, the second factor given in the Report is "the value of the property before contribution should take into account zoning, conservation, or historic preservation law that would restrict the development of the property where applicable."

213. *Id.*

In any event, the valuation problem, along with any other problems associated with the present legal status of conservation easements,[214] will have to be resolved. That there are fewer restrictions on easements compared to other less-than-fee interests, coupled with the tax benefit available for the donation of a conservation easement, should render it increasingly popular.

The deduction allowed for gifts of conservation easements is doubtless an incentive for some taxpayers to take steps that will further land conservation and preservation goals. The tax deduction is certainly a step toward involving the private sector in conserving

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214. Apart from the various problems involved in determining the value of a conservation easement, another difficulty is raised by the requirement of § 170 that the charitable deduction may be taken only where the conservation easement is granted in perpetuity. (I.R.C. § 170(h)(2)(C), (5)(A) (1982)). As mentioned previously, "perpetuity" does not necessarily mean forever; rather it is a legal term which requires that the easement be donated for an indefinite duration, as opposed to for a term of years. This requirement of perpetual protection may, in some states, be impossible to satisfy due to the states' recording statutes.

In an effort to curtail the period of search of the record title to land and to eliminate obsolete use restrictions on property, a majority of states have enacted legislation which essentially bars actions to enforce interests in real estate, or simply terminates such interests (including easements) unless the documents containing the restrictions are re-recorded at periodic intervals. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 47-33b to 47-33l (1978); WIS. STAT. § 893.33(5) (Supp. 1982); MASS. GEN. LAWS ANN. ch. 184 § 26 (West 1977). Typically, such statutes require use restrictions to be re-recorded by the holder of the easement, irrespective of a perpetual duration expressed in the instrument creating the restriction. Brown and VanDorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69, 80 (1975). In some instances the statute may make an exception for easements for public or charitable purposes or for conveyances to governmental units. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 184 § 23 (West 1980); N.Y. GEN. MUN. LAW § 247 (1979); WIS. STAT. § 893.33(6m) (Supp. 1982). Where this is not the case, however, easements which are subject to the re-recording requirement are simply incapable of being made perpetual in the full and literal legal sense—that is, of indefinite duration—thus presenting an obstacle to the taxpayer who wishes to take advantage of the charitable deduction by granting a conservation easement.

Section 1.170A-7(a)(3) of the treasury regulations may provide some relief from this problem. That section provides that:

> [a] deduction shall not be disallowed under section 170(f)(3)(A) and this section merely because the interest which passes to, or is vested in, the charity may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible.

I.R.C. § 1.170A-7(a)(3) (1981). Though the regulation does not specifically address the problem of state recording statutes rendering a conservation easement incapable of being granted in perpetuity, presumably the possibility that the "qualified organization" of § 170 will neglect to re-record the easement is a remote one. Nevertheless, a tax advisor might still hesitate to express an opinion that the deduction for a conservation easement thus subject to termination will be allowed. Though a taxpayer may find some support from the language of Regulation § 1.170A-7(a)(3), it is highly attenuated support, and a more satisfactory resolution to this conflict between the code requirement of perpetuity and state statutes that require re-recording of easements might be best achieved through a Code amendment.

land. There may, however, be more effective ways to accomplish conservation and preservation goals. The next section of the article examines a couple of the alternatives.

IV. Alternatives to the Use of a Charitable Deduction for Conservation Purposes

By providing for a charitable deduction for gifts of conservation easements, Congress appears to have decided that (1) land conservation and historic preservation are goals of overriding importance to society, and (2) such goals can be achieved most effectively through the tax system.[215] Land conservation and historic preservation may be well accepted national goals; it is not quite so clear, however, whether these societal objectives are best achieved by providing a charitable deduction for private gifts of conservation easements. A comparison of the charitable deduction with the use of the government's power of eminent domain and the use of comprehensive tax credit may help determine its relative effectiveness.

Certain deductions provided for in the Internal Revenue Code are required by the concept of net income. That is, they are essential to defining that portion of the taxpayer's income which is properly taxable.[216] Other deductions are classified as tax expenditures[217] because they are unrelated to the definition of income. Such deductions are included in the Code to accomplish two general objectives.[218] The first of these objectives is to provide relief for personal hardship.[219] The second general objective of tax expenditures is to promote desired activity.[220] The deduction of gifts of conservation easements falls under this second objective in that it was designed to encourage such charitable contributions.[221]

215. *See supra* note 100.

216. The most significant of these deductions are provided for in I.R.C. § 162(a) (1982). This section allows a deduction for qualifying trade or business expenses.

217. The tax expenditure concept embodies two elements: 1) the imputed tax payment that would have been made in the absence of special provisions and 2) the simultaneous expenditure of that payment as a direct grant to the person benefitted by the special provision. The deduction in question is thus seen as a combined process of assumed payment by the taxpayer of the proper tax and an appropriation by the government of an expenditure made to the taxpayer in the amount of the reduction in his or her actual tax payment from the assumed payment, that is, the tax reduction provided by the special provision. Surrey, Warren, McDaniel & Ault, Federal Income Taxation, 240-252 (1972) (hereinafter cited as Surrey).

218. *Id.* at 246-47.

219. *Id.* Examples of expenditures designed to provide such relief are the extra personal exemption for the blind (I.R.C. § 151(d) (1982)), the extra personal exemption for the aged (I.R.C. § 151(c) (1982)) and the deduction of extraordinary medical expenses (I.R.C. § 213 (1982)).

220. Surrey, *supra* note 217, at 246-47.

221. Teitell & Johnson, *supra* note 45, at 1.

A. Eminent Domain

An alternative to the use of a tax incentive to achieve land conservation is for the government to exercise its power of eminent domain. Eminent domain is the power of government at all levels to take private land, or any lesser interest in it (including easements), for public use.[222] The legislature may authorize appropriation of land for such things as opening roads, extending highways, or establishing parks.[223] The government's power of eminent domain is limited by the Fifth Amendment of the U.S. Constitution which provides: "[N]or shall private property be taken for public use without just compensation."[224]

Measuring "just compensation" is probably one of the most frequently litigated issues in eminent domain proceedings.[225] Courts have generally held that the government must compensate the private property owner by paying the fair market value of the property or property interest at the time of the taking.[226] The fair market value, in turn, is based upon the highest and best use that may be made of the property under the existing zoning regulations.[227] Thus, if a vacant parcel is zoned for subdivision, the government must pay the value that the land would have to a subdivider, even though the owner may have never contemplated subdividing the property.[228]

As mentioned previously,[229] there are clear limits as to how much land a government can afford to purchase. In *Penn. Central Transportation Co. v. New York City,*[230] the United States Supreme Court intimated that the increasing cost of land tended to render unfeasible the whole system of government acquisition of property.[231] The Court, in suggesting that excessive public ownership of historic property in an urban setting was unwise, stated that "[p]ublic ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public

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222. Housing Authority of Cherokee Nation of Oklahoma v. Langley, 555 P. 2d 1025, 1028 (Okla. 1976).

223. LAND USE CONTROLS 538 (J. Beuscher ed. 3rd. ed. 1964).

224. U.S. CONST. amend. V.

225. Sargstock and McAuliffe, *What is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings,* 44 J. URBAN L. 185 (1967).

226. *Id.* at 186.

227. *Id.* at 187-91.

228. *Id.*

229. *See supra* text at note 2.

230. 438 U.S. 104 (1978).

231. *Id.* at 109, n.6.

buildings as museums and similar facilities, rather than as economically productive features of the urban scene."[232]

While it may be true that the rising cost of land makes it too expensive for the government to acquire private property for public use through the exercise of eminent domain, a tax deduction for gifts of conservation easements also requires that the government absorb, albeit indirectly, some of the costs. For example, land values increase the value of a conservation easement. This, in turn, allows the taxpayer to take a correspondingly greater deduction. Accordingly, the amount of tax revenue decreases.

It is, however, less expensive to control land use by giving charitable deductions than by acquiring the land through the exercise of eminent domain. Moreover, there is a more convincing argument in support of the use of the charitable deduction for conservation easements to encourage land conservation. Qualifying charitable organizations are likely to have far more resources, time, and skills than the government.[233] Most are better able to establish and administer specific programs that meet the diverse need of donors who grant various types of conservation easements. Many of these organizations are staffed by people who have a greater interest than the government in ensuring that conservation easements are enforced.[234] Additionally, there is an element of choice inherent in a tax incentive, which is psychologically more appealing to potential easement donors than direct appropriation by the government.[235]

B. The Tax Credit

In evaluating the effectiveness of a charitable deduction, it is important to consider that many taxpayers may not have enough income to take advantage of the charitable deduction. Critics commonly point out that tax incentives in the form of a deduction are worth

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232. *Id.*

233. Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVT'L AFF. L. REV. 513, 517 (1981).

234. The recipient of the easement has the right to enforce compliance with the terms of the easement. Enforcement problems are more likely to develop with future owners of the burdened land than with the donor of the easement. It is interesting to note that many land trusts require the donor of an easement to make a cash donation to help establish a stewardship or monitoring fund. Because the donee organization is providing the donor with a tax benefit, that organization may be in a strong position to make such a request. *See* Tiedt, *supra* note 187, at 67.

235. SURREY, *supra* note 217, at 260-61. On the other hand, it can be argued that this element of choice has a serious drawback in that one of the choices available to the taxpayer is to simply *not* make the contribution.

more to the higher bracket taxpayer.[236] The upside-down effect of deductions means the government effectively pays a larger subsidy to higher bracket taxpayers for their charitable contributions.[237] The deduction is meaningless to a taxpayer whose income is so low that he or she may fall outside the tax system.[238] If one considers that there are many landowners who are land-rich, yet cash-poor,[239] it is easy to see how the use of a deduction as an incentive for donating conservation easements may not be the most effective method of encouraging charitable contributions of interest in land. The charitable deduction "misses" a class of taxpayers who have land to donate, but not enough income to take advantage of the deduction.

An alternative tax incentive may solve this problem. Instead of a charitable deduction, the government could use a comprehensive tax credit against income, gift,[240] and estate[241] taxation equal to the value of the conservation easement donated.[242] A tax credit is an amount which is subtracted from the computed tax itself, as opposed to a deduction which is subtracted from gross income or adjusted gross income to arrive at taxable income. The amount of the credit, therefore, has a dollar-for-dollar value to the taxpayer,[243] and the upside-down effect of the deduction[244] is avoided.

The credit could be used against income tax liability, or against gift taxation, for example, upon transfer of a farm to a son or daughter of the donor during the donor's lifetime. Any remaining amount of credit could be carried over and applied against estate tax liability upon the death of the donor if necessary for full use of the credit.[245]

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236. This is because in calculating the amount of the deduction to be taken, the value of the conservation easement is multiplied by the taxpayer's marginal rate. Therefore, if the taxpayer is in the 50% tax bracket, the deduction will be worth more to him or her than the deduction taken by the 20% bracket taxpayer.

237. SURREY, *supra* note 217, at 249-52.

238. *Id.* at 261-69.

239. Tiedt, *supra* note 187.

240. The gift tax is a tax imposed on the transfer of property by gift. Such tax is imposed upon the donor of a gift and is based on the fair market value of the property on the date of the gift. I.R.C. §§ 2501-2522 (1980).

241. An estate tax is a tax imposed on the right to transfer property by death. An estate tax is levied on the decedent's estate and not on the heirs receiving the property. The tax is based on the value of the whole estate less certain deductions. I.R.C. §§ 2001-2051 (1980).

242. Thompson, *Protecting Farmland and Farming Enterprise: Federal Tax Incentives*, in PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION 96 (1982) (papers presented at two conferences organized by the Montana Land Reliance and the Land Trust Exchange, 1981).

243. CHIRELSTEIN, FEDERAL INCOME TAXATION 2 (2d. ed. 1982).

244. *See supra* note 236.

245. Thompson, *supra* note 242, at 97.

The use of a credit would extend the tax incentive for easement donations to the average or low income landowner to whom tax deductions are generally not attractive.

To summarize, because of the prohibitive cost of eminent domain, the use of a charitable deduction to encourage land conservation is probably a better alternative to control land use. Additionally, organizations smaller than the government have more resources, time, and skill to maintain the donated property and to ensure that the easements are enforced. However, the use of a comprehensive tax credit either in addition to or instead of the charitable deduction would be more equitable. Higher bracket taxpayers would not get a larger subsidy from the government for their contributions. A comprehensive tax credit would also be attractive to those taxpayers who have land to donate, but whose incomes are not high enough to make a deduction advantageous.

V. Conclusion

In considering the common law restrictions on the transferability and enforceability of various less-than-fee interests where the benefit is in gross, the easement appears to be the most restriction-free. Consequently, easements are the most viable alternative to acquiring land in fee simple where a private or governmental organization wishes to effectuate land use restrictions for conservation purposes.

While the easement in gross is subject to some problems of legal interpretation and assignability, modern courts appear to be more willing to allow assignment and transfer of the benefit of an easement in gross. There also appears to be a growing legislative acceptance of the use of the easement in gross for conservation and preservation purposes. Furthermore, the underlying fear of hidden restrictions on land, which gave rise to the various common law obstacles to utilizing less-than-fee interests, may be assigned by incorporating mandatory procedures for review and special approval of conservation easements into recording systems. Such procedures, now employed by a few states, would help to assure that conservation easements will not go unnoticed or become lost to successive parties as land is transferred. Thus, though not completely free from obstacles, the easement is the most practical less-than-fee interest to use for conservation purposes.

The use of conservation easements has been further enhanced through specific endorsement by the federal tax system which provides for a charitable deduction for the contribution of this less-than-fee interest. Although the Economic Recovery Tax Act has the ef-

fect of decreasing the amount of government subsidy that results from a charitable contribution, the 1980 amendments to section 170(f)(3) are effectively a legislative ratification of charitable gifts of conservation easements. The amendments created the "qualified conservation contribution," expanded the range of permissible conservation purposes, and specifically codified the requirement of perpetual protection by incorporating it into the Code's definition of "exclusively for conservation purposes."

The use of a charitable deduction is a more practical and effective method of controlling land use than is the government's exercise of its power of eminent domain. Granting a charitable deduction is less costly to the government, and the smaller donee organizations have far more resources, time, skill, and interest in maintaining the donated property and ensuring that the easements are enforced. A comprehensive tax credit, however, which could be applied against income, gift and estate taxes, would extend the tax incentive for conservation easement donations to those people who are land rich, yet cash poor and therefore unable to take advantage of an income tax deduction. Thus, the government took a step in the right direction when it decided to seek private involvement through the tax system in land conservation. But it may not have chosen the most effective or equitable tax incentive when it chose to provide for a tax deduction as opposed to a tax credit.