A SIMPLIFIED GUIDE
to
THE TAX BENEFITS
of
DONATING A CONSERVATION EASEMENT

By C. Timothy Lindstrom, Esq.

The Jackson Hole Land Trust
P.O. Box 2897
555 East Broadway, Suite 228
Jackson, WY 83001
(307) 733-4707
tim@jhlandtrust.org

Table of Contents

Table of Contents (continued)

Table of Contents (continued)

Table of Contents (continued)

A SIMPLIFIED GUIDE TO THE TAX BENEFITS OF DONATING A CONSERVATION EASEMENT

October, 2001

By C. Timothy Lindstrom, Esq.

Summary

There are four types of tax benefits available to easement donors and their families, all of which can be enjoyed in combination.

Income Tax Deduction: A gift of a permanent conservation easement to a qualified organization or agency constitutes a charitable contribution and the value of the easement (generally, the difference in the value of the property subject to the easement before and after the easement is put in place) may be deducted from the donor's income for purposes of calculating state and federal income tax.

Reduction in Taxable Estate: The restrictions imposed by a conservation easement reduce the value of real property in a decedent's estate. This reduction in value results in estate tax savings.

Exclusion from Taxable Estate: Section 2031(c) of the Internal Revenue Code allows the executor of a decedent's estate to exclude 40% of the value of land subject to a qualified conservation easement, taking into account the reduction in value resulting from the conservation easement. The maximum amount that may be excluded under this provision is $500,000 per estate.

Reduced Real Estate Tax Assessment: Under the provisions of many state and local laws land subject to a conservation easement is entitled to a lower real estate tax assessment to reflect the restrictions of the easement. This can result in substantial local real estate tax savings.

WHAT IS A CONSERVATION EASEMENT?

Conservation easements are voluntary restrictions on the use of land negotiated by a landowner and a private charitable conservation organization or government agency chosen by the landowner to "hold" (enforce) the restrictions.

Conservation easements do not generally provide third parties or the public with the right to access or use the land subject to the conservation easement. Unless the purpose of the easement is the conservation of some feature that is meaningless without public access, no public access is required.

The terms of conservation easements are entirely up to the landowner and the prospective easement holder to negotiate. However, the Internal Revenue Code sets standards that must be met if the donation of an easement is to be deductible.

The protection of farm land, ranch land, timber land, and open space (particularly where such land is under residential or commercial development pressure and where local planning identifies such activities as valuable to the community) are typical objectives of conservation easements. In addition, the protection of wetlands, floodplains, important wildlife habitat, scenic views, and historic land areas and structures are also appropriate uses of easements.

Easements which are permanent, donated by the landowner (or subject to a qualified bargain sale), and which conserve for the public benefit one or more of the foregoing values typically qualify for the tax benefits offered by the Internal Revenue Code. The amount of the deduction must be determined by an independent appraisal of the value of the easement donated.

In addition, easements normally permit the continuation of the rural uses being enjoyed by the landowner at the time of the donation of the easement. Land subject to conservation easement may be freely sold, donated, passed on to heirs and transferred in every normal fashion, so long as it remains subject to the restrictions of the easement. It is also possible to retain some rights to limited residential development (e.g. one unit per 100 acres), so long as the retention of such rights does not conflict with the conservation purposes of the easement.

To qualify for federal and state tax benefits easements must be held either by a federal, state, or local government agency, or by a private charitable organization that has the capacity to enforce the terms of the easement. Such an organization need not be an environmental organization. A landowners' association could qualify, so long as it is dedicated to the conservation of the features identified in the easement. For example, an association of ranch owners established for the purpose of protecting ranch land and qualifying as a charitable organization under section 501(c)(3) of the Internal Revenue Code would be qualified to hold easements on ranch land if it has the capacity to enforce the easement.

REQUIREMENTS FOR TAX BENEFITS

Section (§) 170(h) of the Internal Revenue Code (IRC) requires that a conservation easement meet the definition of a "qualified conservation contribution" to be eligible for a federal income tax deduction. The Treasury Regulations (Regs.) have elaborate provisions controlling eligibility. The new provisions of IRC §2031(c) require compliance with §170(h). **A detailed summary of Section 170(h) is contained in the Appendix.** An excellent, detailed discussion of the requirements of §170(h) can also be found in *The Federal Tax Law of Conservation Easements*, by Stephen J. Small, published by the Land Trust Alliance.

1. The easement must provide a "qualified conservation contribution."

"A qualified conservation contribution is the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes." Regs. §1.170A-14(a).

2. The easement must be in perpetuity.

To be eligible for an income tax deduction the conservation purpose advanced by the easement must be protected in perpetuity. Regs. §1.170A-14(a).

3. Existing mortgages must be subordinated to the easement.

Existing mortgages must be subordinated to the conservation easement in order for the easement to be deductible. Regs. §1.170A-14(g)(2). Although this may appear a difficult requirement to meet, in practice it rarely poses a problem.

4. The easement must convey a "qualified real property interest."

A "qualified real property interest" includes restrictions (granted in perpetuity) on the use which may be made of the real property. IRC §170(h)(2)(c).

A "perpetual conservation restriction" is "a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g. a restrictive covenant or equitable servitude)." Regs. §1.170A-14(b)(2).

"Any rights retained by the donation of a perpetual conservation restriction must conform to the requirements of this section." Regs. § 1.170A-14(h)(2).

5. The easement must be conveyed to a qualified organization.

"To be considered an eligible donee under this section, an organization must be a qualified organization, have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions." Regs. §1.170A-14(c).

Qualified organizations include local, state, and federal governmental agencies; and charitable organizations qualified under IRC §501(c)(3).

Any subsequent transfer by a donee organization must be restricted by the easement document to qualified organizations that agree to carry out the conservation purposes of the donation.

The Regs. do not prevent a trade organization from establishing a qualified organization to hold easements. For example, in Colorado an association of cattlemen established a land trust to hold easements on ranch land. In other words, easements may be held by organizations that are not purely environmental.

6. The easement must advance a qualified conservation purpose.

Qualified conservation purposes include the preservation of land areas for outdoor recreation by or the education of the general public; the protection of a relatively natural habitat for fish, wildlife, or plants; the preservation of certain open space (including farmland and forest land); or the preservation of an historically important land area or certified historic structure. Regs. §1.170A-14(d)(1).

7. Easements protecting "open space" qualify if they fit one of two categories.

There are two kinds of open space easements: those pursuant to a governmental conservation policy and those protecting scenic values. The Regs. contain the following provisions governing easements preserving open space:

> (4) *Preservation of open space* --(i) *In general.* The donation of a qualified real property interest to preserve open space (including farmland and forest land) will meet the conservation purposes test of this section if such preservation is—
>
> (A) Pursuant to a clearly delineated federal, state, or local governmental conservation policy and will yield a significant public benefit, or

(B) For the scenic enjoyment of the general public and will yield a significant public benefit.

Regs. §1.170A-14(d)(4)(i).

"Governmental conservation policies" include local agricultural zoning or other specific land use designations recognizing the conservation value of the land. To the extent that there are specific public expenditures associated with these designations, e.g. a real estate assessment program providing tax relief to farms or open space, the policy is stronger and more likely to support the deductibility of the easement. See Regs. §1.170A-14(d)(4)(iii).

In order to qualify as a "scenic easement" there must be visual access (not necessarily physical access) by the public to those features of the land considered scenic. See Regs. §1.170A-14(d)(4)(ii).

8. Uses inconsistent with conservation values must be prohibited.

Generally, a deduction will be denied if the donor has retained rights to the use of land which would permit the destruction of significant conservation values, even if those values are not specifically protected by the easement. For example, an easement the purpose of which is to support a government flood control program but allows unrestricted use of pesticides that could destroy a naturally occurring ecosystem would not be deductible . Regs. §1.170A-14(e)(2).

A deduction will be denied for open space easements that retain rights to use land that would interfere with the essential scenic qualities of the land or with the governmental policy to be furthered by the easement. See Regs. §1.170A-14(d)(4)(v).

9. Public access is not required for most "open space" easements.

Easements to preserve open space pursuant to a governmental conservation policy normally are not required to provide public access in order to be deductible. Regs. §1.170A-14(d)(4)(iii)(C).

Only when the purpose of the easement requires public access for there to be a public benefit is access required. Examples of easements requiring public access would be scenic easements (scenic qualities must be publicly visible, Regs. §1.170A-14(d)(4)(ii)(B)) or historic easements (public must have at least visual access to the historic area or structure, Regs. §1.170A-14(d)(5)(iv)).

10. No deduction will be allowed where surface mining rights are retained.

An easement which reserves the right to recover a "qualified mineral interest" by any surface mining method is not deductible. Regs. §1.170A-14(g)(4)(i).

An exception exists where mineral interests have been severed from the fee and are not owned by the grantor of the easement *and* the probability of surface mining such minerals is "so remote as to be negligible." Regs §1.170A-14(g)(4)(ii). Typically a letter from a qualified geologist that the probability of surface mining is so remote as to be negligible will satisfy this requirement.

11. No deduction will be allowed where mining rights of any kind inconsistent with the conservation purposes of the easement are retained.

No deduction will be allowed for any easement reserving the right to recover any qualified mineral interest by any method that is inconsistent with the conservation purposes of the easement. Regs. §1.170A-14(g)(4).

A "qualified mineral interest" is the retention by "any person" of an interest in subsurface oil, gas, or other minerals and the right of access to such minerals. Regs. §§1.170A-14(b)(1)(i) and 1.170A-14(g)(4).

However, a deduction will not be denied if the easement retains the right to engage in a form of mining (but not surface mining) that has only a limited, localized impact on the land and that is not irremediably destructive of significant conservation interests. Regs §1.170A-14(g)(4)(i).

INCOME TAX BENEFITS

There are significant income tax advantages associated with the donation of conservation easements complying with the requirements of IRC §170(h) and Regs. beginning with section 1.170A-14.

1. The value of the easement is deductible.

The donor of a conservation easement in compliance with the requirements of IRC §170(h) and Regs. beginning with §1.170A-14, may deduct the value of the easement from his income. The value of the easement for purposes of the deduction is generally the difference in the value of the easement property before the donation and after the donation. Regs. §1.170A-14(h)(3)(ii).

Example:

Assume that Mr. Jones donates an easement on land valued at $1,000,000 before the donation and $700,000 after the donation. The value of the easement is the difference in these values, $300,000. Assuming sufficient annual income to fully deduct this gift (see the discussion of limitations in the following paragraph) and that all of the income would be taxed at the top marginal federal rate of 39.6% and (for example) a 5.75% state income tax rate, the value of the deduction to Mr. Smith would be $136,050 ((39.6% + 5.75%) x $300,000). If Mr. Smith resided in a state without income tax, then the tax benefit would be $118,800 (39.6% x $300,000).

2. The amount of the deduction is subject to an annual limitation.

When an individual makes a gift of "capital gain" property (a capital asset held more than one year, e.g. a conservation easement on land owned for more than one year) the deduction will be limited to 30% of the donor's "contribution base" (essentially, adjusted gross income). Regs. §1.170A-8(d)(1).

However, if a donor elects to take the deduction based upon his basis in the property (roughly, what he paid for the property) he may take the deduction up to 50% of adjusted gross income. See Regs. §1.170A-8(d)(2). This may be the case where the donor has recently purchased property that will be placed under easement. The 50% limit can be a significant benefit to a "conservation buyer" (someone buying property with the intention of protecting it).

Any unused portion of the easement deduction may be carried forward for 5 years after the year of the donation (allowing a maximum of 6 years within which the deduction may be utilized), or until the amount of the deduction has been used up, whichever comes first. Regs. §170A-10(c)(1)(ii).

Example 1:

Mr. Jones's easement is worth $300,000. Mr. Jones's income is $124,000 annually. He may deduct up to 30% of his adjusted gross income for gifts of capital gain property. This allows him to deduct $37,200 annually (30% x $124,000). Therefore, he can deduct $223,200 (6 x $37,200) of his $300,000 gift by carrying the unused balance forward 5 years after the date of the gift. He will be unable to use $76,800 of the gift ($300,000 - $223,200).

Example 2:

If Mr. Jones had just purchased his land, the $300,000 would represent a portion of his basis (what he paid) not appreciated value. This would allow him to elect to deduct up to 50% of his income annually, an annual deduction of $62,000 (50%

x $124,000). Therefore, he could deduct the entire value of the gift over 6 years ($62,000 x 6 = $372,000).

3. The extent of the tax deduction depends upon the value of the easement.

One of the most critical, and frequently challenged, aspects of easement donation is the valuation of the easement gift. Valuations reflecting reductions in fair market value due to easement donation have been recognized judicially ranging from 16% to over 90%.

a. Before and after valuation method.

In the before and after approach the property subject to the easement is valued both without the easement in place and with the easement in place. The difference represents the value of the easement donation for deduction purposes. Regs. §1.170A-14(h)(3); Rev. Rul. 73-339, 1973-2 C.B. 68, and Thayer v. Commissioner, T.C. Memo 1977-370.

b. Comparable sales valuation method.

Although the before and after method is allowed by the Regs. when there are no comparable sales of easements, the "comparable sales" method is preferred, using actual easement sales (as in a "purchase of development rights" program) as comparables. However, the Regs. recognize that in many cases there will not be a "substantial record" of comparable easement sales and, therefore, they allow the before and after method. Regs. §1.170A-14(h)(3)(i).

c. "Enhancement" may reduce the value of the easement.

Enhancement occurs when a landowner donates an easement that has the effect of increasing the value of unrestricted property owned by the donor or a member of the donor's family. Regs. §1.170A-14(h)(3)(i).

Example:

The land Mr. Jones placed under easement is just a quarter of a mile from 200 acres that overlooks the easement property. Mr. Jones also owns the 200 acres. The easement reduces the value on the subject property by $300,000, but the 200 acres increases in value by $500 per acre because its view is permanently protected by the easement. This $100,000 "enhancement" will be subtracted from the $300,000 value of the easement. Therefore, Mr. Jones deduction will be reduced to $200,000.

d. Any consideration received by an easement donor in exchange for the easement must be subtracted from the deduction.

The value of an easement must be reduced by any cash payment or other economic benefit received, or reasonably expected, by the donor or family member of the donor as a result of the donation of the easement. Regs. §1.170A-14(h)(3)(i).

This "quid pro quo" rule includes schemes in which several neighboring landowners agree to collectively donate easements to preserve an entire block of land. It also applies to cluster development schemes where an easement is donated to preserve open space in exchange for the landowner being allowed to cluster permitted density under certain zoning regulations.

The quid pro quo rule does not necessarily disqualify the deduction entirely. It does require that the value of the benefits received be subtracted from the value of the easement. Regs. §1.170A-14(h)(3)(i). However, if the value received by the easement grantor for his conveyance of an easement exceeds the value of the easement to the public, no deduction will be allowed. Regs. §1.170A-14(h)(3)(i).

Example 1:

Mr. Blue donates an easement valued at $100,000. He qualifies for a grant to cover the costs of legal and appraisal fees incurred in making the donation. The grant amounts to $5,000. He is allowed a deduction of $95,000 ($100,000 - $5,000).

Example 2:

Mr. Smith owns 300 acres that local zoning allows to be developed into fifteen 20-acre lots. Mr. Smith is permitted to cluster the lots on as little as 2 acres each (dramatically reducing development costs) if he relinquishes the right to develop five of the lots and imposes a permanent conservation easement on the resulting open space. The easement on the 270 acres of open space reduces the value of that land by $125,000 (essentially the value of the five lots given up in the clustering scheme). However, Mr. Smith is able to save over $200,000 in the cost of subdivision roads as a result of being allowed to cluster. Because he saved more in road development costs than he gave up in the value of the easement he is not entitled to a deduction for the easement.

Example 3:

Ms. Brown agrees with the ABC Land Trust to sell them a conservation easement on land that she owns adjoining one of ABC's most important holdings. The agreed price for the easement is $50,000. An appraisal of the easement shows that its value is $150,000. Ms. Brown is allowed a deduction of $100,000 for this qualified "bargain sale."

e. The value of the deduction must be substantiated.

Any claim for a charitable donation deduction exceeding $5,000 must be supported by a "qualified appraisal" (Regs. §1.170A-13(c)(2) and (3)) conducted by a "qualified appraiser" (see Regs. §1.170A-13(c)(5) for definition).

Form 8283, "Noncash Charitable Contributions," must accompany any return claiming an easement deduction. The gift must be acknowledged by the donee organization. The organization is required to state whether the donor has received any goods or services in exchange for the gift. Regs. §1.170A-13(f).

Substantiating appraisals are complex and sometimes costly. They must be conducted no earlier than 60 days prior to the conveyance and not later than the due date for the tax return first claiming the deduction. Regs. §1.170A-13(c)(3)(A).

Regardless of when the appraisal is made, it must reflect the value of the easement on the date of the conveyance. Regs. §1.170A-13(c)(3)(ii)(I).

For further information about the valuation and substantiation of easements, see Appraising Easements, Third Edition (1999), a project of The National Trust and The Land Trust Alliance.

4. The donation of a conservation easement will reduce the donor's basis in the land.

When a landowner donates a conservation easement he must reduce his basis in the property to reflect the value of the easement donated. This reduction in value shall reflect proportion of the unrestricted fair market value of the land at the date of the donation represented by the value of the easement. Regs. §1.170A-14(h)(3)(iii).

Example:

Mr. Brown donates an easement on his land. Before the easement the land was valued at $1,000,000. After the easement it was valued at $500,000. Therefore the value of the easement donation is $500,000 ($1,000,000 - $500,000). Mr. Brown's basis in his land was $100,000. The easement represents 50% of the unrestricted value of the land when the donation was made. Therefore, Mr. Brown must reduce his basis by 50% to $50,000.

Note: The basis adjustment does not reflect "enhancement" of adjoining unrestricted land. See example (11), Regs. §1.170A-14(h)(3)(iii).

5. "Dealers" in real estate will be limited in deductions for easement donations to their basis in the property subject to the donation.

Regs. §1.170A-4(a)(1) requires that the deduction for gifts of "ordinary income property" be reduced by the amount of gain that would not have been considered long-term gain had the property been sold on the day of the contribution. Because the sale of ordinary income property generates ordinary income rather than capital gain ("long-term gain") this rule essentially limits the deduction to the donor's basis.

Regs. §1.170A-4(b)(1) includes within the definition of "ordinary income property" property "held by the donor primarily for sale to customers in the 'ordinary course of his trade or business.'" It is possible for a dealer in real estate to hold property primarily as investment property and not for sale to customers. The donation of a conservation easement on such property will not be limited to basis.

Example:

Jack Hoyle is a real estate developer. He has developed 50 lots for sale, but has identified 100 acres of the development property for "open space" protection and it has never been offered for sale. On his books Jack carries the 50 lots as "inventory" and the 100 acres as a capital asset.

Five years later after having sold 40 lots Jack decides to start a new project and wrap this one up. He agrees with a local land trust to donate a conservation easement on the remaining 10 lots and the 100 acres. His basis in the 10 lots, including development costs, is $10,000 each. His basis in the 100 acres is $100,000, his original cost (he made no improvements). The easement on the 10 lots is valued at $2,000,000 and on the 100 acres at $5,000,000.

Jack will be allowed to deduct $100,000 for the donation of the easement on the lots. This is because his deduction must be reduced $1,900,000 which is the amount that would have been ordinary income if he had sold the property ($2,000,000 – ($10,000 x 10) = $1,900,000). He will be allowed to deduct the full $5,000,000 on the 100 acres because this property was clearly not held for "sale to customers in the ordinary course of his trade or business" but is treated as a capital asset held for investment.

ESTATE TAX ADVANTAGES

The two most important attributes of a conservation easement for estate planning purposes are that:

- A conservation easement qualifies the estate holding land subject to a conservation easement for two specific estate tax benefits.

- A conservation easement controls the future use of property when it passes out of a decedent's estate more effectively than any other technique available.

As a result of these two features, conservation easements complement and increase the power of many estate planning techniques.

There are two distinct estate tax benefits available for the families of easement donors. The first is the reduction in the value of real property included in a decedent's estate if that property is subject to a conservation easement. This reduction reflects the restrictions imposed by the easement. Because this is not a formal "deduction" it will be referred to here as a "reduction." For easements donated by will there is a formal "deduction" available under IRC §2055(f).

The second benefit is the "exclusion" of 40% of the value of land remaining after taking into account the reduction in value due to the restrictions of the easement. For purposes of the following discussion, this reduced value will be referred to as the "remainder" value.

1. The restrictions of a conservation easement reduce the value of the estate.

The restrictions imposed by a conservation easement on real property assets of a decedent's estate are taken into account in valuing that property for estate tax purposes. This "reduction" in value is available regardless of whether the easement was sold or donated. The value of real property subject to a conservation easement will be determined at the same time as other estate assets: the decedent's death or on the alternate valuation date if the executor elects the alternate date.

Example:

At the date of Mr. Jones's death the land over which he donated a conservation easement would have had a value of $2,000,000 but for the existence of the conservation easement. However, the restrictions imposed by the easement have reduced the value of the land to $1,500,000. The $500,000 reduction is not taxable in Mr. Jones's estate. Assuming that Mr. Jones's estate has sufficient other assets so that the entire $500,000 in value removed by the easement would have been taxed at the 55% marginal federal estate tax rate (everything in excess of $3 million is taxed at 55%) the easement will save his heirs $275,000 in federal estate taxes.

2. The value of a conservation easement donated by will qualifies for an estate tax deduction.

For donations of conservation easements made by will there is a formal deduction available valued in the same manner as an easement donated during the decedent's life. IRC §2055(f). According to §2055(f) the deduction for the testamentary bequest of an easement is allowed regardless of whether the easement meets the "conservation purposes" test established for lifetime donations of easements by IRC §170(h)((4)(A) (the conservation purposes test is discussed in paragraphs 6 and 7 on page 4 above).

According to the Committee report issued in 1986 the reason for not requiring that the conservation purposes test be met is to avoid creating a situation in which a decedent makes an irrevocable bequest of a valuable property interest but, because the easement failed to meet a technical standard of the tax code, that property interest is still taxed in the decedent's estate even though it is permanently restricted. See the Committee Reports on P.L. 99-514 (Tax Reform Act of 1986). Regulations have not been promulgated nor cases decided under this provision to give further guidance.

Example:

Mr. Brown, a farmer, has a very large estate because of the value of his farmland, but he has only a small income. An income tax deduction is not going to do him much good. However, his children love the farm and don't want it to be sold out of the family, nor does Mr. Brown. Because of the uncertainty of his financial situation Mr. Brown doesn't want to restrict his ability to sell the farm for top dollar while he is living (Mrs. Brown left, thoroughly disgusted with farming many years earlier). Therefore, he provides in his will for the donation of a conservation easement on the farm (including a completed draft of the instrument so that his executor doesn't have to guess what should go into the easement).

The executor values the farm at the date of Mr. Brown's death at $4,000,000 and after the easement at $3,000,000. The executor is able to deduct the $1,000,000 value of the easement under IRC §2055(f). This saves Mr. Brown's children $550,000 in estate taxes as the entire $1,000,000 is subject to the 55% marginal rate. This, coupled with the unified credit and some insurance policies on Mr. Brown's life, enables the executor to pay estate taxes without liquidating the farm.

Note: Under the terms of new § 2031(c)(9) (see paragraph "u" on page 18), even if Mr. Brown hadn't made a provision in his will for the easement, his heirs could have directed the executor to donate a "post-mortem" easement that would have given the estate the same tax benefits as the testamentary easement.

2. In addition to the reduction for the easement, 40% of the remainder value of property subject to the easement can be excluded from the estate.

A new exclusion from the federal estate tax was enacted on August 5, 1997. Formerly known as the American Farm and Ranch Protection Act, the new exclusion is provided for in IRC §2031(c). §2031(c) is an entirely new provision without precedent in the tax code. To date no regulations or cases are available to provide guidance.

a. Extent of the exclusion.

IRC §2031(c) provides that a decedent's executor may exclude 40% of the remainder value of land subject to a permanent conservation easement. In other words, the exclusion is applied to value of the land after subtracting the value of the easement. Values are determined as of the date of the decedent's death (or 6 months thereafter if the "alternate valuation date" is elected by the executor) based upon the value of the land as of that date, taking the value of the easement into account. IRC §§2031(c)(1) and (2).

Example:

Mr. Jones owns land that would have been valued at $1 million at his death, but taking into account the effect of a conservation easement donated by Mr. Jones, the value of the land for estate tax purposes is only $500,000. The executor may elect, under §2031(c), to exclude 40% of that remainder value. The value excludable would amount to $200,000 (40% x $500,000). Thus, the easement has reduced the taxable value of the land in Mr. Jones's estate by $700,000: $500,000 from the initial reduction in value and $200,000 due to the exclusion.

b. The easement must meet IRC §170(h) requirements to qualify for the exclusion.

The easement must meet the requirements of IRC §170(h), described beginning on page 3, including the conservation purposes test. IRC §2031(c)(8)(B).

c. The exclusion applies to land only.

The exclusion applies only to the value of land, not improvements on the land. IRC §2031(c)(1)(A). However, this is the only one of the three tax benefits so restricted. The other two benefits, the income tax deduction and the estate tax benefits attributable to the reduction in value resulting from the easement, apply to structures as well as land.

Example:

Mrs. White died owning a 200-acre farm subject to a conservation easement that meets the requirements of IRC §170(h). The easement allows only agricultural use of the land and imposes architectural standards on the house, which is a certified historic structure. Without the easement the land would be worth $1 million and the house and outbuildings $350,000. Taking the easement into account, the land is valued at $750,000 and the house and outbuildings at $300,000 for estate tax purposes. Mrs. White's executor elects to take the new §2031(c) exclusion. As a result he can exclude $300,000 of the remainder value of the land (40% x $750,000). The exclusion does not apply to the house and outbuildings. Thus, for estate tax purposes, the conservation easement results in a total reduction in the value of Mrs. White's farm of $600,000: a reduction of $250,000 in the value of the farmland and $50,000 in the value of the structures; and an exclusion of $300,000 in the value of the farmland.

d. The exclusion does not apply to the gift tax.

The exclusion does not apply to transfers made during a decedent's lifetime. For this reason, estate-planning strategies based upon lifetime transfers of property should carefully evaluate the effect of making a lifetime gift of land subject to a conservation easement. A lifetime gift of such an asset would waste the exclusion. However, there may be other overriding reasons to make lifetime transfers.

Example:

Mr. Smith donates a conservation easement on 100 acres. The value of the land with the easement in place is $200,000. Mr. Smith makes a lifetime gift of the land to his son. This gift is subject to the full federal gift tax on a $200,000 gift; the new exclusion does not apply. However, if Mr. Smith had transferred the land to his son by will, only $120,000 of the value of the land would have been subject to tax. This is because the exclusion would reduce the taxable value by $80,000 (40% x $200,000). If we assume that both the gift and the bequest would have been taxed at 37% (the lowest effective gift and estate tax rate), transferring the land by a lifetime gift rather than by will cost $29,600 (37% x $80,000) in gift tax.

e. The exclusion does not apply to easements that are historic only.

The new exclusion does not apply if the sole conservation purpose of the easement is the preservation of the historic character of the land (and historic structure, being improvements rather than land, aren't eligible for the exclusion either). IRC §2031(c)(8)(B). However, the fact that land is historic will not disqualify it for the exclusion if there is another bona fide conservation purpose for the easement.

Example:

Sally owns an historic 18th Century New England farm. The land is identified in the local comprehensive plan and zoning ordinance as prime agricultural land and is accorded a special reduced real estate tax assessment because of its agricultural value. Sally donates a conservation easement protecting the historic and agricultural characteristics of the farm. When she dies her executor may elect to exclude 40% of the value of the land making up the farm after taking the value of the easement into account.

However, if the sole purpose of the easement and the only significant characteristic of the farm was its historical significance the exclusion would be unavailable, although the value of the farm would be reduced to reflect the effect of the restrictions of the easement.

f. The exclusion is available to any estate established after 12/31/97, regardless of the date of the easement.

The exclusion is available to the estates of decedents dying after December 31, 1997. Thus, the exclusion is available for easements already existing on the effective date of the enactment of §2031(c), as well as those donated thereafter.

Example:

Mary donated a conservation easement in 1980 that meets all of the requirements of §2031(c). She died December 1, 2000 and the land subject to the 1980 easement is included in her estate. Her executor may elect to apply the exclusion provided by §2031(c).

g. Land must be held for 3 years to qualify for the exclusion.

The decedent or a member of the decedent's family must have owned the land subject to the easement for at least three years prior to the decedent's death to be eligible for the exclusion. IRC §2031(c)(8)(A)(ii).

Example:

Joel was given 200 acres by his father who had owned the land for two years before the gift. Joel promptly donated a conservation easement on the land. He died two years later. This land will qualify for the exclusion because the total period of time the land was owned by Joel and his father was four years.

h. The amount of the exclusion is limited and will not be fully phased-in until 2002.

§2031(c) limits the amount that may be excluded to $500,000 per estate. The limitation is phased in $100,000 increments. $200,000 may be excluded in 1999 and up to $500,000 in 2002. IRC §2031(c)(3).

Example:

James owns land subject to a conservation easement, meeting all of the requirements of §2031(c). The value of the land after subtracting the value of the easement is $2,000,000. James dies in the year 2000. 40% of the value of the restricted land is $800,000 (40% x $2,000,000). However, in the year 2000 the maximum amount that may be excluded under §2031(c) is $300,000. Therefore, James' executor can only exclude $300,000 under the new provision. Had James lived until 2002 his executor could have excluded $500,000, which is the maximum amount that can be excluded from 2002 forward.

i. The benefits of the exclusion may be multiplied.

Because the limitation of $500,000 applies per estate (IRC §2031(c)(1)) it is possible that one property may generate multiple exclusions. Multiplying the exclusion can help to overcome the $500,000 limitation.

Example 1:

Mr. Green and his wife own land as "tenants in common" with each entitled to a 50% share in the land. The Greens' wills provide that the share of each will either go into a "by-pass" trust for the benefit of the survivor (but not subject to the marital deduction) or directly to their children, depending upon whether there is a surviving spouse. However, in no case will a decedent's share of the property pass to the survivor or the survivor's estate (were this to happen the ability to multiply the exclusion would be lost). The Greens put extensive easements on the land, reducing the value of each share from $3,250,000 to $1,250,000. Excluding 40% of the restricted value of each share allows each estate to remove $500,000 (40% x $1,250,000), a total of $1,000,000 between the two estates. The total estate tax savings for the Green's children due to the exclusions available in this example (assuming a 55% marginal estate tax rate) will be $550,000. In addition the estates will each save $1,100,000 (55% x $2,000,000) in estate tax due to the reduction in value resulting from the easement (assuming that the land did not appreciate from the time of the easement donation until the Greens' deaths – an unlikely event).

Example 2:

Four brothers own a ranch that they inherited from their parents as equal tenants in common. They donate a conservation easement on the ranch that meets the requirements of §2031(c). The value of the ranch before the easement was $10,000,000 and after the easement it was worth $5,000,000. The brothers all die in a blizzard in 2002. Their executors each elect to take advantage of the 40% exclusion. Each estate receives the decedent brother's 25% interest, still worth $1,250,000 (25% x $5,000,000). The value of the exclusion is $500,000 (40% x $1,250,000) per estate. Therefore, the total value of the ranch that may be excluded is $2,000,000 when the exclusion allowed each of the four estates is taken into account.

The net effect of the conservation easement in this example is a reduction in the taxable value of the ranch from $10,000,000 to $3,000,000. Assuming that this value would have been taxed at the 55% federal estate tax rate, total tax savings between the four estates amounts to $3,850,000 (55% x $7,000,000).

Note: If the brothers had held their interests in the ranch as partners in a partnership or stockholders in a corporation, the result would not have been the same. Because each brother would have owned less than 30% of the partnership or corporation the estates would not have been eligible for the exclusion. See IRC §2031(c)(10) which allows the exclusion for partnership, corporation, and trust interests held by a decedent, but only if the decedent owned at least 30% of such entity.

j. The exclusion may be used in conjunction with other tax benefits for easements.

The law already allows an easement donor to deduct the value of an easement from income for income tax purposes. In addition, the law allows the executor to reflect the effect of an easement's restrictions on the value of property included in a decedent's estate. These benefits continue to be available to easement donors. The new exclusion is an additional benefit.

Example:

Mr. Jones's land is valued at $1,000,000 and his easement reduces that value to $700,000. Mr. Jones is entitled to a $300,000 income tax deduction; his estate can report the value of the easement restricted land as $700,000 rather than $1,000,000; and the executor can elect to exclude $280,000 of the remaining value under 2031(c) (40% x $700,000). Thus the easement removes $580,000 ($300,000 + $280,000) from the taxable value of the estate. In addition, the value of the easement gift is deductible from Mr. Jones's income for purposes of state and federal income taxes.

If we assume that Mr. Jones's income is taxed at the top federal rate of 39.6%, a top state rate of 6%, and that the assets in his estate are taxed at the top marginal rate of 55%, an easement donation would save Mr. Jones and his estate a total of $455,800 in state and federal taxes (income tax savings: (39.6% + 6%) x $300,000; combined with estate tax savings: (55% x $300,000) +55% x (40% x $700,000)).

In addition, the exclusion may be layered on top of the unified credit, the tax benefits available under the special valuation rules under IRC §2032A, and the family-owned business exclusion recently enacted as IRC §2033A.

k. The exclusion may be passed from one generation to the next.

The benefit of the exclusion will be available to each succeeding generation of landowners so long as the land remains in the family of the donor. IRC §2031(c)(8)(C). Once the land passes outside of the family the

exclusion ceases to be available unless the new owner is able to make a significant enough amendment to the easement to constitute an independent "conservation contribution" eligible for the exclusion in its own right.

Example 1:

Mr. Jones donates a conservation easement on his land that qualifies under §2031(c). When Mr. Jones dies the property goes to his son, John. John marries and passes his land to his wife Sarah at his death. Sarah has a daughter by a subsequent marriage (John died young), Julie. Julie inherits the land at Sarah's death, marries and has children who ultimately become beneficiaries of the land. Mr. Jones's estate is eligible for the exclusion, as are the estates of John, Sarah and Julie.

In addition, the reduction in value due to the restrictions imposed by the easement will be available to future generations in the family of the donor. However, unlike the exclusion, the reduction in value attributable to the restrictions of the easement remains available to owners outside of the family of the original donor in the event that the land is transferred outside of the family.

Example 2:

Mr. Green donates an easement on his land that qualifies under §2031(c). The easement reduces the development potential on his land from 100 houses to 10 and generates a significant public conservation benefit. When he dies the land passes to his son, Alfred. Alfred sells the land to his neighbor, Mrs. Brown. Mrs. Brown dies, leaving the land to her daughter Melissa. Melissa donates a second conservation easement that eliminates all remaining 10 house sites so that the land cannot be developed at all. This constitutes a significant public conservation benefit and qualifies the amendment under §2031(c).

Mr. Green's estate is eligible for the exclusion. Alfred's estate doesn't contain the property so no exclusion is available and the proceeds of sale that remain in his estate will be fully taxable. Mrs. Brown's estate is not eligible for the exclusion either because neither she, nor any of her ancestors donated the easement. However, due to the amendment made by Melissa, Melissa's estate is eligible for the exclusion. Presumably the exclusion applies to the value of the land after taking into account the effect of both the original easement and the easement donated by Melissa.

l. The exclusion must be "elected."

In order to take advantage of the exclusion, it is necessary for a decedent's executor or trustee to make an election within nine months of the decedent's death. IRC §§2031(c)(1) and (6). Failure to elect the exclusion does not bar future generations in the donor's family from electing the exclusion in their estates. Form 706, Schedule U ("Qualified Conservation Easement Exclusion") provides that an executor is deemed to have made this election by filing Schedule U and excluding the value of land subject to a conservation easement from the estate.

Note that an executor would probably not want to elect the exclusion if the estate were not otherwise subject to estate tax (because the total value of the estate is less than the amount sheltered by the unified credit, for example). This is because, to the extent of the election, land passing through a decedent's estate is denied a "stepped-up" basis. For a discussion of this see paragraph "p" on page 16.

m. To qualify for the exclusion the easement must reduce land value by at least 30%.

The 40% exclusion will be reduced if the conservation easement is valued at less than 30% of the unrestricted value of the land to which it applies. The statute provides that the 40% exclusion is to be reduced by two percentage points for each percentage point that the easement fails to reduce the land's value by 30%. Values are to be determined as of the date of the decedent's death (or the alternate valuation date if elected). IRC §2031(c)(2). The purpose of this provision is to prevent landowners from donating minimal easements in order to take advantage of the exclusion.

Values for determining compliance with the 30% requirement are the value of the easement at the time it was originally donated. IRC §2031(c)(2).

Example:

To determine compliance with this standard, the executor must obtain information about the value of the easement and the value of the land as restricted by the easement at the time of the original donation. **Note**: for purposes of determining compliance with the 30% requirement, the land and easement values as of the date of the decedent's death don't matter.

The value of the land (reflecting the restrictions of the easement) when Mr. Jones donated the easement was $1,000,000, and the value of the conservation easement on that land was $250,000. To do the calculation

Mr. Jones's executor must add these two values together. The value of the easement is then divided by this sum ($250,000 / $1,250,000). The resulting 20% is ten points less than the minimum standard of 30%. The statute then requires the executor to multiply 10% by 2, and subtract the product from the 40% exclusion factor. The resulting 20% is the adjusted exclusion factor applied to determine the amount of the exclusion to which Mr. Jones's estate is entitled. In this case the amount that may be excluded is $200,000 (20% x $1,000,000).

n. Retained development rights are not eligible for the exclusion.

Any "development rights" retained in the easement agreement will be ineligible for the exclusion. However, if the heirs agree within nine months of the decedent's death to terminate some or all such retained rights the exclusion will apply to the terminated rights. Heirs have two years after the decedent's death to put their agreement into effect (presumably by recording an amendment to the original easement). IRC §§2031(c)(5)(A) and (B).

Development rights are defined in the law as any right to use the land for a commercial purpose "not subordinate to and directly supportive of the use of such land as a farm for farming purposes." Rights to maintain a residence for the owner's use, as well as for normal farming, ranching, and forestry practices probably would not be considered retained development rights. Retained rights to sell land for development, or establish houses for sale or rent, probably would be considered as retained development rights. IRC §2031(c)(5)(D).

Example:

An easement otherwise meeting the requirements of IRC §2031(c) reserves the right to develop and sell five house sites, each worth $50,000, for a total value of $250,000. The land is valued at $2,000,000 before the easement and $1,000,000 after the easement. Before calculating the exclusion, the executor must subtract the value of the retained development rights from the restricted value of the land ($1,000,000 - $250,000 = $750,000). The exclusion is then applied to the remainder value of $750,000. The value which can be excluded from the decedent's estate is, therefore, $300,000 (40% x $750,000).

If the heirs agree to terminate these retained development rights the exclusion will increase to $400,000 (40% x $1,000,000). If the value excluded were subject to the 55% federal estate tax rate, terminating these rights would save the heirs $55,000 (55% x $100,000) in estate taxes.

Note: It may be possible for the heirs to take advantage of the "post mortem" easement provisions of §2031(c)(9) easement (see the discussion of post-mortem easements in paragraph "u" on page 18) and eliminate the retained development rights by donating a new easement within 9 months of the decedent's death. This would qualify the termination of the retained rights for both an expanded exclusion as well as an estate tax deduction under §2055(f). These benefits would be in addition to the reduction in value already attributable to the restrictions of the easement donated by the decedent during his lifetime.

o. Prohibition on retained rights to commercial recreational use.

Any easement that retains more than a "de minimis" right to use the land for commercial recreational use is disqualified from enjoying the exclusion provided by 2031(c). IRC § 2031(c)(8)(B).

The official explanation of this provision provided by the Congress is that a "de minimis" use does *not* include retaining the right to grant hunting or fishing licenses on land under easement. See Joint Committee on Taxation, "General Explanation of Tax Legislation Enacted in 1997."

However, until the matter is clarified further, it may be wise to include in an easement an express prohibition against all but de minimis commercial recreational activity, or to provide a blanket prohibition on all commercial recreational activity.

Existing easements that do not include such prohibitions will need to be re-examined and possibly amended. The staff of the Joint Committee on Taxation has taken the position that such a prohibition may be supplied by a decedent's executor or trustee in a "post-mortem" amendment to an existing easement (see the discussion of post-mortem easements in paragraph "u" on page 18).

p. The exclusion imposes a carryover basis

The Taxpayer Relief Act of 1997 added IRC §1014(a)(4) providing that, to the extent of the exclusion, land received from a decedent shall have a "carryover basis" in the hands of heirs rather than a "stepped-up basis." Essentially this means that if heirs sell the land they must pay capital gains tax on the difference between what the *decedent paid* for the land and the price for which the land was sold. Most assets passing through an estate get a stepped-up basis, which means that heirs pay income tax on the difference between the value of the asset at the *date of the decedent's death* and the price at which the heirs sold the asset.

Example:

Assume that Mr. Smith donates an easement on land he acquired for $5,000. The value of his land on the date of his death, as restricted by a conservation easement, is $750,000. The exclusion allowed is $300,000 ($750,000 x 40%). The carryover basis rule requires that 40% of Mr. Smith's $5,000 basis is carried over to the heirs along with the stepped up basis on that portion of the land not subject to the exclusion. Thus $2,000 ($5,000 x 40%) must be carried over to the heirs. That portion of the value of the land at Mr. Smith's death not subject to the exclusion ($750,000 - $300,000 = $450,000) would continue to receive a stepped-up basis. The total adjusted basis for the land is therefore $452,000 ($2,000 + $450,000).

Because improvements are not subject to the exclusion they will continue to receive a full step-up in basis regardless of whether the exclusion is elected.

r. Geographic limitations on the exclusion.

When originally enacted the benefits of IRC §2031(c) were limited to land in or within a twenty-five mile radius of Metropolitan Statistical Areas (MSA), national parks and national wilderness areas. IRC §2031(c)(8). This requirement was eliminated by the Economic Growth and Tax Relief Reconciliation Act of 2001.

s. Debt-financed property.

The amount of any debt outstanding at the decedent's death incurred to acquire land subject to a conservation easement qualifying for the exclusion must be subtracted from the value of the land before calculating the exclusion. IRC §2031(c)(4). However, the debt is deductible under other provisions of the federal estate tax code.

Example:

If land has a value of $700,000 after taking into account the restrictions of an easement, and it is subject to a $300,000 mortgage when the decedent dies, the exclusion can only be applied to $400,000 ($700,000 - $300,000). The exclusion amount in this case would be $160,000.

t. Property owned by partnerships, corporations and trusts.

If the decedent's interest in land eligible for the exclusion is held indirectly through a partnership, corporation, or trust his estate may still enjoy the benefit of the exclusion to the extent of the decedent's ownership interest. However, the decedent must own at least a 30% interest in the entity in order for his estate to be able to take advantage of the exclusion. IRC §2031(c)(10). Note that although the statute does not speak of limited liability companies, it is likely that they will qualify for similar treatment as they are treated like partnerships for most other purposes under the tax code.

Example:

Mrs. Sanders, a widow, placed the land making up the family farm in a family corporation in order to facilitate the transfer of interests in the farm to her four children who all worked on the farm. She placed all of the farmland under easement before transferring it to the corporation. At the date of her death the farmland was worth $4 million, the other assets in the corporation were worth $1 million. She owned 35% of the stock of the corporation at her death. The restricted value of the farm is reflected in the value of the stock owned by Mrs. Sanders' estate.

The executor may elect to exclude 40% of the value of Mrs. Sanders' stock *attributable to the land* from her estate because she owned over 30% of the stock in the corporation at her death. If we assume that the portion of the stock value attributable to the land value is $1,400,000 (35% x $4 million – remember that the exclusion applies to the value of land only, not improvements), then the executor may exclude $500,000 of that value from the estate. Note that 40% of Mrs. Sanders' share of the land is $560,000; however, because of the limitation on the amount of the deduction, her estate can only exclude $500,000 (assuming her death is in the year 2002 or later).

u. Easements donated after the decedent's death ("post-mortem" easements).

§2031(c) makes the exclusion available for easements donated by a decedent's executor or trustee after the decedent's death -- even though the decedent failed to donate an easement before his death. IRC §2031(c)(8)(A)(iii) and (C).

IRC §2031(c)(9) allows such a post-mortem easement to qualify for both the exclusion ***and*** an estate tax deduction under §2055(f), provided that no income tax deduction has been taken with regards to the easement (but see

Note 1 below). This provision makes available an important "retroactive" estate planning technique.

Example:

Sam and Susie had tried for years to get their aging father to put a conservation easement on his farm. The old man never seemed to get around to it and died without having donated the easement. Sam and Susie, being the only persons with any legal claim to the land, directed their father's executor to donate an easement on the farm and the donation was completed within 9 months of their father's death. The easement was worth $400,000, thereby generating a $400,000 deduction under §2055(f). The exclusion removed an additional $240,000 (40% x $600,000) from the estate. Given the value of other assets, the estate's marginal rate was 55%. Thus, the post-mortem election saved Sam and Susie $352,000 (55% x ($400,000 + $240,000)) in estate tax.

Note 1: In a Private Letter Ruling dated 10/29/01 (200143011), the IRS ruled that a decedent's estate could enjoy the full tax benefits of a post-mortem easement (the §2055(f) deduction and the §2031(c) exclusion) even though an income tax deduction for the donation had also been claimed by two individuals who owned an undivided co-tenancy interest in the property. Because these undivided interests were not included in the decedent's estate, were not subject to the §2031(c) exclusion or the §2055(f) deduction, the Service ruled that the individuals' claim of an income tax deduction with respect to the easement donation on their undivided interest did not disqualify the estate from the tax benefits of the post-mortem election.

Note 2: State law governs the powers of executors and trustees. Unless state law specifically allows these fiduciaries to convey an easement, in the absence of a specific provision in the decedent's will, they cannot do so without a specific court order, regardless of the new federal provision. However, at least one state (Virginia) has recently amended its laws to allow post-mortem easements to be made by an executor or trustee in order to take advantage of the new federal provision.

3. Addressing fears over "giving away" land value by easement donation.

Many landowners are reluctant to donate easements even though they are concerned about conserving their land and would benefit significantly from the income tax and estate tax savings. The reason is their fear of reducing the value of assets available for their children. Responses include the following:

a. Tax benefits may make up most of, if not more than, the lost value.

With enactment of IRC §2031(c) it is possible that the entire value of the easement, or more, can be recovered through the various federal and state tax benefits associated with easement donation.

Example:

Mr. Jones's land is valued at $1 million and his easement reduces that value to $700,000. Mr. Jones is entitled to a $300,000 income tax deduction; the restrictions of the easement remove at least $300,000 in taxable value from his estate; and the executor can elect to exclude $280,000 of the remaining value under 2031(c). Thus, the easement removes $580,000 from the estate. In addition, the value of the easement gift is deductible from Mr. Jones's income for purposes of state and federal income taxes.

If we assume that Mr. Jones's income is taxed at the top federal rate of 39.6%, a top state rate of 6%, and that the assets in his estate are taxed at the top marginal rate of 55%, an easement donation would save Mr. Jones and his estate a total of $455,800 in state and federal taxes (income tax savings: (39.6% + 6%) x $300,000; combined with estate tax savings: 55% x $580,000.

These tax savings represent 152% of the cost of the easement donation, more than replacing the lost value.

b. Conservation easements may be the easiest way to protect intergenerational transfers of rural land from the federal estate tax.

When a landowners' goal is keeping land in the family rather than maximizing the value of the land as an asset in the hands of the heirs, a conservation easement can be an important estate planning tool. Compared to the requirements of IRC §§2032A (the special use valuation provisions pertaining to farmland, etc.) and 2057 (pertaining to family-owned businesses) the tax benefits available for donation of a conservation easement may be more extensive and more easily obtained as well.

c. "Value replacement."

Income tax savings from easement donation can be used to replace the value "lost" by the donation by providing premium payments for the purchase of life insurance or funds for other investments. If the insurance is placed in an "inter-vivos" trust which also holds all of the "incidents of ownership," proceeds of the policy will be exempt from both income and estate taxes.

Tax savings generated by the donation of a conservation easement can be applied to the payment of premiums on a whole life policy or other investment held by an inter-vivos trust. This strategy can replace the value removed by donation of an easement. In many cases of value replacement, the total value passing to an easement donor's heirs may be substantially greater than it would have been had the easement not been donated.

Example:

Assume that John and Joan are aged 51 and 43 respectively. Assume that they donate an easement worth $1.5 million and that the income tax deduction saves them $733,000 in income tax. They spend $53,000 on a new Boxster and buy a "second to die" life insurance policy with the remaining $680,000. They place the policy into an "inter-vivos" trust for the benefit of their children and transfer all of the "incidents of ownership" to the trust.

A premium payment of $680,000 for a second to die policy on a couple John and Joan's age will buy $12,500,000 in coverage. Properly placed in an inter-vivos trust there will be no tax on the policy proceeds. Thus, John and Joan have replaced $1.5 million in reduced land value due to the easement with $11,820,000 (face value of the policy less the premium) in cash payable directly to their children tax-free.

Note that investing the $680,000 in stocks or mutual funds transferred to an inter-vivos trust could generate substantial results as well. There are many variations.

4. Using easements to maximize credits and exclusions.

Easements are unique in their ability to significantly reduce the value of an important real estate asset without significantly affecting (in most cases) the current use of the real estate or its utility to the donor or donor's family. This aspect of easement donation can provide important leverage for various estate tax credits and exclusions.

a. Maximizing the $10,000 annual gift tax exclusion.

Easements lower the value of land gifts made under the exclusion, allowing a transfer of more acreage with each gift and facilitating the complete transfer of ownership out of the grantor's estate. An easement will also ensure that use of land after it leaves the ownership of the donor will be consistent with the donor's wishes.

Making the donation prior to beginning the transfer of ownership insures that the entire value of the deduction is available to the family members most likely to be able to take full advantage of the deduction. However, consideration should be given to identifying which "generation" has the most income in order to maximize use of the deduction, as it may not necessarily be the parents.

Example:

Mr. and Mrs. Savage own a 20,000-acre ranch valued at $5 million. They have five children, each married. They want to begin giving the ranch to their children using the $10,000 annual gift tax exclusion (note that the exclusion is increased after 1997 by the increase in the Consumer Price Index over the CPI for 1997). They each can give $10,000 a year to each child and spouse. Thus,they can transfer a total of $200,000 in ranch value annually ($10,000 x 2 x 10). If they make the transfer based upon the value of the ranch unrestricted by a conservation easement it will take them 25 years to complete the transfer, assuming the ranch doesn't change in value (which it certainly will).

If a conservation easement were donated on the land, reducing its value to $3 million, it would be possible for the Savage's to make the transfer in 15 years (again, assuming no inflation in value). In addition the Savages would be assured that the ranch would not be developed even after control passes to their children. Furthermore, if the Savages invest the income tax savings in a value replacement scheme they can provide their children with potentially substantial liquidity at their death to operate the ranch.

b. Transfers using partnerships, limited liability companies, family corporations, etc.

By reducing the value of land transferred via partnerships, corporations, etc., conservation easements can accelerate the transfer of land to family members.

c. Increasing the amount of land passing under the unified credit provided in §2010.

In a similar fashion, easements can reduce the value of land passed either outright or in trust under the unified credit provided for in IRC §2010, thereby maximizing the use of the credit and minimizing the problem of overloading the surviving spouse's estate with taxable value.

d. Increasing the amount of land passing under the special use value provisions of §2032A.

Easements can be used to maximize the amount of land that can be covered by the reduced assessment for agricultural land included in a decedent's estate provided by IRC §2032A.

Care must be taken that an easement conveyance does not reduce the value of qualified land and personal property used in an agricultural operation that would otherwise qualify under §2032A below 50% of the total value of the adjusted gross estate, or reduce the value of qualified land below 25% of the value of the adjusted gross estate. These percentages are a prerequisite to qualifying under §2032A.

e. Increasing the Generation-Skipping Tax (GST) exemption under §2631.

Easements can maximize the amount of land that can be passed under the exemption for "generation-skipping transfers."

5. Controlling future use.

Easements can control the future use of the land in estate planning programs that depend upon transfer of all or portions of the land to heirs prior to a landowner's death.

a. Controlling gifts of undivided land interests to family members.

In programs which depend upon transferring undivided interests in land to children, using the $10,000 annual exclusion, imposing a conservation easement on the land prior to the transfers ensures that conservation intentions of the grantors will not be violated when ownership becomes fragmented, should a majority of the new owners later consider development or a minority of owners seek partition. The same principle applies where land is given outright in its entirety but the grantors wish it to remain in rural use.

b. Controlling gifts of stock, partnership interests, etc.

Where interests in land are conveyed indirectly by the use of a corporation, partnership, limited liability company, trust, etc., imposition of a conservation easement on the land prior to beginning the transfer program will have the same benefits as described in the preceding paragraph.

“C” corporations are only entitled to deduct 10% of their income for charitable gifts, as opposed to 30% for individuals (with respect to capital gain property), so making the easement donation before transferring land out of individual ownership and into corporate ownership may result in improved tax savings. Note that the 10% limitation does not apply to “S” corporations where donations are deductible at the shareholder level rather than the corporate level.

c. Controlling future use of charitable transfers.

Easements ensure that future land use is controlled in the event of the transfer of land to a charity, either as an outright bequest, gift, or transfer to a charitable remainder trust.

1) Avoiding unpleasant surprises.

Donors to land conservation organizations (and other charities and public agencies) are sometimes surprised to see the organization sell the land or use it in a fashion inconsistent with the donor’s expectations. The best way to ensure future use is not to rely upon expectations and assurances, but to legally bind the donee and its successors to specified uses through the imposition of a conservation easement.

2) Avoiding the effect of “merger.”

A conservation easement and the fee interest in the land subject to the easement must be held by legally separate entities to avoid "merger" of the interests. Merger essentially terminates the restrictions imposed by the easement. Therefore, easement land should not be donated to an organization which already holds the easement on that land, or *vice versa*, unless it is intended that the organization own unrestricted land.

d. “Phasing” charitable gifts using easements.

A gift of appreciated property, such as land, can only be deducted up to 30% of the donor's adjusted gross income, and the unused portion of the deduction can only be carried forward for five years after the year of the gift (see the discussion of limitations in paragraph 2, page 6). These limitations mean that some donors of land or easements may be unable to take full advantage of the income tax deduction attributable to their gift because their incomes are too small. Easements can be structured to “phase” charitable gifts, effectively spreading the deduction over a period

of years so that donors can maximize the charitable deductions provided for in the tax code.

1) Doubling the 6-year period allowed for utilization of a charitable deduction.

Where a landowner plans a donation of land to a public charity such as a land trust, he can phase the donation by first making a gift of a conservation easement. When the charitable deduction attributable to the easement donation has been used up, the landowner can make a gift of the remainder interest in the land and take a second deduction for this gift.

Note that where the easement and the remainder interest in the land are held by the same organization the restrictions of the easement will "merge" into the remainder and cease to be effective. Therefore, as noted above, a landowner wishing to ensure that the restrictions of the easement remain effective will donate the easement to one organization and the remainder interest to another, thereby avoiding the merger of the two interests.

2) Beyond twelve years.

Where a landowner with a relatively small income plans an easement gift on a large tract, he may maximize the benefits of the charitable deduction by restricting only a portion of the land at a time. When the benefits of the deduction have been used up, then the easement may be extended to unrestricted land, creating a new deduction. This technique can spread the availability of tax benefits over many years. Care must be taken in planning the easements to avoid the problem of "enhancement" discussed in paragraph "c" on page 7.

APPENDIX

Summary of the Provisions of I.R.C. Sec. 170(h)

(*There is NO Substitute for Reading the Tax Code!)*

To be deductible a conservation easement must fit the definition of a "qualified real property interest." 1.170A-14(a)

There are two types of qualified real property interests:

1. The entire interest of the donor other than a "qualified mineral interest." 1.170A-14(b)(1); and

2. A "perpetual conservation restriction." 1.170A-14(a)(2). Conservation easements are perpetual conservation restrictions if they:

    a. Impose a restriction on the use of real property. 1.170A-14(b)(2) (Easements or other similar restrictions recognized by state law.)

    b. Are in perpetuity. 1.170A-14(b)(2)

    c. Are held by a qualified organization. 1.170A-14(c) Qualified organizations:

        1) Must have commitment to protect conservation purposes. 1.170A-14(c)

        2) Must have resources to enforce restrictions (funds need not be set aside). 1.170A-14(c)

        3) Must be governmental units 1.170A-14(c)(i), or

        4) Public charities. 1.170A-14(c)(ii)-(iv)

The easement document must:

1. Prohibit the donee from transferring the easement unless the conservation purposes are required to be carried out by the transferee. 1.170A-14(c)(2)

2. Prohibit the donee from transferring the easement to other than qualified organizations qualified at the time of the transfer. 1.170A-14(C)(2)

3. Require that in the event of an unexpected change making the purposes of the easement impossible or impractical to achieve the proceeds of any sale or exchange be used consistent with conservation purposes of the original donation. 1.170A-14(C)(2)

Qualified conservation purposes include:

1. The preservation of land for recreational use by the public. 1.170A-14(d)(1)(i)

    a. The easement must provide for substantial public use 1.170A-14(d)(2)(ii), and for

    b. Regular public use. 1.170A-14(d)(2)(ii)

2. The preservation of a significant relatively natural animal or plant habitat. 1.170A-14(d)(1)(ii)

    a. Some alteration by man is allowed if animals or plants continue to live in relatively natural state. 1.170A-14(d)(3)(i)

    b. Significant habitats include:

        1) Habitats of rare, endangered or threatened species; 1.170A-14(d)(3)(ii)

        2) Natural high quality examples of terrestrial or aquatic communities; 1.170A-14(d)(3)(ii)

        3) Natural areas contributing to ecological viability of public parks or preserves. 1.170A-14(d)(3)(ii)

    c. Public access is not required for habitat preservation easements. 1.170A-14(d)(3)(iii)

3. The preservation of open space (including farm and forest land). 1.170A-14(d)(1)(iii)

    a. Preservation may be pursuant to a clearly delineated governmental policy; 1.170A-14(d)(4)(i)(A)

        1) A general declaration by a single official or legislative body isn't enough. 1.170A-14(d)(4)(iii)

        2) There is no requirement for certification of specific properties. 1.170A-14(d)(4)(iii)

        3) Donations furthering a specific, identified, conservation project must meet this requirement. 1.170A-14(d)(4)(iii), examples include:

            a) preservation of significant land within a local landmark district

            b) preservation of wild or scenic rivers

            c) preservation of farmland pursuant to a state flood prevention or control program

d) protection of scenic, ecological, or historic character of land contiguous to or an integral part of the surroundings of existing recreation or conservation sites

4) Programs must involve a significant governmental commitment. 1.170A-14(d)(4)(iii)(A)

a) Program need not be funded to satisfy this requirement.

b) Preferential tax assessment programs, or

c) Preferential zoning for property deemed worthy of protection demonstrate requisite commitment. 1.170A-14(d)(4)(iii)(A).

5) Acceptance of the easement by governmental agency tends to establish compliance with clearly delineated governmental policy, depending upon existence of other factors and rigor of agency review. 1.170A-14(d)(4)(iii)(B)

6) Public access is not a requisite unless the conservation purpose would be undermined without such access. 1.170A-14(d)(4)(iii)(C)

b. Or, for the scenic enjoyment of public. 1.170A-14(d)(4)(i)(B)

1) Development would impair scenic character of local rural or urban landscape 1.170A-14(d)(4)(ii)(A), or

2) Development would interfere with a scenic panorama viewed from a

(a) Park 1.170A-14(d)(4)(ii)(A)

(b) Preserve 1.170A-14(d)(4)(ii)(A)

(c) Road 1.170A-14(d)(4)(ii)(A)

(d) Water body 1.170A-14(d)(4)(ii)(A)

(e) Trail 1.170A-14(d)(4)(ii)(A)

(f) Historic area or structure 1.170A-14(d)(4)(ii)(A) and

3) The land area or transportation way is open to or used by the public. 1.170A-14(d)(4)(ii)(A)

4) Visual access, not physical access, to the view is required. 1.170A-14(d)(4)(ii)(B).

5) See 1.170A-14(d)(4)(ii)(A)(1)-(8) for criteria to evaluate scenic quality.

c. Open space contributions must yield a significant public benefit. 1.170A-14(d)(i)(A) and (B); factors include:

Uniqueness of property subject to easement to the area; 1.170A-14(d)(4)(iv)(A)(1)

1) The intensity of existing and planned development in the area; 1.170A-14(d)(4)(iv)(A)(2)

2) The consistency of proposed open space with public conservation programs in the region 1.170A-14(d)(4)(iv)(A)(3); including

   a) Outdoor recreation; 1.170A-14(d)(4)(iv)(A)(3)

   b) Irrigation or water supply protection; 1.170A-14(d)(4)(iv)(A)(3)

   c) Water quality maintenance or enhancement; 1.170A-14(d)(4)(iv)(A)(3)

   d) Flood prevention and control; 1.170A-14(d)(4)(iv)(A)(3)

   e) Erosion control; 1.170A-14(d)(4)(iv)(A)(3)

   f) Shoreline protection; 1.170A-14(d)(4)(iv)(A)(3)

   g) Protection of land areas included in or related to a government master plan or land management area; 1.170A-14(d)(4)(iv)(A)(3)

3) The consistency of proposed open space with existing private conservation programs in the area. 1.170A-14(d)(4)(iv)(A)(4)

4) The likelihood that development of the property would lead to degradation of scenic, natural or historic character of area; 1.170A14(d)(4)(iv)(A)(5)

5) The opportunity of the public to use property or enjoy its scenic values; 1.170A-14(d)(4)(iv)(A)(6)

6) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce in the area; 1.170A-14(d)(4)(iv)(A)(7)

7) The likelihood that the donee organization will acquire equally desirable and valuable property or property rights. 1.170A-14(d)(4)(iv)(A)(8)

8) The cost to donee of enforcing the easement. 1.170A-14(d)(4)(iv)(A)(9)

9) The population density in the area of property. 1.170A-14(d)(4)(iv)(A)(10)

10) The consistency of the proposed open space with a legislatively mandated program identifying specific parcels for future protection. 1.170A-14(d)(4)(iv)(A)(11).

d. Open space easements can't allow retention of development rights that would interfere with the scenic quality or governmental conservation policy furthered by donation. 1.170A-14(d)(4)(v)

4. The preservation of historically important land or certified structures. 1.170A-14(d)(1)(iv)

a. Historic easements on land in an historic district must require that any development allowed conform to applicable construction standards for the district. 1.170A-14(d)(5)(i)

b. Historic land area includes:

1) Independently significant land areas; 1.170A-14(d)(5)(ii)(A)

2) Land and buildings in an historic district which contribute to the significance of the district; 1.170A-14(d)(5)(ii)(B)

3) Land areas adjacent to National Register properties if the features of the land area contribute to the character of the Register property; 1.170A-14(d)(5)(ii)(C)

c. Certified historic structure means any structure or land area:

1) Listed on the National Register; 1.170A-14(d)(5)(iii)(A)

2) Located in a registered historic district certified by the Secretary of Interior; 1.170A-14(d)(5)(iii)(B)

3) Structures include residences. 1.170A-14(d)(5)(iii)

d. There must be visual access to a structure or at least a meaningful portion of a land area to qualify for a deduction. If the property isn't accessible, then arrangements must be made to allow the public visual access on a regular basis. 1.170A-14(d)(5)(iv)(A). Subparagraphs (B) and (C) provide guidelines for public access to historic land areas and structures.

5. 1.170A-14(f) contains examples of conservation purposes.

An easement must prohibit Inconsistent Uses. 1.170A-14(e):

1. An easement must be exclusively for conservation purposes. 1.170A-14(e):

2. An easement may not allow uses inconsistent with significant conservation interests even though they are not the conservation purposes enumerated in the easement. 1.170A-14(e)(2)

   a. The retention of rights to use property which rights do not impair significant conservation interests are not inconsistent uses. 1.170A-14(e)(2)

   b. Uses destructive of conservation interests are permitted if necessary for the protection of the conservation purposes of the easement. 1.170A-14(e)(3)

   c. An easement may preserve a preexisting use of property if the use is not in conflict with the conservation purposes of the easement. 1.170A-14(e)(3)

An easement must be enforceable in perpetuity. 1.170A-14(g):

1. Uses retained in the easement must be subject to legally enforceable restrictions preventing their exercise in a manner that would be inconsistent with conservation purposes of the easement. 1.170A-14(g)(1)

   a. A remainder interest contribution must be restricted so that life tenants will not be able to diminish the conservation values protected by the contribution. 1.170A-14(g)(1)

   b. The holder of any mortgage on the property must subordinate its interest to the rights of the easement holder to enforce the terms of the easement. 1.170A-14(g)(2)

   c. Events that might defeat the purpose of the contribution do not violate the requirement that the easement be in perpetuity so long as the events are, at the time of the donation, so remote as to be negligible. 1.170A-14(g)(3)

   d. Retention of a qualified mineral interest will not violate the requirement of perpetual enforceability unless:

      1) Surface mining of such minerals is possible. 1.170A-14(g)(4)(i)

      2) Mining in a manner inconsistent with the conservation purposes is allowed. 1.170A-14(g)(4)(i)

      3) Mining having a localized, limited impact not irremediably destructive of significant conservation interests is permissible. 1.170A-14(g)(4)(i)

      4) A separation of the mineral interests in property is allowable so long as the probability of surface mining such minerals is so remote as to be negligible. 1.170A-14(g)(4)(ii)

Documentation of conditions is required if the donor retains any rights to use the property that is subject to the easement. 1.170A-14(g)(5):

1. Documentation sufficient to establish property condition must be given to the donee prior to the donation if rights to use the property are retained which could impair the conservation interests of the property. 1.170A-14(g)(5). Documents should include:

    a. U.S.G.S. survey maps showing property lines and nearby protected areas, 1.170A-14(g)(5)(i)(A)

    b. Scale maps of the area showing manmade and natural features of significance, 1.170A-14(g)(5)(i)(B)

    c. Aerial photos of the property taken as close to the time of donation as possible, 1.170A-14(g)(5)(i)(C)

    d. On-site photos of the property taken from appropriate locations. 1.170A-14(g)(5)(i)(D)

    e. Easements with restrictions pertaining to specific natural resources must be accompanied by documentation of the condition of the resource at or near the time of donation. 1.170A-14(g)(5)(i)(D)

2. All documentation must be accompanied by a statement signed by the donor and donee that "This natural resource inventory is an accurate representation of [the protected property] at the time of the transfer." 1.170A-14(g)(5)(i)(D)

The donee must be able to inspect property if donor retains rights to use property. 1.170A-14(g)(5)(ii)

1. The donor must agree to notify donee, in writing, before exercising any rights reserved in the easement if the exercise of those rights might impair the conservation interests of the property. 1.170A-14(g)(5)(ii)

2. The easement must provide the donee with the right to enter the property at reasonable times to inspect. 1.170A-14(g)(5)(ii)

3. The easement must provide that the donee may enforce the easement by appropriate legal proceedings, including, but not limited to, the right to require the restoration of the property to its condition at the time of the donation. 1.170A-14(g)(5)(ii)

Extinguishment of an easement in whole or in part will not affect deductibility if:

1. The termination was by court order; 1.170A-14(g)(6)(i)

2. The termination was due to a change in conditions surrounding the property making continued use for conservation purposes impractical or impossible; 1.170A-14(g)(6)(i), and

3. All the donee's proceeds from a subsequent sale or exchange are used by donee in a manner that is consistent with the conservation purposes of the original donation; 1.170A-14(g)(6)(i)

The value of the donee's interest in the easement must be fixed in the easement.

1. The easement must provide that the donee's interest is a vested property interest; 1.170-14A(g)(6)(ii)

2. The fair market value of the donee's interest must at least equal the proportionate value that the easement at the time of the donation bears to the value of the property as a whole at the time of the donation; 1.170A-14(g)(6)(ii)

3. The easement must provide that that proportionate value will remain constant. 1.170A-14(g)(6)(ii)

4. The easement must provide that, in the event of extinguishment, the proceeds of any sale, exchange or involuntary conversion must be at least equal to that proportionate value. 1.170A-14(g)(6)(ii)

FEDERAL ESTATE TAX SECTION 2031(C)

(c) Estate Tax With Respect To Land Subject To a Qualified Conservation Easement.—

(1) In General.-- If the executor makes the election described in paragraph (6), then, except as otherwise provided in this subsection, there shall be excluded from the gross estate the lesser of –

(A) the applicable percentage of the value of land subject to a qualified conservation easement, reduced by the amount of any deduction under section 2055(f) with respect to such land, or

(B) the exclusion limitation.

(2) Applicable Percentage.-- For purposes of paragraph (1), the term "applicable percentage" means 40 percent reduced (but not below zero) by 2 percentage points for each percentage point (or fraction thereof) by which the value of the qualified conservation easement is less than 30 percent of the value of the land [1] (determined without regard to the value of such easement and reduced by the value of any retained development right (as defined in paragraph (5)). The values taken into account under the preceding sentence shall be such values as of the date of the contribution referred to in paragraph (8)(B). **[Editor's Note: the preceding sentence applies to the estates of decedents dying after December 31, 2000. This sentence does not apply to estates of decedents dying prior to that date.]**

(3) Exclusion Limitation.-- For purposes of paragraph (1), the exclusion limitation is the limitation determined in accordance with the following table:

In the case of estates of decedents dying during:	*The exclusion limitation is:*
1998	$100,000
1999	$200,000
2000	$300,000
2001	$400,000
2002 or thereafter	$500,000

(4) Treatment of Certain Indebtedness.--

(A) In General.-- The exclusion provided in paragraph (1) shall not apply to the extent that the land is debt-financed property.

(B) Definitions.-- For purposes of this paragraph--

(i) Debt-financed property.-- The term "debt-financed property" means any property with respect to which there is an acquisition indebtedness (as defined in clause (ii)) on the date of the decedent's death.

(ii) Acquisition Indebtedness.--The term "acquisition indebtedness" means, with respect to debt-financed property, the unpaid amount of—

(I) the indebtedness incurred by the donor in acquiring such property,

(II) the indebtedness incurred before the acquisition of such property if such indebtedness would not have been incurred but for such acquisition,

(III) the indebtedness incurred after the acquisition of such property if such indebtedness would not have been incurred but for such acquisition and the incurrence of such indebtedness was reasonably foreseeable at the time of such acquisition, and

(IV) the extension, renewal, or refinancing of an acquisition indebtedness.

(5) Treatment of Retained Development Right.--

(A) In General.-- Paragraph (1) shall not apply to the value of any development right retained by the donor in the conveyance of a qualified conservation easement.

(B) Termination of Retained Development Right.-- If every person in being who has an interest (whether or not in possession) in the land executes an agreement to extinguish permanently some or all of any development rights (as defined in subparagraph (D)) retained by the donor on or before the date for filing the return of the tax imposed by section 2001, then any tax imposed by section 2001 shall be reduced accordingly. Such agreement shall be filed with the return of the tax imposed by section 2001. The agreement shall be in such form as the Secretary shall prescribe.

(C) Additional tax.— Any failure to implement the agreement described in subparagraph (B) not later than the earlier of—

(i) the date which is 2 years after the date of the decedent's death, or

(ii) the date of the sale of such land subject to the qualified conservation easement, shall result in the imposition of an additional tax in the amount of the tax which would have been due on the retained development rights subject to such agreement. Such additional tax shall be due and payable on the last day of the 6th month following such date.

(D) Development Right Defined.-- For purposes of this paragraph, the term "development right" means any right to use the land subject to the qualified conservation easement in which such right is retained for any commercial purpose which is not subordinate to and directly supportive of the use of such land as a farm for farming purposes (within the meaning of section 2032A(e)(5)).

(6) Election.--The election under this subsection shall be made on or before the due date (including extensions) for filing the return of tax imposed by section 2001 and shall be made on such return. Such an election, once made, shall be irrevocable.

(7) Calculation of Estate Tax Due.-- An executor making the election described in paragraph (6) shall, for purposes of calculating the amount of tax imposed by section 2001, include the value of any development right (as defined in paragraph (5)) retained by the donor in the conveyance of such qualified conservation easement. The computation of tax on any retained development right prescribed in this paragraph shall be done in such manner and on such forms as the Secretary shall prescribe.

(8) Definitions.-- For purposes of this subsection—

(A) Land Subject To a Qualified Conservation Easement.-- The term "land subject to a qualified conservation easement" means land--

[Editor's Note: The following subparagraph "(i)" applies to the estates of decedents dying prior to January 1, 2001 only.]

(i) which is located--

(I) in or within 25 miles of an area which, on the date of the decedent's death, is a metropolitan area (as defined by the Office of Management and Budget),

(II) in or within 25 miles of an area which, on the date of the decedent's death, is a national park or wilderness area designated as part of the National Wilderness Preservation System (unless it is determined by the Secretary that land in or within 25 miles of such a park or wilderness area is not under significant development pressure), or

(III) in or within 10 miles of an area which, on the date of the decedent's death, is an Urban National Forest (as designated by the Forest Service),

[Editor's Note: The following subparagraph "(i)" applies to the estates of decedents dying after December 31, 2000 only.]

(i) which is located in the United States or any possession of the United States,

(ii) which was owned by the decedent or a member of the decedent's family at all times during the 3-year period ending on the date of the decedent's death, and

(iii) with respect to which a qualified conservation easement has been made by an individual described in subparagraph (C), as of the date of the election described in paragraph (6).

(B) Qualified Conservation Easement.-- The term "qualified conservation easement" means a qualified conservation contribution (as defined in section 170(h)(1)) of a qualified real property interest (as defined in section 170(h)(2)(C)), except that clause (iv) of section 170(h)(4)(A) shall not apply, and the restriction on the use of such interest described in section 170(h)(2)(C) shall include a prohibition on more than a de minimis use for a commercial recreational activity.

(C) Individual Described.-- An individual is described in this subparagraph if such individual is--

(i) the decedent,

(ii) a member of the decedent's family,

(iii) the executor of the decedent's estate, or

(iv) the trustee of a trust the corpus of which includes the land to be subject to the qualified conservation easement.

(D) Member of family.-- The term "member of the decedent's family" means any member of the family (as defined in section 2032A(e)(2)) of the decedent.

(9) Treatment of Easements Granted After Death.-- In any case in which the qualified conservation easement is granted after the date of the decedent's death and on or before the due date (including extensions) for filing the return of tax imposed by section 2001, the deduction under section 2055(f) with respect to such easement shall be allowed to the estate but only if no charitable deduction is allowed under chapter 1 to any person with respect to the grant of such easement.

(10) Application of this section to interests in partnerships, corporations, and trusts.— This section shall apply to an interest in a partnership, corporation, or trust if at least 30 percent of the entity is owned (directly or indirectly) by the decedent, as determined under the rules described in section 2057(e)(3).