

CONSERVATION EASEMENT CHANGES

A LOOK AT HOW RECENT LEGISLATION PROTECTS FEDERAL INCOME TAX DEDUCTIONS AND PROVIDES ADDITIONAL FUNDING FOR PURCHASED EASEMENTS FROM PRIVATE LANDOWNERS.

BY HAL ROBINSON

Conservation easements are a land management tool familiar to those working in forestry and those involved in estate, financial, and tax planning. However, recent legislation and federal funding allocations changed some aspects of conservation easements.

Fortunately, these changes seek: (1) to protect the integrity of the donated "qualified conservation contribution" federal income tax deduction and (2) to provide additional funding for purchased easements from private landowners.

Before getting into the nuances of these recent developments, let's review how conservation easements can be used as a land management tool to protect significant natural resources, critical habitat, and scenic viewshed, as well as to ensure important, productive soils for forestry are not converted to other uses.

A conservation easement is an agreement between a landowner and a qualified organization, such as a land trust, which ensures the land remains in a specific condition or usage. While conservation easement terms vary — all land is unique, after all — many conservation easements are working-land easements and, generally, incorporate best management practices.

Under a typical working-land conservation easement, a landowner continues to possess the land and engage in forestry

and agriculture consistent with BMPs. And, while specific significant habitats might have increased protection, many conservation easements still permit a residential dwelling (or two, depending upon the property size), as well as barns, sheds, and other agricultural infrastructure in a predetermined location.

The landowner also retains the right to engage in recreational activities, like hunting, fishing, horseback riding, or hiking. The protected land can still be sold, gifted, devised as part of an estate, or otherwise conveyed — albeit subject to the conservation easement.

In short, it is often the case for many landowners that they can keep using the property in the same way as before the easement while relinquishing certain development rights. And, by relinquishing those development rights, the landowner might be able to seek tax deductions for the value of those rights — provided the landowner/donor complies with applicable federal law and tax regulations (i.e., the conservation easement is a qualified conservation contribution that is substantiated by a qualified appraisal) and the donor satisfies other requirements.

The public benefits by protecting valuable natural resources with a perpetual conservation easement. Improved water quality, food security, and habitat preservation typically result. This is



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why a qualified conservation contribution can yield tax deductions.

While not the focus of this article, the federal income tax deduction program can be summarized as follows: If a perpetual conservation easement is voluntarily donated to a qualified organization, and if the donation benefits the public by permanently protecting legitimate conservation purposes, the donation might constitute a qualified conservation contribution, allowing the donor to deduct up to 50 percent of annual income within a carry-forward period of up to 15 years.

Unfortunately, there were instances of bad actors abusing this program by claiming excessive values over the past decade. Those abuses led to new federal legislation protecting the integrity of the donated easement program. And, separately, additional funding for purchased easements continues.

With that said, here's what's new.

RECENT FEDERAL LEGISLATION:

To ensure donated easements remain an essential tool for protecting natural resources and landscapes, Congress recently passed the Charitable Conservation Easement Program Integrity Act (the "Act") with bipartisan support. The Act became law on December 29, 2022.

The Act seeks to prevent abusive deduction claims while preserving the deduction for legitimate donations. The hope is that by deterring bad actors, this important deduction will remain available to landowners who genuinely want to see their land protected through a qualified contribution and can adequately substantiate their donation's value.

The Act also provides "safe harbor" easement language to further increase donor confidence and fairness in the program. By providing safe harbor language, a donor has increased assurance that a conservation easement's terms meet federal



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requirements to constitute a perpetual, qualified conservation contribution.

To accomplish these goals, the Act contains, among other terms, two key provisions.

Claimed Deduction Relative to Basis: The first provision of the Act disallows a charitable deduction by a partnership (including pass-through entities) if the deduction claimed exceeds 2.5 times the sum of each partner's relevant basis. Two exceptions exist. First, the 2.5 times basis ratio does not apply to property owned for more than three years. The relevant date for calculating the period of ownership is the latter of the following: (a) the last date on which the partnership acquired any portion of the real property; or (b) the last date on which



Under a typical working-land conservation easement, a landowner can continue to engage in best management practices, such as prescribed burning.



The public benefits by protecting valuable natural resources, such as water quality, with a perpetual conservation easement.

any partner acquired any interest in the partnership. The other exception to the 2.5 times basis ratio applies where substantially all of the partnership is owned by an individual and members of the family of such individual, as defined in 26 U.S.C. Section 152(d)(2)(A)-(G). While a claimed value below the 2.5 times basis threshold does not imply the deduction is automatically approved, having more clearly defined thresholds and definitions is welcome news.

Safe Harbor Language: The second key provision of the Act required the Treasury/IRS to publish safe harbor deed language, making clear what language for specific easement terms, such as Extinguishment Clauses, complies with IRS requirements. Once published, certain past donors would have a 90-day period within which to amend certain existing easements to incorporate the approved language. But, perhaps most importantly, future donors will benefit from knowing which provisions in a new conservation easement are compliant.

On April 24, 2023, the IRS Published Notice 2023-30 ("Conservation Easements – Safe Harbor Deed Language for Extinguishment and Boundary Line Adjustment Clauses") containing the proposed safe harbor language and initiating the 90-day amendment period. Because the 90th day is July 22, 2023, a Saturday, the 90-day period extends to July 24, 2023 – the date eligible easements need to be amended, executed, and recorded. Only certain existing easements are eligible to be amended and, whether one should be amended are matters to consult an attorney about; this article does not give any legal or tax advice – it only seeks to bring awareness of a developing issue. However, the safe harbor language provision of the Act is essential not only for allowing certain existing easements to be amended but also for providing specific language that new easement donors can have confidence in being compliant. If you are considering donating a conservation easement to a qualified organization, it seems only prudent to have your advisors ensure the contemplated easement terms comport with the safe harbor language in the notice.

It is hoped these changes will eliminate the abuse of the

federal donated easement tax deduction program and further encourage legitimate donors to consider participating. While this article is neither legal nor tax advice, we hope it increases your awareness of changes the land trust community has sought for many years. Please consult with your attorney and accountant to confirm the current state of the law and regulations to determine whether a donated conservation easement would help you achieve your objectives for your land.

ADDITIONAL FUNDING AND FOCUS ON NRCS PURCHASED EASEMENTS:

Another change the land trust community has noticed over the past couple of years is additional funding for purchased easements through the United States Department of Agriculture – Natural Resources Conservation Service.

NRCS has worked with landowners to establish Agricultural Conservation Easement Program (ACEP) easements on working land for years. The ACEP program even has a Wetlands Reserve Easement (WRE) component that purchases easements on wetlands and covers certain costs to restore and enhance your wetlands.

These programs provide a unique opportunity to sell an easement – rather than seeking a tax deduction. Because funding is limited, however, applications are competitively ranked by NRCS for selection. Fortunately, it appears funding is continuing to be allocated to these programs, and there is great interest in growing these programs in Georgia.

If you wish to learn more about these programs, visit <https://www.nrcs.usda.gov/programs-initiatives/acep-agricultural-conservation-easement-program>, or contact a member of the Georgia-Alabama Land Trust (GALT) team. Over GALT's nearly 30-year history, we have protected nearly 450,000 acres of land. You will find additional information about donated easements, purchased easements, and other land protection programs at www.galandtrust.org.

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