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"The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform"

Mr. Chairman and honorable members of the Senate Finance Committee and Staff:

Thank you very much for the invitation to speak here this morning. It is an honor to be asked to participate in discussions of matters critical to the future of the landscape of America. I also want to especially thank Senator Thomas, not just for his role in providing me with this opportunity to speak with you, but also for the long and productive relationship he has held with the Wyoming land trusts that I am representing here today.

I am speaking on behalf of the Wyoming Stockgrowers Agricultural Land Trust, the Green River Valley Land Trust, and the Jackson Hole Land Trust, the three "indigenous" land trusts operating in the State of Wyoming. For the past five years I have been am currently the attorney and Director of Protection for the Jackson Hole Land Trust in Jackson, Wyoming. The Jackson Hole Land Trust, by the way, has through the use of conservation easements protected over 20% of the private land in Teton County, Wyoming in its 25 years of work.

I am also speaking from my experience as the donor of two conservation easements on farms my family and I have owned in Virginia and Michigan, and as an attorney specializing in conservation easements and related tax benefits.

My clients include non-profits and individuals. I have also done a considerable amount of writing and teaching on the subject of the tax aspects of conservation easement donation, including sessions for farmers and ranchers, land trusts, lawyers, realtors and appraisers.

I have divided my statement into sections, which hopefully will allow me to present clearly my many thoughts and concerns about the matters that confront the Committee. My full testimony has been submitted to the Committee for the record.

Importance of Conservation Easements

There are really three general means of land protection in the United States today. These are local land use regulations, such as zoning and subdivision control; public ownership;

and private conservation. Conservation easements, which are private contracts providing for the limitation on future development of land, are the key to private conservation.

Land Use Regulation

Having spent twelve years as an elected county supervisor in Virginia, and having taught land use law at the University of Virginia for over twenty years, I can state personally that land use regulation, such as zoning and subdivision regulations, is really not capable of long-term land conservation, which is not to say that land use regulations do not have a very important role to play. There are three principal reasons why land use regulation cannot effectively provide for the long-term protection of land.

First, as an exercise of the state's police power, land use regulation is subject to the prohibition against uncompensated "takings" imposed by the U.S. and most state constitutions. The Supreme Court has over the years extended the prohibition against takings to include local land use regulations. It is safe to say that the kind of restrictions on future use of land that can be imposed by a conservation easement would be unconstitutional if imposed through a police power-based land use regulation. In addition, some states (e.g. most recently Oregon) have begun to impose additional constitutional and/or statutory limitations on local authority over land use. Finally, such concepts as "Dillon's Rule," and similar limitations on local authority, further limit the ability of land use regulations to preserve land.

Second, government regulation of land is not politically popular, and is typically strenuously resisted by landowners, even landowners with a strong conservation ethic. People simply don't like to be told what to do with their land. This resistance makes extensive regulation of private land politically difficult, if not impossible.

Third, land use regulations are very much subject to the vagaries of local politics. A strong set of land protection regulations, even if they pass legal muster, are really only good until the next local election. Long-term land conservation on a meaningful scale simply cannot be achieved in fits and starts.

Public Ownership

A vast amount of land in the United States, particularly in the West, is already owned by the public. This land represents one of the nation's most valuable and enduring assets. However, in the West, and throughout much of the rest of the nation, further extending public ownership is anathema to many people.

In addition, public acquisition is extremely costly. It is costly in terms of purchase price, costly in terms of maintenance of the land itself once in public ownership, costly in terms of administration, and it takes land off from local tax rolls. It is also politically costly. The demise, at least in the House, of the Land and Water Conservation Fund, one of the most important sources of federal funding for public acquisition, is an indication of the grave difficulties confronting the expansion of public ownership of land.

Private Conservation

Most of the private land in the United States that is truly open is a tribute to the land ethics of its owners. Most of the land in the United States is privately owned and managed. The fact that many landowners reject governmental interference in their ownership does not mean that they are not dedicated to the careful stewardship of their land. Unfortunately, as agriculture becomes less and less a family affair, many of these landowners are the last of the line of such private stewards.

Conservation easements are ***the*** tool that allows these landowners, whose private stewardship has made their land a national asset, to insure the future protection of their land. Conservation easements avoid all of the pitfalls of the other two methods of land conservation previously described: they are private and therefore their terms are up to the landowner, unrestricted by the complex and extensive constitutional and statutory constraints on land use regulation. Conservation easements transcend the tortuous political cycles that prevent consistent conservation by local government. Conservation easements do not involve the costs of public acquisition and, however costly the tax benefits provided to conservation easement donors, this cost will never be more than a fraction of the cost of public acquisition and ownership. Most importantly, conservation easements leave the management of the land up to the owner and, typically, local private conservation organizations.

According to the Land Trust Alliance, private conservation easements have provided long-term, effective protection for over seven million acres of land in the United States over the past several decades. The value of this land can be reckoned in the billions of dollars. In Teton County, Wyoming, alone, we have calculated that the market value of the land protected by conservation easements amounts to nearly $700 million. Nearly all of this value has been ***donated*** by the landowners. And, **there can be no question whatever that without the tax benefits afforded by section 170(h) of the Internal Revenue Code, much of this land would remain unprotected today, or developed.**

Examples of Private Conservation

Over 4 million tourists annually travel from Jackson, Wyoming, west to the little crossroads of Wilson, or north to Teton Village, along Wyoming Highway 22. Highway 22 travels almost entirely through private land and starts only several miles west of the Jackson Town Square. Yet Highway 22 is without a doubt one of the most spectacular roads in America, with sweeping views of meadows, pastures, creeks, ponds, buttes, the Teton Range, the Gros Ventre Wilderness, and the Snake River Range. The preservation of this spectacular highway corridor has been ***entirely*** due to private conservation through the use of conservation easements. Here again, this conservation would never have occurred without the tax incentives provided by section 170(h).

Just south of Jackson Hole lies Sublette County. Sublette is a much different landscape and place than Jackson. It is still dominated by large ranches. Much of this country is

high desert, crisscrossed with verdant river valleys, such as those of the Green and the New Fork Rivers. This land has been made legendary by the accounts of its early history contained in Bernard DeVoto's *Across the Wide Missouri*.

Nobody messes with the ranchers of Sublette County, believe me. However, they are dedicated to their land and they have been permanently conserving it in 1,000-acre and 2,000-acre chunks over the past decade. This conservation is entirely through conservation easements. Again, without the tax incentives, this would not be happening.

One of the conservation easements that my family and I donated was over our farm outside of Charlottesville, Virginia, in the Southwest Mountains just north of Monticello. Our farm was only 110 acres, but it was a unique part of the landscape of the Southwest Mountains. Today, over 7,000 acres of land in these mountains has been protected through private conservation. There is nothing that local government could have done to effectively protect this historic landscape, although it tried. The tax incentives were instrumental.

These are a very, very, few stories of the thousands that could be told illustrating the importance of conservation easements in the private protection of land in the United States.

Flexibility is Key

The popularity and usefulness of conservation easements is due to the flexibility inherent in these private agreements. This flexibility is also the source of increasing criticism in the press, and in Congress. However, while the conservation resulting from conservation easements may not meet everyone's ideal of preservation, it must be remembered that not even the federal government is willing to lock up public lands and throw away the key. Perfect conservation is not consistent with the practical realities of land ownership and management. However imperfect in some people's minds, conservation easements have indisputably protected vast tracts of land from development and sprawl in a way that simply could not have been achieved otherwise.

Conservation easements, to have any chance at effectiveness, must be acceptable to landowners, without whose support easements will simply not be granted.

Unquestionably there have been, and will continue to be, abuses of this flexibility. I believe that much of the abuse, as I will describe later, can be effectively addressed by more vigorous enforcement of existing law. However, like most things, if we tighten the screws on conservation easement deductions to address the concerns of those who believe that effective conservation means putting land in a glass case to look at, but never touch, the program will become useful to only a small handful of landowners who have no need to use their land in the future.

Is There a Need for Reform?

My short answer to this question is: "No." An objective and persuasive case for reform has not yet been made. To my knowledge, the two primary commentaries on the need for reform have come in the form of the series on The Nature Conservancy published by *The Washington Post* just over two years ago; and pages 277 through 287 of the Report issued by the Joint Committee on Taxation early this year ("Options to Improve Tax Compliance and Reform Tax Expenditures," published by the Staff of the Joint Committee on Taxation, January 27, 2005).

Enforcement History

Against these commentaries is set the judicial record of IRS challenges to conservation easement deductions. In preparation for writing an article for the *Wyoming Law Review* which appeared earlier this year, my assistant and I reviewed all of the reported cases involving IRS challenges of conservation easement deductions. There were about 115 or so such cases. Of these cases, there were ***only three*** relating to land conservation that actually addressed the substance of the easement and its compliance with the requirements for deductibility. These were *Great Northern Nekoosa Corporation v. US,* 38 Fed. Cl. 645 (1997); *McLennan v. US*, 994 F.2d 839 (Fed. Cir. 1993); and just last month *Glass v. CIR*, 124 TC 16, 2005. The rest of the reported cases focused almost exclusively on challenging appraisal valuations of easements.

In the *Nekoosa* case the IRS successfully claimed that the right to extract gravel on the 5,000-acre easement property for use in maintaining roads and for construction purposes on the property violated the tax code requirement that deductible conservation easements prohibit surface mining. The court agreed with the IRS, and disallowed the entirety of a $19 million tax deduction. Believe me we pay close attention to gravel extraction provisions in conservation easements as a result of this case.

In *McLennan* the IRS claimed, among other things, that the conservation easement was not "exclusively for conservation purposes" as required by the tax code, because the donor was motivated to obtain a tax deduction by making the donation. The court threw that argument out. The other argument made by the IRS was that the donor had no intention of developing her property anyway, so in valuing the property using the "before and after" valuation method, it was inappropriate for the taxpayer to base the before easement value on the future development value of the property. The court agreed with this position, but allowed a deduction anyway because it found that even comparing the property with other undeveloped property the easement property had lost value due to the restrictions on future use imposed by the easement.

Finally, in May the U.S. Tax Court ruled in favor of the taxpayer in the *Glass* case. In this case the IRS argued that the easement failed to meet the conservation purposes test of the tax code and that the easement was not exclusively for conservation purposes as required by the code. The court in this case was able to find that an easement protecting the habitat of several endangered species, where surrounding land was under considerable

development pressure, passed the conservation purposes test for preservation of a significant, relatively natural habitat. The court also found that an easement held by an established land trust, with substantial assets, staff and experience, and a history of land conservation, was held exclusively for conservation purposes. It is hard to fault this outcome.

In other words, in two of the three cases where the IRS has actually challenged the substance of a conservation easement deduction for lack of compliance, it has been successful, at least in part. This is not, in my opinion, a record supporting the need for reform. Of course, we have no access to the record of audits of conservation easements.

The IRS focus has been, as noted above, almost exclusively on challenges to easement valuations. In this, the IRS has met with mixed results. However, challenging local valuations and locally-knowledgeable appraisers is admittedly difficult. All that we can surmise from the record here is that the presumably objective courts hearing these cases have found that the taxpayers' claims of easement value are often relatively accurate.

From my observation, knowledgeable challenges by the IRS to the compliance of the easement document with requirements of the tax law would be both easier to prosecute and far more likely to succeed. The fact that the IRS has not really examined easement documents, or appraisals, for compliance with the extensive requirements of the tax law and, by its own admission, has largely ignored conservation easement deductions over the past decade, suggests that more challenges directed to compliance, not just valuation, would do much to strengthen compliance.

The Washington Post Series

Only a small part of *The Washington Post* series addressed conservation easement abuses, namely "conservation buyer transactions" involving "insiders." However, the series left out important details about these transactions that would allow an accurate determination of whether or not the transactions were, or were not, in compliance with tax law. For example, if the sales prices were based on valid, independent appraisals, and if the board members involved had no role in the decision to sell, these deals appear to me to be compliant with the law. Such lack of critical detail is not limited to the *Post* series, but appears in other articles that have sensationalized the issue of conservation easement tax benefits.

The *Post* also implied, and a subsequent Notice issued by the IRS last summer (Notice 2004-41 published July 12, 2004), stated, that the type of transactions described in the *Post* series were in violation of existing tax law. I will discuss these transactions later, and I have appended to this Statement a copy of an article that I recently wrote discussing them in detail. For now, let me simply say that I believe that these transactions, assuming proper appraisals, are lawful, and completely consistent with IRS Rulings (e.g., Rev. Rul. 70-15), Regulations (e.g., sections 1.170A-1(d)(1), and 1.170A-14(h)(3)(i)), and a decision by the United States Supreme Court (*U.S. v. American Bar Endowment,* 477 US 105 (1986)).

I also believe that these conservation buyer transactions, and similar ones, are consistent with the policy and intention of Congress to promote voluntary permanent land conservation through the tax code.

The Joint Committee Report

The Joint Committee on Taxations' Report, already mentioned, recommended draconian changes in the tax provisions governing conservation easement deductions. If implemented, these changes would essentially eliminate the federal tax incentive for conservation easement donations, which, as I noted previously, has been the moving force in private land conservation in the United States for over three decades.

I believe that the Report's proposed changes go far beyond a recommendation for improving compliance and are tantamount to a recommended reversal of long-standing national policy to encourage voluntary land conservation through the tax code.

The Report's recommendations are premised upon some questionable and, as yet, unproven assumptions. Let me start by saying that I spent a number of years working with the Joint Committee Staff in connection with what has become section 2031(c) of the Internal Revenue Code, providing an additional estate tax benefit for conservation easement donors. I found the staff to be extremely competent, knowledgeable, and very decent to work with. However, it was clear to me that the staff, at least those members with whom I worked, was skeptical in the extreme of conservation easements.

This skepticism characterizes the Report's treatment of conservation easements. The Report appears to predicate its recommendations on three things. First, easement valuation is very subjective and speculative. Second, taxpayers and land trusts have too much latitude in determining whether conservation easements serve a significant conservation purpose. Third, because easement donors typically would be unlikely to develop their land, the current tax incentives are providing an ineffective "windfall" for landowners, rather an incentive changing the their behavior.

I would like to take a minute to respond to these three points. First, I admit that easement valuation is subjective and somewhat speculative: that is the nature of the appraisal business. However, the current law is quite specific about what things an appraiser must consider in valuing a conservation easement. I believe that whether or not an appraisal complies with these requirements is not subjective and is easily determined. A redirection by the IRS of its approach to easement appraisals is likely to yield significantly better results for the government.

Second, there is no basis in the case law for the Report's position that there is too much latitude available to taxpayers and land trusts in determining public benefits. If there were a record of judicial decisions in which abuses were documented, a change in the law might be appropriate. That record does not now exist. I suggest that the IRS needs to

tackle those cases where it believes that abuse of this part of the law has occurred before we can know if a problem needing a legislative solution exists.

Third, whether or not an easement donor is likely to develop his or her property is not a relevant factor in determining the value and effectiveness of the easement. The fact is that land changes hands, and easements, once donated, bind all future owners regardless of their motivations for owning the land.

Furthermore, the tax benefits of easement donation do not equal the potential profit that can be derived from land development. Therefore, if the landowner is a developer, the incentives are highly unlikely to motivate him or her to donate an easement preventing such development. For this reason it is necessary to capitalize on the owner who has no development intentions – someone for whom the tax benefits represent a meaningful economic incentive.

Because easements are perpetual and bind future owners, the action of a conservation-minded donor effectively protects the land against future owners who may not be conservation minded. This is the key to the success of conservation easements, not evidence that they are ineffective.

The Committee staff also suggests that easements may actually increase the economic value of the land restricted by the easement. I have heard this argument before, and it has recently been repeated in the press. I believe that it is based upon watching the value of land ***adjoining*** easement-protected land increase in response to that protection. It is well established that people will pay a higher price for land that adjoins protected land.

However, I think it a very dubious proposition that a rational buyer would pay a premium for land subject to restrictions that will tie the buyer's hands in the future in using that land. ***Restrictions on the potential uses that can be made of real property simply do not increase the economic value of that property.*** Occasionally, where a group of properties are protected by conservation easements all values in the group will increase, but this is due to the protection against what neighboring landowners can do with their property.

Proposed Reforms

In my invitation to speak here today I was asked to comment upon the reforms being recommended regarding conservation easement tax deductions. When I wrote this statement on Monday of this week these proposals were unavailable for me to review. Therefore, I will address some of the reform proposals which have been rumored. I have already commented on most of the reforms proposed in the Joint Committee's Report. I do support that Report's recommendation of strengthened standards for appraisers, and will elaborate on that at the end of my statement.

Establish a "conservation review board"

Part of my problem in evaluating this recommendation is that I don't know the details. Such a review board, if established as an appeal board for taxpayers whose easements are in audit, might be very helpful in determining whether the easement actually serves a significant conservation purpose, without discouraging legitimate contributions. However, because the resource value of land is often a function of the context in which the land is located, for this recommendation to truly serve such a purpose review boards should be established in every state, rather than being located solely in Washington, D.C., for example.

My second concern about this proposal is insuring that conservation review boards are manned by independent citizens who understand the law and conservation principals and can objectively apply the law and these principals to evaluating conservation easements. The danger is that such review boards would be, or would become, politicized.

However, provided that such review boards are limited to assisting in evaluating conservation easements that are in audit, and that the concerns I have just described are properly addressed, conservation review boards may be beneficial.

If conservation review boards are established as a separate hurdle to easement donation, prior to completion of the donation, or if such boards are allowed to develop their own criteria for evaluating easements that goes beyond the existing law, they could be quite counter-productive to private land conservation.

Fees to Fund Review

It has been suggested that financial support for review boards come from fees imposed on easement donors. Easement donors already face a number of costs in donating an easement, not the least of which is the loss in value of the land due to the restrictions imposed by the easement. Among these costs should be, and often is, a payment to the land trust holding the easement to provide for the perpetual monitoring and enforcement of the easement. Properly endowing these land trust obligations may run $15,000 to $20,000 or more.

Additionally, appraisal costs are already substantial, running between $5,000 and $10,000 in many parts of the country, and if new standards on easement appraisers are imposed these costs are likely to increase. While a fee for a donor with a substantial income is unlikely to be a problem, farmers and ranchers are often not among this class, yet they often own land highly worthy of protection. Because donors with smaller incomes get a smaller benefit from the easement tax deduction to begin with, imposing fees on such donors will even further diminish the incentive to them to donate the easement.

If a fee is to be imposed, I would suggest that it be in the form of a fraction of a percentage point of the amount of the actual tax benefit reflected on that donor's return, and that it reduce that amount on the form, rather than being paid separately. This insures

that the fee would only marginally affect the tax benefit, that it is proportional to the actual benefit, and that it is assessed in a way that does not require an additional out-of-pocket expenditure by the donor. And, of course, such fees should be dedicated to support of the conservation review boards and not simply be counted as additional general revenue.

A fee in the form of a percentage of the value of the easement creates a direct disincentive to the donation of valuable easements. Furthermore, the value of the easement is not a reliable measure of the value of the tax benefit to the donor due to the several existing limitations on the use of the deduction which are tied to the donor's income.

Mandatory Accreditation of Land Trusts.

In principle I believe that land trusts should be accredited. Holding a conservation easement is a very serious and long-term obligation. The tax aspects of easement contributions and related conservation transactions are complex. Land trusts need to know what they are doing, and they need to understand the serious consequences of doing it wrong. However, I believe that imposing a mandatory accreditation requirement that must be met within the next several years for all of the nation's land trusts is a Herculean task that will be extremely difficult and costly to complete. It may be a task that is impossible to accomplish equitably and reliably.

Such accreditation should be done within the land trust community, based upon the existing *Standards and Practices* developed by the Land Trust Alliance, and adopted by many of the nation's land trusts. However, I take LTA at its word that, while it will work to implement a voluntary accreditation program over the next several years, it is not in a position to undertake a mandatory program, compliance with which will govern the ability of individual land trusts to accept deductible easements.

I would also note that the IRS already has, within the law and regulations, the ability to challenge land trusts that it believes are not "qualified organizations" as defined in the law. I have an alternative to mandatory accreditation that I will describe at the end of my statement.

Require that all conservation easements be pursuant to clearly delineated governmental policies.

This recommendation is found in the Joint Committee's Report. This requirement already pertains to open space easements and appears not to have been a problem; however, as there are no recorded cases challenging easement deductions because they fail this test, it is hard to know how attempts to enforce this requirement might play out. In effect, this is a recommendation to expand a requirement that has yet to be tested in court.

Other than the *Glass* case that recently emerged from the Tax Court, there have been no reported cases where deductions have been challenged for failure to comply with any of the conservation purposes tests. This is a very thin record of failed enforcement attempts, or abuses, upon which to base a change in the law.

The problem with expanding this requirement, particularly to conservation easements where the conservation purpose is protection of a relatively natural habitat, is that ***in many parts of the country there are no relevant governmental policies for such protection***. The lack of such a policy does not mean that there are no important habitats that need protection. Lack of policy may simply mean that the public is unaware of such habitats, or that it is politically unpopular for government to make a policy directed at protection of privately owned habitat.

A major issue in Wyoming, and other western states, is the Endangered Species Act. One of the goals of the Wyoming Game and Fish Department is to provide support and protection for wildlife habitat before species get put on the list; in other words, before a species or its habitat becomes a focus of "clearly delineated governmental policy." This makes sense, and is largely dependent upon voluntary action and education. However, if a habitat is so threatened that its protection becomes a "clearly delineated governmental policy" the battle to save the habitat may already be lost.

Require local governmental approval of conservation easements.

From my observation, requiring local governmental approval of conservation easements will scare off a great many potential easement donors: folks (like many western ranchers, for example) who want nothing to do with the political process, and who do not believe that their private contributions should be made part of a local public process.

Such a requirement would add additional burdens to already swamped local government officials. It wrongly assumes that localities have a sufficient level of understanding of land conservation and the conservation purposes established by existing tax law to be helpful. It would inject a true wild card in the easement donation process, one that could delay the processing of easement donations for months. And, it leaves landowners hostage to local political whims.

One of the strengths of the private conservation movement, as I noted earlier, is that it has been apolitical, really apart from politics. This measure would make easement donation a very political process, and subject private conservation to some of the same problems that make local land use regulation ineffective at long-term land protection.

Impose penalties on land trusts that fail to enforce conservation easements.

This recommendation appears on page 112 of the "General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals." Of course, the details of this proposal, and the method of enforcement, are the keys to whether it would be good or bad for conservation. However, I believe it very likely that such a proposal, properly

implemented and enforced, could have a salutary effect. However, it is difficult to know how "failure to enforce a conservation restriction" could be monitored; how large or small the failure would have to be to violate the proposed new requirement; whether land trusts would be allowed to cure such failures before being penalized, etc. These are the details that need to be addressed before this proposal can be practically evaluated.

Require that changes in easements be reviewed by an independent body, such as a court.

Land trusts are precluded from entering into easement amendments that confer private benefits under existing law. The penalty for doing so is an excise tax of 25% of the value of the benefit imposed on the landowner, and a penalty on land trust managers involved in the transaction of up to $10,000. In addition, repeated violations can lead to revocation of tax exempt status. In other words, the law already provides an adequate safe-guard against improper easement changes.

Often easement amendments increase conservation benefits (many land trusts have amendment policies that require that any amendment increase conservation benefits). Would such amendments also have to be reviewed? This measure unnecessarily injects additional uncertainty into easement donation for landowners and, therefore, will discourage donations in the future. Finally, such a process, especially if judicial review were required, could be very lengthy and costly. Easements need to be flexible enough to allow some financially neutral and conservation positive adjustments to accommodate unforeseeable consequences.

Establish a "de minimis" standard, such as a minimum acreage, for deductibility.

The law already requires that a conservation easement confer a "significant public benefit." A uniform, one-size-fits-all standard for easement donations would be incapable of recognizing the unique nature of each property and its context, throughout the country. For example, many in-holdings within the Grand Teton National Park, which the Park Service in anxious to protect but does not have funds to purchase, could be protected by conservation easements, but are less than ten acres in size. Land along seacoasts and lake shores has often been subdivided into small parcels, nevertheless these parcels are rich in scenic and resource value; a *de minimis* standard may preclude protection of such parcels from qualifying for a deduction.

Require a second appraisal for large easement donations

Such a measure is counter-productive because it creates a disincentive to the donation of particularly valuable easements. Here again, for donors with substantial incomes, the cost of a second appraisal is probably not a deterrent to the donation. However, many landowners with conservation-worthy land, such as farmers and ranchers, do not have large incomes to absorb these costs. Existing law, if applied and enforced, already establishes standards for appraisals that should effectively limit abuses.

Conservation Buyer Transactions

Conservation buyer transactions involve the sale of conservation-worthy property in a manner which insures the protection of the property through the use of a conservation easement. Without going into the variations of such transactions (I have appended an article that I recently wrote describing these transactions), they are an increasingly important conservation tool. Conservation buyer transactions have been responsible for the protection of a substantial part of the land protected by conservation easements in my own town of Jackson, Wyoming, and are (or were) being used in other parts of Wyoming and throughout the United States.

The July 2005 IRS Notice, mentioned previously, was critical of the type of conservation transaction described in the *Post* series. That Notice also criticized conservation buyer transactions in general. It is unfortunate that this Notice cast a pall over virtually all conservation buyer transactions. In effect the Notice dictates that a buyer of conservation-worthy land who is willing to commit, prior to the purchase, to protect the land once purchased, is penalized, whereas, the buyer unwilling to make such a commitment is not. This is certainly a counter-intuitive result.

The article that I have appended to this statement deals in some detail with the problems that the Notice poses for conservation buyer transactions, and offers some suggestions.

Some Recommendations

With the publication of the *Post* series on The Nature Conservancy, the publication of the Notice, the Report of the Joint Committee on Taxation, and the Congressional investigations and considerations of reform, I believe folks finally understand that the law is important to easement deductions. The past few years have been a wake-up call for land trusts.

I believe that now is the time to capitalize on the attention that is being given to the need for compliance. I think that most people want to comply and, as I have noted at length earlier in this statement, I believe that existing law is adequate, given effective enforcement, to prevent abuse. Of course, preventing all abuse is impossible, except by eliminating the benefit.

I believe that what is needed now is education all around, ***compulsory*** education, and certification requirements for appraisals and easements that force people to specifically acknowledge the requirements of the law. With that in mind, ***on my own behalf and not for any of the land trusts that I have spoken for thus far***, I suggest the following measures in lieu of changing the existing law:

1. Create a special unit within the IRS, trained in, and knowledgeable about, conservation easements and conservation transactions. Assign these agents to focus on the review of a select number of easements annually. Nothing teaches like example. Currently, even though in most cases they are well-intentioned, many land trusts,

appraisers, donors and their legal counsel simply are not motivated to learn the basics. Knowledgeable audits will create a very effective incentive.

2. Rather than impose a mandatory accreditation program on land trusts impose a **mandatory continuing education requirement** on land trusts that wish to hold deductible easements. Many professions have such requirements. The complexity and importance of the proper administration of a conservation easement program involving tax deductible easements **requires** knowledge.

The Land Trust Alliance already has an extensive education program both nationally and regionally. While the Alliance may not be able to effectively accredit all of the land trusts doing business within the next several years, it is likely that it can provide continuing education programs that are accessible to land trusts throughout the United States within such a period.

A requirement that at least one official of each land trust holding deductible easements annually attend a course on compliance with the tax code and regulations would not be unreasonable. Certifying such attendance, while administratively cumbersome, should be manageable, especially if supported by a reasonable fee for each course taken. Bar associations throughout the nation do this every year for far more lawyers than there are land trusts. The land trust community should be able to implement such a program within a reasonable time.

3. Similar educational requirements, suggested in the Joint Committee Report's recommendations, should be imposed on easement appraisers.

4. I believe that many appraisers, easement donors, and land trusts, simply do not focus on the legal requirements for a deductible easement. One means of getting that focus is to require certification of compliance with, at least, the key provisions of the law. To provide for this I suggest that a new version of Form 8283 "Noncash Charitable Contributions," designed expressly for conservation easement donations, be created. I suggest that, in addition to the relevant provisions of the existing Form, the new form include certifications, more or less along the following lines:

> **By the appraiser:**
>
> If valuing the qualified conservation contribution by comparing the value of the real property subject to the contribution both before and after the contribution (the "before and after" method) I certify, to the best of my knowledge and belief, as follows:
>
> a. I have examined and taken into account the effect upon the value of the real property subject to the contribution of all legal restrictions (zoning, restrictive covenants, environmental regulations, etc.) applicable to such property.

b. If I have assumed the "before" value of the real property subject to such contribution based upon the value of such property as a completed development, I have taken into account the demand for such development, the costs of such development (infrastructure, sales costs, etc.), the absorption time for the development, and reasonable discounts for the holding costs, and developer's profit, as applicable.

c. I have not assumed speculative development approvals, rezonings, or other discretionary land use or environmental approvals, except as specifically noted and explained in the appraisal.

d. In valuing the qualified conservation contribution I have taken into account the effect of the contribution on the value of all of the real property owned by the donor or a member of the donor's family, either contiguous to the property subject to the contribution, and/or other real property owned by the donor or a member of the donor's family the value of which may be affected by the contribution.

By the the donor, or the donor's attorney:

I certify, to the best of my knowledge and belief, that the qualified conservation contribution with respect to which this Form is filed complies with the requirements of §170(h) of the Internal Revenue Code of 1986, as amended, and the accompanying Treasury Regulations, including the requirements that the contribution:

a. Permanently restricts the real property to which it applies and is binding upon the donor's heirs, successors and assigns, in perpetuity.

b. Is contributed exclusively for one or more of the "conservation purposes" as described in §1.170A-14(d) of the Treasury Regulations.

c. That the contribution does not reserve unto the donor any uses of the real property subject to the contribution that would be inconsistent with the conservation purposes of the contribution, or other significant conservation interests, as required by §1.170A-14(e).

d. That if the contribution is for the preservation of open space the contribution confers a significant public benefit within the meaning of §1.170A-14(d)(4)(iv) and (vi)(B) of the Treasury Regulations.

e. That the documentation of the natural resources of the real property subject to the contribution required by §1.170A-14(g)(5) of the Treasury Regulations has been completed and delivered to the organization to which the contribution was made on or before the recordation of the instrument making the contribution.

f. That the contribution grants the donee the right to inspect the real property subject to the contribution on a periodic basis to determine compliance with the terms of the contribution.

g. That the contribution grants the donee the right to enforce the terms of the contribution, including the right to require restoration of the real property subject to the contribution necessary to correct any violation of the terms of the contribution.

h. That the contribution grants to the donee the right to receive a certain proportion of the proceeds of any sale or other transfer resulting from an extinguishment of the restrictions imposed by the contribution, according to the provisions of §1.170A-14(g)(6).

By the donee:

On behalf of the donee organization, I certify, to the best of my knowledge and belief, that the donee:

a. Is either a governmental entity, or a private non-profit organization recognized under §501(c)(3) of the Internal Revenue Code.

b. Has, among its purposes, the purpose to conserve the conservation values of the real property with respect to which the qualified conservation contribution has been made.

c. Has the means and ability to enforce the terms of the contribution.

Along with this new form, I suggest that easement donors be allowed to revise their easement documents to bring them into compliance, even if they have already been put to record, provided that such revisions are completed and recorded prior to the due date (plus extensions) for the return on which the conservation easement tax deduction will first be claimed. This is because the form is often not considered until after the contribution has been put to record. The intent of the revisions to the form is to highlight the importance of compliance. Donors should be able to respond to the certifications included in the form with revisions that will be effective to bring the easement into compliance.

Other Suggestions

In addition to the foregoing recommendations to improve understanding and enforcement of the law governing conservation easement tax deductions, I have two suggestions for steps that would advance private conservation through conservation easements:

1. Clarify the July 2005 IRS Notice pertaining to conservation buyer transactions, as suggested in the appended article, to allow these types of transactions to resume on a reasonable basis, and to reflect the existing law.

2. Enact the proposals made by Chairman Grassley, and Ranking Member Baucus, embodied in the former S. 701. These proposals were to increase to 15 years the carry-forward period for unused portions of easement deductions, and to increase the percentage of income against which such deductions are taken to 100% of the donor's income. These revisions to the law would be limited to those easement donors more than 50% of whose income is derived from farming or ranching.

While we do not have any solid evidence of need for reform to cure perceived abuses, as I have noted previously, there is ample evidence that landowners with valuable land, but small incomes, do not derive the full tax benefit, or even a substantial part of the tax benefit, from donating a conservation easement. These recommendations by Senators Grassley and Baucus would do much to make the conservation easement tax benefits more equitable and more effective for farmers and ranchers.

Conclusion

I would like to thank the Committee and Staff, and especially Senator Thomas, for arranging for my participation in this important hearing. ***I urge you to consider whether the issue before you requires new laws, or rather, whether the few abuses we have heard about could be avoided in the future by strengthening enforcement and knowledge of existing law.***

I truly believe that improving enforcement and understanding of the existing law, rather than the enactment of new laws, is the key to efficiently and economically furthering the clear intention of Congress to encourage private conservation of land in America.

If there is anything that I can do to assist in this effort I would be honored to do so.

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THE IRS AND CONSERVATION BUYER TRANSACTIONS: THROWING THE BABY OUT WITH THE BATHWATER?

By Tim Lindstrom

The Nature of Conservation Buyer Transactions

An increasingly important tool for land conservation is the "conservation buyer transaction." Conservation buyer transactions come in a number of forms, but most

either involve the sale of property subject to a conservation easement put in place just prior to closing, or a sale in which the buyer agrees, before closing, to conserve the property with an easement after closing.

Conservation buyer transactions can occur anywhere, but they are most useful in places where land values are very high, and land buyers are primarily "amenity buyers," seeking peace, quiet, and beauty, rather than development potential, from their land. These areas tend to be areas where conservation values are exceptional, such as Jackson Hole, where I live.

IRS Criticism of Conservation Buyer Transactions

The by now famous Notice, published by the IRS in June, has, among other things, cast a pall over most conservation buyer transactions. This is due to the criticism contained in the Notice of conservation buyer transactions, in particular a type of transaction used by The Nature Conservancy, but by others as well. Quoting from the Notice:

> "Some taxpayers are claiming charitable contribution deductions under §170 [26 U.S.C. §170, pertaining to charitable contribution deductions, including conservation easement donations under §170(h)] for cash payments or easement transfers to charitable organizations in connection with the taxpayers' purchase of property. In some of these questionable cases, the charitable organization purchases the property and places a conservation easement on the property. Then, the charitable organization sells the property subject to the easement to a buyer for a price that is substantially less than the price paid by the charitable organization for the property. As a part of the sale, the buyer makes a second payment, designated as a 'charitable contribution' to the charitable organization. The total of the payments from the buyer to the charitable organization fully reimburses the charitable organization for the cost of the property.
>
> "In appropriate cases, the Service will treat these transactions in accordance with their substance, rather than their form. Thus, the Service may treat the total of the buyer's payments to the charitable organization as the purchase price paid by the buyer for the property" [thereby disallowing any charitable deduction].

Applicable Tax Rules

Before going further, let's have a very short course in tax analysis. The "form versus substance" doctrine, invoked by the Notice, along with the similar "step transaction" doctrine, have been tools used by the IRS, and the courts, to evaluate the appropriateness of tax benefits claimed by taxpayers in various types of transactions, most of them commercial. The substance versus form doctrine is fairly self-explanatory. In an effort to avoid payment of tax, people sometimes create artificial structures, which have no

business purpose. In such cases, tax benefits may be disallowed when the IRS ignores the artificial "form" of the transaction, and evaluates its "substance."

The step transaction doctrine is a more elegant version of form versus substance. The step transaction doctrine is a way of analyzing the structure of a transaction that is made up of a series of steps to determine what really happened. Where the steps have no purpose other than tax avoidance, the IRS will "collapse" them, and evaluate the transaction based upon the result. As already noted, traditionally these two doctrines have been applied to business settings, not charitable transactions. In fact, the courts have made it clear that donating property (including a conservation easement) for the exclusive purpose of obtaining a tax deduction is not a basis for disallowing the deduction.

Neither the form versus substance doctrine, nor the step transaction doctrine, should be used to disallow a charitable deduction where a transaction has a genuinely charitable and publicly beneficial result. In such cases, the *substance* of the transaction is consistent with the public policy behind the charitable contribution deduction, which, simply put, is to encourage charitable contributions.

Lack of Detail in the Notice is Confusing

A major problem with the Notice is its lack of detail. For example, assume that a land trust (for purposes of this article land trusts are presumed to be public charities, recognized as exempt organizations under §501(c)(3) of the tax code) buys a ranch for $2 million, and retains a conservation easement at closing reducing the value of the ranch to $1 million. Also, assume that the buyer paid $1 million for the ranch, and made a $1 million cash gift to the organization. Using the form versus substance doctrine to conclude that the buyer should be treated as having paid $2 million for the ranch (as suggested in the Notice), and denying him a charitable deduction for the $1 million cash payment to the land trust, ignores the true substance of the transaction: the buyer has paid $2 million to a public charity for property valued at $1 million. The charity ends up with a publicly significant conservation easement worth $1 million, and recovers the full value that it paid for the ranch.

However, let's assume that the land trust in the preceding example paid $2 million for the ranch, and retained a conservation easement at closing that reduced the value of the ranch to $1.5 million. Assume that the land trust then sold the ranch for $1 million to the buyer, who made a $1 million cash gift to the land trust, and claimed a $1 million income tax deduction. In this case, the buyer has paid $2 million to a public charity for property valued at $1.5 million, and seeks a $1 million tax deduction. The charity ends up with its investment in the ranch back, and a conservation easement worth $500,000. Clearly, the end result is that there has been a net charitable contribution of no more than $500,000, to which the buyer should be limited.

The lack of detail in the Notice leaves the reader in the dark as to which, if either, of the transactions described in these examples would pass an audit. In other words, legitimate

and phony transactions may both fall within the indefinite language of the Notice. Few conservative tax lawyers (redundant, I realize) familiar with the Notice are likely to advise their clients to engage in either of these transactions until the scope of the Notice is clarified. In the meantime many important, and legitimate, transactions may be dying on the vine.

"Dual Character" Transactions

The criticism contained in the Notice was not just confined to transactions in which a land trust retains an easement, and receives a cash contribution from the buyer. The Notice also refers to "easement transfers to charitable organizations in connection with the taxpayers' purchase of property." This very general criticism could apply to virtually every conservation buyer transaction, not just the type discussed above.

What may be at the heart of the Notice's criticism of easement transfers in connection with land purchases is that the IRS believes that such transactions lack "donative intent." That is, the buyer did not *intend* the easement donation as a charitable contribution, but donated the easement because it was the only way that the property could be acquired. Thus, so the argument goes, the donation of the easement was part of a "quid pro quo" transaction in which the easement was exchanged for something of value (i.e. the privilege of being able to buy the property), which negates the necessary donative intent.

A similar issue is involved in the question of whether the purchaser of tickets to a charity ball is entitled to deduct the price of the tickets. Suppose you want to hobnob with the elite of society by attending the Firefighters Ball. The only way that you can mix with these wonderful folks is to pay $250 for a ticket. The music is poor, the food is worse, but the company is fantastic. The law is clear that you are allowed a charitable deduction for the difference between what you paid for the ticket, and the value of the ticket, in terms of the benefits that you received. The Firefighters tell you that the value of the ticket (i.e., the value of the food, drink, and entertainment) is only $50. Therefore, you are considered to have made a charitable contribution to the Firefighters of $200, for which you are entitled to a deduction.

The IRS and the courts call these types of charitable transactions "dual character" transactions. Part of the payment is charitable, and therefore deductible; part of the payment is for benefits received, and therefore not deductible. The IRS has said that it is only willing to extend "dual character" treatment to payments for tickets to charitable events, and to membership fees for membership in charitable organizations. However, the U. S. Supreme Court has not limited the dual character rule in such a fashion. In a decision rendered since the IRS limited its application of the dual character rule, the Supreme Court has said:

> "A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return. However . . . a taxpayer may sometimes receive only a nominal benefit in return for his contribution. Where the size of the payment is clearly out of proportion to

> the benefit received, it would not serve the purposes of §170 to deny a deduction altogether. A taxpayer may therefore claim a deduction for the difference between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the "dual character" of a purchase and a contribution. [Emphasis added.] *U.S. v. American Bar Endowment*, 477 U.S. 105, 117, 118 (1986).

The Treasury Regulations pertaining to the valuation of conservation easements for federal deduction purposes also implicitly recognize the dual character rule:

> "If, as a result of the donation of a perpetual conservation restriction, the donor . . . receives, or can reasonably expect to receive, financial or economic benefits that are greater than those that will inure to the general public from the transfer, no deduction is allowable under this section. However, if the donor . . . receives, or can reasonably expect to receive, a financial or economic benefit that is substantial, but it is clearly shown that the benefit is less than the amount of the transfer, then a deduction under this section is allowable for the excess of the amount transferred over the amount of the financial or economic benefit received . . ." [Emphasis added.] 26 C.F.R. §1.170A-14(h)(3)(i).

The sale by a land trust of property to a buyer, on condition that the buyer donate a conservation easement on the property, should be considered a dual character transaction, assuming that the value of the easement exceeds the value of the right to buy the property, and that the buyer intends that difference as a charitable contribution to the land trust.

The question of what value should be allocated to the right to buy the property is beyond the scope of this article (and possibly beyond the scope of appraisal techniques). However, the denial of a charitable deduction to a buyer, who contributes an otherwise qualified conservation easement, requires either a finding that the value of the right to buy the property is at least equal to the value of the easement, or that the easement has no value. To make either of these findings requires the parties to ignore the restrictions imposed by the easement, and the effect on fair market value resulting from those restrictions.

Therefore, I would argue that the purchase of property from a land trust, subject to the condition that the buyer donates a conservation easement, should be eligible for "dual character" transaction treatment. Of course, the easement must otherwise qualify under §170(h) of the tax code, and the value of the easement must be validated by a qualified appraisal. Not only would such a transaction appear to comply with the formal requirements of the tax code, it also produces a result that satisfies the public policy behind the tax code's land conservation incentives, i.e. bona fide, perpetual conservation of the land involved.

Dual character status should also be accorded to cash contributions made in connection with land trust sales on the same principles.

Transactions Involving Private Sellers

So far, this discussion has been confined to transactions in which a land trust, as opposed to a private party, is the seller of the property in question. However, the fact that the seller is a private party should not preclude a deductible conservation buyer transaction. If the conveyance of the easement is the result of a private contractual obligation between the seller and buyer, there is no deduction because the private contract precludes donative intent.

On the other hand, if the conveyance is the result of a contractual arrangement between a land trust and the buyer, there is no reason, all other things being equal, why the conveyance should not be deductible. This is because the tax code recognizes that the fact that a contribution of money or property is made pursuant to a charitable pledge, or other charitable commitment, does not, in and of itself, rob the contribution of "donative intent."

Thus, for example, if Mr. Blue agrees to sell his land to Mrs. Green, subject to a contractual agreement between them that Mrs. Green will convey a conservation easement over the property to a local land trust, there is no deduction. Or, if Mr. Blue grants and records an option, giving the local land trust the right to acquire a conservation easement on Mr. Blue's property, and the option is exercised after Mrs. Green purchases the property, there is no deduction (because Mrs. Green is complying with a private contractual obligation arising from taking title subject to the pre-existing option).

However, before she buys Mr. Blue's property, Mrs. Green could grant an option to the local land trust giving it the right to acquire a conservation easement on Mr. Blue's property when, and if, Mrs. Green purchases the property. Assuming that Mrs. Green buys Mr. Blue's property, and that the land trust then exercises the option, Mrs. Green should be entitled to a tax deduction for the difference between the value of the easement, and whatever the land trust paid to acquire it from her. This is because the commitment to convey the easement is, in effect, a charitable pledge to a public charity by Mrs. Green, not a contract with a private individual or entity. Applying the form versus substance doctrine, let us take a more critical look at this transaction.

In form, the buyer is discharging an obligation to a public charity, which is deductible. However, the obvious question arises: Why didn't the buyer simply purchase the property and donate the easement later? The option must be explained because it appears to have no role in the outcome. One explanation is that the private seller would not sell to any buyer who had not committed to the donation of a conservation easement once the property was purchased. Does this allow the IRS to ignore the option with the land trust, and treat it as a private precondition of sale, thereby negating donative intent? It may. But, should it?

Denying a tax deduction to a buyer because he is willing to commit, prior to acquiring title to property, to permanently conserve that property in the future, creates the odd result that buyers unwilling to make any commitment to future conservation are favored by the tax code over those who are willing to make such commitments. This is inconsistent with the conservation policy behind the tax code provisions, the primary purpose of which is, as already noted, to encourage land conservation.

Because of our progressive tax system, which taxes people with big incomes more than people with small incomes, tax incentives for land conservation work best for those with big incomes. However, a great deal of very conservation-worthy land in the United States is owned by farmers and ranchers who, almost by definition, are folks unlikely to have big incomes. Therefore, the incentive doesn't work very well for them, and important conservation opportunities stand to be lost.

Conservation buyer transactions involving private sellers help to overcome this problem by finding buyers for such properties who can benefit from the charitable deduction for easement donations. Deductions should be allowed to buyers who donate conservation easements as part of the transaction, if the following conditions are met: (i) the end result of the transaction is permanent, publicly significant conservation; (ii) the conservation easement meets the requirements of §170(h) of the tax code; (iii) the value of the conservation easement is validated by a qualified appraisal; and (iv) the value of the conservation easement contribution outweighs any benefits received by the donor. Deductions under such circumstances should be allowed, even though the contribution is the result of a prior commitment made as part of the purchase of the property conserved. Such a commitment is no more, and no less, than an insurance policy that permanent land conservation will result from the sale; it should not be a reason for disallowing the buyer's otherwise valid deduction.

Some Examples

In summary, let me provide some examples, and state what I think the outcome should be, based upon the foregoing discussion (which is not to say that the IRS would agree with me):

A land trust purchases property for $2 million, and offers it for sale for $1 million (its appraised value subject to a retained easement), to any buyer who will pay the purchase price and make a cash contribution to the land trust of $1 million. ***The buyer should be entitled to a tax deduction for the cash contribution for this dual character transaction. The deduction should be for $1 million, less the value of the right to purchase the property.***

A land trust purchases property for $2 million, and offers it for sale for $1 million (its appraised value subject to a retained easement), to any buyer who will pay the $1 million purchase price. ***No contribution is involved; therefore a deduction is not an issue.***

A land trust sells unrestricted property for $2 million, with the hope and expectation (but no legal commitment) that the buyer will donate a conservation easement. Six months

later the buyer does, in fact, donate the easement, which is valued at $1 million. ***The buyer <u>is</u> entitled to a $1 million deduction for the easement donation, which was made free of any obligation to do so.***

A land trust sells unrestricted property for $2 million to a buyer who has, prior to closing, and as a condition of the sale, granted the land trust an option (or pledge) to acquire a conservation easement on the property for $5,000. Two weeks after closing, the land trust exercises the option and acquires the conservation easement, appraised at $1 million, in exchange for the payment of $5,000. ***The buyer <u>should be</u> entitled to a tax deduction, because the conveyance is pursuant to a charitable pledge made by him, and the transaction is a dual character transaction. The deduction should be for $995,000, less the value of the right to purchase the property.***

Mr. Jones sells property, over which he has granted and recorded an option, to a land trust to acquire an easement for $5,000. Mr. Jones sells the property to Mr. Brown, the land trust exercises the option, and Mr. Brown conveys an easement to the land trust appraised at $1 million. ***Mr. Brown <u>is not</u> entitled to a tax deduction, because he is discharging a private contractual obligation assumed with the title to the property.***

Mr. Brown has been looking for a ranch on which to raise his children, and finds Mr. Jones' ranch to be just the property he needs. Mr. Jones tells him that he will only sell the property to him if he grants the local land trust an option to acquire a conservation easement on the property after closing. Mr. Brown enters into an option with the local land trust to sell them an easement for $5,000, if he buys the property. Closing occurs and the land trust exercises its option, acquiring for $5,000 an easement appraised at $1 million. ***Mr. Brown <u>should be</u> entitled to a tax deduction for $995,000, the difference between the value of the easement and the payment from the land trust, because he was legally bound to a public charity by the option, not to the seller.***

The Alternatives to Conservation Buyer Transactions

The ability to include enforceable commitments in conservation buyer transactions is the essence of their usefulness. If enforceable commitments are going to be a poison pill for the deductibility of conservation buyer transactions, land trusts will be pretty much forced to accept one of three alternatives:

1) Allow the sale of conservation-worthy property unrestricted, hoping that buyers will do the right thing and protect the property. Such a strategy is risky, and will inevitably lead to disappointments, and the loss of potentially important conservation values.

2) Only sell conservation-worthy property subject to easements retained by the land trust, or donated by a private seller, prior to closing. This approach will force land trusts to absorb the easement value as a cost of the transaction, making conservation buyer transactions substantially more costly and, therefore, less feasible. This is especially true if buyers cannot make deductible cash contributions to land trusts as part of the sale (as suggested by the Notice).

This alternative is also likely to discourage private sellers, especially those sellers, such as farmers and ranchers, whose limited income precludes the enjoyment of substantial tax benefits from easement donations, from bothering about the conservation of their property.

3) Simply abandon the use of conservation buyer transactions altogether.

A Suggestion and Conclusion

The conservation benefits of conservation buyer transactions are proven and substantial. The commitment to future conservation from buyers that is inherent in such transactions is plainly key to the predictability and, therefore, the usefulness of such transactions. There is nothing about these transactions, or the commitment from buyers to conserve land acquired through them, that is inconsistent with the tax policy behind conservation easement deductions. Therefore, I would respectfully suggest the following:

1) That the IRS clarify the Notice with respect to conservation buyer transactions, to eliminate the uncertainties described above.

2) That the IRS refrain from denying deductions solely because of a taxpayer's commitment to donate cash, or a conservation easement, as part of a conservation buyer transaction.

I respect, and share, the IRS's concern over fraudulent appraisals, sham conservation transactions, and tax shelter operations masquerading as land trusts, and I support the efforts to end these practices. However, I believe that the IRS has done a damaging disservice to legitimate land conservation in the rather vague criticism of conservation buyer transactions contained in the Notice. I hope that this unfortunate situation can be rectified soon, because important and legitimate conservation opportunities are being missed in the meantime.