

Understanding the Conservation Easement Controversy: Latest Regulations, Laws, and IRS Actions

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by

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ABOUT THE SPEAKER

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Cases and Rulings. Hale has participated in over 150 tax cases before the Tax Court, Courts of Appeal, District Courts, and various State Tax Tribunals. In addition to resolving issues through tax litigation, Hale has obtained dozens of favorable Private Letter Rulings for clients from the IRS National Office on procedural, tax, and international issues.

Education. Hale holds five college degrees. At the University of Kansas, he earned a B.S., with distinction, M.A., with honors, and J.D. He later received an LL.M. degree in international law, with highest distinction, from the Universidad de Chile in South America. Finally, he obtained an LL.M. degree in tax from the University of Florida, where he was a graduate tax scholar.

Awards and Recognitions. During his studies, Hale received several awards for academic excellence, including the prestigious Harry S. Truman Foundation Scholarship, Janice Dawson Quinn Tax Scholarship, Tinker Foundation Scholarship, and Senator James B. Pearson International Fellowship. Hale also served as a graduate editor of the Florida Tax Review and member of the Kansas Journal of Law & Public Policy. Chambers USA, Legal 500, Super Lawyers, Best Lawyers in America, and other groups have recognized Hale as a leader in tax litigation for many years. He has also been inducted into the American College of Tax Counsel.

Publications. Hale ranks among the most active tax writers in the country. He has published over 230 major articles in top tax journals, including Journal of Taxation, International Tax Journal, The Tax Adviser, Journal of International Taxation, Journal of Tax Practice and Procedure, Taxes Magazine, Journal of Corporate Taxation, Practical Tax Lawyer, Journal of Passthrough Entities, Tax Management International Journal, Journal of Multistate Tax & Incentives, Tax Notes International, Taxation of Exempts, Practical Tax Strategies, Corporate Business Taxation, Trust and Estates Journal, Journal of Taxation of Financial Products, Real Estate Taxation, and others. He has also published major articles in more than 20 university law reviews, both in the United States and abroad.

Activities and Affiliations. Hale has held leadership positions in many professional and civic organizations, including: (i) Journal of Taxation, Editorial Board Member, (ii) IRS-Practitioner Liaison Committee, state bar representative, (iii) Journal of Tax Practice & Procedure, Editorial Board Member, (iv) Georgia Bar Tax Section, President, (v) Georgia Bar Journal, Editorial Board Member, (vi) GSU Low-Income Taxpayer Clinic, Advisory Committee Member, and (vii) Atlanta Bar Tax Section Board Member.

SOURCES FOR THIS OUTLINE

This outline derives from the following articles written by Hale. If you would like a copy of any of the articles, please send Hale an e-mail at hale.sheppard@chamberlainlaw.com or call him at 404-658-5441. He would be glad to send you the articles.

- IRS Shifts Focus to Original Landowners in Easement Disputes 180 *TAX NOTES FEDERAL* 1077 (2023).
- California's Settlement Initiative for Conservation Easements, 180(4) *TAX NOTES FEDERAL* 543; republished in 109(4) *TAX NOTES STATE* 261 (2023).
- IRS Issues Safe Harbors for Easement Deeds: Technical Battles Will Persist, 179(6) *TAX NOTES FEDERAL* 975 (2023).
- Easement Evolution: Proposed Regulations, New Law, and Public Comments, 179(4) *TAX NOTES FEDERAL* 587 (2023).
- IRS Still Mining for Foot Faults in Easement Cases? Tax Court Takes Step in Right Direction, 178(13) *TAX NOTES FEDERAL* 2107; 2023 *TAX NOTES TODAY* 13-9 (2023).
- IRS Introduces New Challenge to Tax-Related Insurance: From Easements to Elsewhere, 138(6) *JOURNAL OF TAXATION* 30 (2023); republished in __ *PRACTICAL TAX STRATEGIES* __ (2023); republished in 34 *TAXATION OF EXEMPTS* 27 (2023); republished in __ *REAL ESTATE TAXATION* __ (2023).
- IRS Introduces New Challenge to Tax-Related Insurance: From Easements to Elsewhere, 138(6) *JOURNAL OF TAXATION* 30 (2023); republished in __ *PRACTICAL TAX STRATEGIES* __ (2023); republished in 34 *TAXATION OF EXEMPTS* 27 (2023); republished in __ *REAL ESTATE TAXATION* __ (2023).
- The Accuser Becomes the Accused in the Conservation Easement Context: Courts Hold that IRS Violated the Law in *Green Valley Investors* and Elsewhere, 138(3) *JOURNAL OF TAXATION* 11 (2023); republished in __ *REAL ESTATE TAXATION* __ (2023); republished in __ *PRACTICAL TAX STRATEGIES* __ (2023).
- *Glade Creek and Champions Retreat*: New Cases Bolster Special Conservation Easement Valuation Methods, 177(8) *TAX NOTES FEDERAL* 1107 (2022).
- Recent Rulings Confirm Conservation Easement Valuation Method: Highest and Best Use, Before and After Method, and Discounted Cash-Flow Analysis, 176(13) *TAX NOTES FEDERAL* 2027 (2022).
- Tax Incentives, Economic Substance, and Partnership Validity: New Case Undercuts IRS Attacks by IRS, 137(6) *JOURNAL OF TAXATION* 22 (2022); republished in 50(2) *JOURNAL OF CORPORATE TAXATION* 3 (2022); republished in 110(2) *PRACTICAL TAX STRATEGIES* 16 (2022); republished in __ *TAXATION OF EXEMPTS* __ (2022).
- Valuation, Highest and Best Use, and Conservation Easements: New IRS Attacks of Old Appraisal Methods, 175(7) *TAX NOTES FEDERAL* 1061 (2022).

- Comparing Federal and State Proposals for Resolving Conservation Easement Disputes, *TAXATION OF EXEMPTS* ____ (2022); republished in *JOURNAL OF REAL ESTATE TAXATION* ____ (2022); republished in *JOURNAL OF TAXATION* ____ (2022).
- Analyzing Obstacles for the IRS in Approaching Partners during a Partnership Tax Dispute, *JOURNAL OF TAXATION* ____ (2022); republished in *PRACTICAL TAX STRATEGIES* ____ (2022); republished in 33(5) *TAXATION OF EXEMPTS* 17 (2022); republished in *JOURNAL OF REAL ESTATE TAXATION* ____ (2022).
- Series of Tax Court Orders Allowing Nonconsensual Depositions by IRS: Aberration or Trend? ____ *TAXES — THE TAX MAGAZINE* ____ (2022).
- No Notice, No Examination, No Problem: IRS Further Deprives Appraisers of Procedural Protections, 136(1) *JOURNAL OF TAXATION* 8 (2022); republished in *JOURNAL OF REAL ESTATE TAXATION* ____ (2022); republished in *TAXATION OF EXEMPTS* ____ (2021); republished in *ESTATE PLANNING* ____ (2022).
- Tax Court Case Shows that Conservation Easement Cases Can Settle on Reasonable Terms When the IRS Is Forced to Focus on the Key Issue, Valuation 174(1) *TAX NOTES FEDERAL* 55 (2022).
- 30 Wrongs Do Not Make A Right: Revealing Extraordinary IRS Actions in Conservation Easements Disputes, 33(2) *TAXATION OF EXEMPTS* 8 (2021); republished in 135(3) *JOURNAL OF TAXATION* 21 (2021); republished in *JOURNAL OF REAL ESTATE TAXATION* ____ (2021).
- Can the IRS Really Do That? Third Party Contacts, Notification Duties, Reprisal Exception, and More, 23(2) *JOURNAL OF TAX PRACTICE & PROCEDURE* 33 (2021).
- Three New IRS Challenges to Tax Result Insurance in Conservation Easement Disputes, 134(6) *JOURNAL OF TAXATION* 18 (2021); republished in *JOURNAL OF REAL ESTATE TAXATION* ____ (2021); republished 33(1) *TAXATION OF EXEMPTS* 26 (2021).
- 20 Recent IRS Enforcement Actions in Conservation Easement Disputes: Awareness and Preparation Are Key, 134(3) *JOURNAL OF TAXATION* 15 (2021); republished in 48(4) *JOURNAL OF REAL ESTATE TAXATION* 4 (2021); republished 32(6) *TAXATION OF EXEMPTS* 14 (2021).
- Partnerships, Making “Qualified Offers,” and Conservation Easement Disputes: Analyzing Problems with the IRS’s Positions, Now and Later, 22(4) *JOURNAL OF TAX PRACTICE & PROCEDURE* 33 (2020); republished in *TAXES — THE TAX MAGAZINE* ____ (2021).
- Conservation Easements and Pine Mountain: Favorable Rulings by Court of Appeals and Pending Issues 134(1) *JOURNAL OF TAXATION* 18 (2021); republished in 48(3) *JOURNAL OF REAL ESTATE TAXATION* 18 (2021); republished in 32(5) *TAXATION OF EXEMPTS* 12 (2021).

- Conservation Easement Settlement Initiative: More IRS Guidance, More Uncertainty, 169(7) *TAX NOTES FEDERAL* 1085 (2020); republished in 98(7) *TAX NOTES STATE* 687 (2020).
- Newest IRS Action in Conservation Easement Disputes: Attempts to Use Same Data against Different Parties in Multiple Proceedings, 133(6) *JOURNAL OF TAXATION* 14 (2020); republished in ___ *JOURNAL OF REAL ESTATE TAXATION* ___ (2021).
- Depriving Partnerships of Access to the Independent Office of Appeals: Old and New IRS Tactics in Challenging Conservation Easements; ___ *JOURNAL OF TAX PRACTICE & PROCEDURE* ___ (2020); republished in 99(7) *TAXES — THE TAX MAGAZINE* 35 (2021).
- Questions Remain about Conservation Easement Settlement Initiative, 168(12) *TAX NOTES FEDERAL* 2219 (2020); republished in 97(12) *TAX NOTES STATE* 1265 (2020).
- Conservation Easement Battles: The IRS Attempts to Use “Syndication Expenses” and Forms 8283 to Disallow Charitable Deductions, 22(3) *JOURNAL OF TAX PRACTICE & PROCEDURE* 39 (2020); republished in ___ *TAXES — THE TAX MAGAZINE* ___ (2020).
- IRS Challenges “Commercial Forestry” in Conservation Easement Disputes: Getting to the Root of the Matter, 98(7) *TAXES — THE TAX MAGAZINE* 33 (2020).
- Conservation Easement Disputes, Expansive Data Demands by the IRS, and Scope of the Tax Practitioner Privilege under Section 7525, 105(2) *PRACTICAL TAX STRATEGIES* 16 (2020); republished in ___ *JOURNAL OF REAL ESTATE TAXATION* ___ (2021); republished in 47(12) *ESTATE PLANNING* 41 (2021).
- Civil Suit Emphasizes Critical Role of Notifications by Tax Matters Partners in Conservation Easement and Other Tax Disputes, 22(2) *JOURNAL OF TAX PRACTICE & PROCEDURE* 39 (2020).
- Five Obscure IRS Actions in 2020 with Serious Implications for Conservation Easement Disputes, 133(1) *JOURNAL OF TAXATION* 11 (2020); republished in ___ *TAXATION OF EXEMPTS* ___ (2020); republished in 48(1) *JOURNAL OF REAL ESTATE TAXATION* 14 (2020).
- Conservation Easement Enforcement: IRS Quietly Eliminates Procedural Protections for Appraisers, 132(5) *JOURNAL OF TAXATION* 17 (2020); republished in 31(6) *TAXATION OF EXEMPTS* 13 (2020); and 47(4) *JOURNAL OF REAL ESTATE TAXATION* 19 (2020).
- Conservation Easements, Partners, and Qualified Amended Returns? 166(3) *TAX NOTES FEDERAL* 373 (2020).
- Conservation Easements, Legitimate Risks, and Potential Issues Related to Tax Result Insurance: Identifying Realities Facing the IRS, ___ *PRACTICE TAX STRATEGIES* ___ (2019); republished in 31(4) *TAXATION OF EXEMPTS* 10 (2019); republished in 47(3) *JOURNAL OF REAL ESTATE TAXATION* 31 (2019).

- Conservation Easements, Recent *Mayo Clinic* Case, and Expanded Defenses to IRS Attacks on “Conservation Purpose,” 47(2) *JOURNAL OF REAL ESTATE TAXATION* 12 (2019); republished in 131(6) *JOURNAL OF TAXATION* 6 (2019).
- Fee Simple Charitable Donations Instead of Conservation Easements: Case on Mining Property Undercuts IRS’s Core Positions, ___ *PRACTICE TAX STRATEGIES* ___ (2019); republished in 31(3) *TAXATION OF EXEMPTS* 3 (2019).
- Conservation Easements, “Substantially Similar” Transactions, and the Reach of Notice 2017-10, ___ *JOURNAL OF REAL ESTATE TAXATION* ___ (2019); republished in 131(4) *JOURNAL OF TAXATION* 19 (2019).
- Making “Qualified Offers” in Partnership Disputes: Extreme Positions by the IRS in Conservation Easements Cases Might Backfire, 22(5) *JOURNAL OF PASSTHROUGH ENTITIES* 71 (2019).
- Conservation Easements, Partnerships, Risks, and Profitability: U.S. Government Takes Contradictory Positions in Tax and Securities Cases, 16(3) *JOURNAL OF TAXATION OF FINANCIAL PRODUCTS* 49 (2019).
- *Champions Retreat*: Conservation Easements, Clarifications on “Significant” Preservation, and Lessons from Issues Unaddressed by the Tax Court, 46(4) *JOURNAL OF REAL ESTATE TAXATION* 12 (2019); republished in 131(1) *JOURNAL OF TAXATION* 23 (2019).
- *Pine Mountain Preserve* and Conservation Easements: Victory in Disguise for Taxpayers? ___ *JOURNAL OF REAL ESTATE TAXATION* ___ (2019); republished in 130(5) *JOURNAL OF TAXATION* 22 (2019).
- Conservation Easements, Notice 2017-10, Injunction Action, and the Potential Reach of Return Preparer Penalties under Section 6694, 21(1) *JOURNAL OF TAX PRACTICE & PROCEDURE* 23 (2019).

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I. Introduction

- There is so much misinformation, hyperbole, distortion, chest-thumping and other “noise” surrounding conservation easement disputes it is difficult to get to the truth.
- In an effort to provide some clarity, this presentation explains the relevant rules for donations, noteworthy enforcement actions, and the very latest in the world of easements, including new regulations, laws and IRS pronouncements.

II. Overview of Easement Donations

A. Common Options for Undeveloped Land

1. Taxpayers with undeveloped real property have several choices, including:
 - a. holding the property for investment, selling it when it appreciates,
 - b. determining how to maximize profitability from the property and do that, regardless of negative effects on the local environment, community, or economy, or
 - c. voluntarily restricting certain future uses of the property, such that it is protected forever for the benefit of society.
2. The third option, known as donating a “conservation easement,” not only achieves the goal of environmental protection, but might also trigger another benefit, tax deductions for donors.¹

B. Conservation Purposes

1. Taxpayers cannot donate an easement on any old property and claim a tax deduction; they must demonstrate that the property is worth protecting.
2. A donation has an acceptable “conservation purpose” if it meets at least one of the following requirements:
 - a. It preserves land for outdoor recreation by, or the education of, the general public;
 - b. It preserves a relatively natural habitat of fish, wildlife, or plants, or a similar ecosystem;

¹ Section 170(f)(3)(B)(iii); Treas. Reg. § 1.170A-7(a)(5); Section 170(h)(1); Section 170(h)(2); Treas. Reg. § 1.170A-14(a); Treas. Reg. § 1.170A-14(b)(2).

- c. It preserves open space (including farmland and forest land) for the scenic enjoyment of the general public and will yield a significant public benefit;
- d. It preserves open space (including farmland and forest land) pursuant to a federal, state, or local governmental conservation policy and will yield a significant public benefit; or
- e. It preserves historically important land area or a certified structure.²

C. Reserved Rights

- 1. Taxpayers memorialize the donation to charity by filing a Deed of Conservation Easement (“Deed”) or similar document.
- 2. In preparing the Deed, taxpayers often coordinate with the land trust to identify certain limited activities that can continue on the property *after* the donation, without interfering with the Deed, prejudicing the conservation purposes, or jeopardizing the tax deduction.³ These activities are called “Reserved Rights.”

D. Baseline Report

- 1. The IRS will not allow the tax deduction stemming from a conservation easement, unless the taxpayer obtains, before making the donation, “documentation sufficient to establish the condition of the property at the time of the gift.”⁴ This is called the “Baseline Report.”
- 2. The Baseline Report may feature several things, including, but not limited to, (i) survey maps identifying the property lines and other contiguous or nearby protected areas, (ii) a map of the area drawn to scale showing existing man-made improvements or incursions, vegetation, flora and fauna, animal breeding and roosting areas, migration routes, land use history, and distinct natural features, (iii) an aerial photograph of the property taken as close as possible to the date of the donation, and (iv) on-site photographs taken at various locations on the property.⁵

E. Value of the Conservation Easement

- 1. The value of the conservation easement is the fair market value (“FMV”) of the property at the time of the donation.⁶

² Section 170(h)(4)(A); Treas. Reg. § 170A-14(d)(1); S. Rept. 96-1007, at 10 (1980).

³ Treas. Reg. § 1.170A-14(b)(2).

⁴ Treas. Reg. § 1.170A-14(g)(5)(i).

⁵ Treas. Reg. § 1.170A-14(g)(5)(i).

⁶ Section 170(a)(1); Treas. Reg. § 1.170A-1(c)(1).

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