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Amici Curiae Brief, Pine Mountain Preserve, LLP V. Commissioner, Filed in the U.S. Court of Appeals for the Eleventh Circuit

Nancy McLaughlin

No. 19-11795-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PINE MOUNTAIN PRESERVE, LLLP,
F.K.A. CHELSEA PRESERVE, LLLP
AND EDDLEMAN PROPERTIES, LLC,
TAX MATTERS PARTNER,

Petitioners, Appellants, and Cross-Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent, Appellee, and Cross-Appellant.

On Appeal from United States Tax Court No. 8956-13
151 T.C. No. 14 (2018)
Judge Albert G. Lauber

AMICUS BRIEF OF K. KING BURNETT, ROGER COLINVAUX, JOHN ECHEVERRIA, JOHN LESHY, NANCY McLAUGHLIN, JANET MILNE, AND ANN TAYLOR SCHWING in Support of Respondent and in Support of Affirmance in Part and Reversal in Part

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ANN TAYLOR SCHWING
CA Bar No. 91914
BEST BEST & KRIEGER, L.L.P.
500 Capitol Mall, 17th Floor
Sacramento, California 95814
Telephone: (916) 325-4000
Facsimile: (916) 325-4010
Ann.Schwing@BBKlaw.com

No. 19-11795-DD
PINE MOUNTAIN PRESERVE, LLLP v. COMMISSIONER

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), the undersigned counsel of record hereby certifies that, to the best of her knowledge, information, and belief, the following persons and entities have an interest in the outcome of this appeal:

- Christensen, Jacob, attorney, Tax Division, U.S. Department of Justice;
- Cleverdon, Edwin B., Senior Attorney, Internal Revenue Service;
- Crump, Horace, Associate Area Counsel, Internal Revenue Service;
- Desmond, Michael J., Chief Counsel, Internal Revenue Service
- Eddleman, Bill, Petitioner-Appellant;
- Eddleman, Douglas, Petitioner-Appellant;
- Eddleman Properties, LLC, Tax Matters Partner, Petitioner-Appellant;
- Kelley, Matthew R., Attorney, Internal Revenue Service;
- Land Trust Accreditation Commission;
- Land Trust Alliance, Inc., Amicus;
- Lauber, Albert G., Judge, United State Tax Court;
- Levin, Michelle Abroms, Attorney for Petitioner-Appellant;

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- Levin, Robert H., Attorney for Amicus
- Levitt, Ronald A., Attorney for Petitioner-Appellant;
- Morrison, Richard T., Judge, United States Tax Court;
- Pine Mountain Preserve, LLLP, Petitioner-Appellant;
- Rhodes, Gregory P., Attorney for Petitioner-Appellant
- Rothenberg, Gilbert S., Chief, Appellate Section, Tax Division, Department of Justice;
- Ugolini, Francesca, Attorney, Tax Division, U.S. Department of Justice;
- Wooldridge, David M., Attorney for Petitioner-Appellant;
- Zuckerman, Richard E., Principal Deputy Assistant Attorney General, Tax Division, U.S. Department of Justice;
- Federal taxpayers subsidizing conservation easement acquisitions through deductions available to donors of perpetual easements;
- Communities enjoying the benefits of deductible perpetual conservation easements;
- Past, present and future donors of deductible perpetual conservation easements;

- Those owning or anticipating ownership of conservation easement-encumbered land who intend or hope to modify or abrogate all or part of the perpetual use restrictions;
- Approximately 1,300 land trusts and similar charitable organizations accepting conservation easements in the U.S., many of which have faced or will face requests to relax or release easements' perpetual use restrictions;
- Thousands of municipalities, districts, and other government entities holding conservation easements and facing requests to relax or release the easements' perpetual use restrictions.

Except as included in general terms above, I believe there are no identified corporations or publicly-traded companies having an interest in the outcome of this appeal within the meaning of the Eleventh Circuit Rule 26.1.

CONSENT TO FILE

The Internal Revenue Service and the Department of Justice consented to the filing of this brief acting through Jacob Christensen and Francesca Ugolini of the U.S. Department of Justice (Respondent's Counsel), and Edwin B. Cleverdon (Respondent's Trial Counsel). The remaining parties and proposed amicus supporting Petitioners elected to remain silent following concurrent receipt of this

brief and did not consent: David M. Wooldridge, Ronald A. Levitt, Gregory P. Rhodes, and Michelle A. Levin of Sirote & Permutt, P.C. (Petitioners' Counsel), and Robert H. Levin (Amici Counsel for Land Trust Alliance, Inc., supporting Petitioners). A motion is concurrently filed with this brief urging that K. King Burnett, Roger Colinvaux, John Echeverria, John Leshy, Nancy Mclaughlin, Janet Milne, and Ann Taylor Schwing be permitted to appear as amicus curiae.

RULE 29(A)(4)(E) STATEMENT

Amicus curiae certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than amicus contributed money intended to fund this brief. Schwing authored this brief pro bono with ideas from law professors, the land trust community, and easement donors. Her amicus briefs supporting perpetuity started with *Belk v. Commissioner,* 774 F.3d 221 (4th Cir.2014).

No person or party contributed funds for preparation or submission of this brief; incidental costs initially borne by Schwing's law firm will be reimbursed when appeal is complete.

/s/ Ann Taylor Schwing
Ann Taylor Schwing
Attorney of Record for Amici Curiae

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I. IDENTITY AND INTEREST OF AMICI

Amici are law professors Roger Colinvaux, John Echeverria, John Leshy, Nancy McLaughlin, and Janet Milne who teach or have taught tax, nonprofit, property, land use, natural resources, and conservation easement law; K. King Burnett, who served on the Uniform Conservation Easement Act drafting committee; and Ann Taylor Schwing, eleven-year Land Trust Accreditation Commissioner. Several Amici have served or now serve on land trust boards, and several are easement donors. Given their professional and personal experience, detailed in their motion to appear, Amici believe allowing deductions for the Pine Mountain Preserve (PMP) easements would be contrary to I.R.C. §170(h), the Treasury Regulations, and the legislative history, and would open the door to abusive transactions that would produce little or no conservation benefit at significant cost to taxpayers. Amici seek to highlight arguments that powerfully support the Commissioner and bring broader legal and policy issues to the Court's attention.

II. STATEMENT OF ISSUES

Did PMP's amendment provision violate §170(h)(5)(A)?

Did the Tax Court make additional errors in its analysis of the amendment issue?

Did PMP's reserved rights violate §170(h)(5)(A)?

III. SUMMARY OF ARGUMENT

At trial, PMP claimed a $97.37 million deduction under §170(h) for donating three easements to North American Land Trust (NALT). The easements violated Regulation §1.170A-14(e)(2)-(3) (the no-inconsistent-use requirement) and, thus, §170(h)(5)(A)'s protected-in-perpetuity requirement because they contain (1) a loosely-drafted amendment provision that permits uses destructive of conservation interests, (2) reserved rights that permit such destructive uses, and (3) reserved rights that prevent IRS (or court) verification of compliance with the no-inconsistent-use requirement.

The Tax Court disallowed deductions for the 2005 and 2006 easements, and Amici endorse those holdings, providing additional reasons. The Tax Court allowed the 2007 easement deduction, and Amici disagree. Amici also submit that the Tax Court's holding and dicta on amendments contain fundamental errors of fact and law that require rectification to protect the public interest and multi-billion dollar federal taxpayer investment in deductible easements.

This brief primarily addresses the 2005 easement; the same principles apply to the 2006 and 2007 easements.

IV. ARGUMENT

A. Congress Did Not Rely On Easement Holders To Ensure Protection In Perpetuity

In 1969, Congress adopted a general prohibition on deductions for donations of partial interests in property, and it has kept this general prohibition ever since. Tax Reform Act of 1969, Pub. L. No. 91-172, §201; I.R.C. §170(f)(3)(A). Partial interest donations are disfavored because they often involve abusive arrangements where donors retain extensive control over the property and the public receives little benefit.

Congress made an exception to this general prohibition for conservation easement donations in enacting §170(h) in 1980, but it imposed strict limits on the deduction given the significant potential for abuse. I.R.C. §§170(f)(3)(B)(iii), 170(h). Professor Colinvaux explains:

> That the easement deduction was born as an exception to the partial interest rule is critical to its design. Congress could simply have waived the partial interest rules and left conservation easements to be treated like any other contribution of real property…. A donor could arrange for a conservation easement on property and contribute the easement to any charity for any reason, and a fair market value deduction would be available. This is, after all, how it normally works—with the oversight role of the IRS generally limited to checking value.

> But … Congress took a different approach and adopted a number of special rules intended to address potential (and anticipated) problems.[1]

To be eligible for a deduction, a taxpayer must contribute "a restriction (granted in perpetuity) on the use which may be made of the real property," to a "qualified organization," for a "conservation purpose" that must be "protected in perpetuity." I.R.C. §170(h). The protected-in-perpetuity requirement has numerous component requirements, including restriction-on-transfer; no-inconsistent-use; general-enforceable-in-perpetuity; mortgage-subordination; mining-restrictions; baseline; donee notice, access, and enforcement; judicial-extinguishment; and division-of-proceeds. Treas. Reg. §1.170A-14(c), (e), (g); Senate Report No. 96-1007, 96th Cong. 2d Sess. 8, 13-14 (1980).[2]

The IRS verifies compliance with these requirements *at the time of donation*. If the parties were free to modify perpetual easement restrictions or site potentially-destructive uses post-donation, taxpayers would be changing the deal after the

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[1] Colinvaux, Roger, *Conservation Easements: Design Flaws, Enforcement Challenges, and Reform*, 3 Utah L. Rev. 755, 758 (2013).

[2] Congress's concerns about abuse support applying a strict construction rule to §170(h), which numerous Circuit Courts have done. *Scheidelman v. Commissioner*, 755 F.3d 148, 154 (2d Cir.2014); *Belk v. Commissioner*, 774 F.3d 221, 225 (4th Cir.2014); *Glass v. Commissioner,* 471 F.3d 698, 706 (6th Cir.2006); *RP Golf v. Commissioner*, 860 F.3d 1096, 1100 (8th Cir.2017); *Minnick v. Commissioner*, 796 F.3d 1156, 1159 (9th Cir.2015); *Esgar Corp. v. Commissioner*, 744 F.3d 648, 653 (10th Cir.2014).

donation and be beyond the reach of the Commissioner. Restrictions could be altered and siting decisions made in a vacuum in which none of the deduction requirements or indirect policing that occurs in the IRS tax return review and audit process would apply.

PMP asserts that the public interest is protected because amendments and siting decisions require the concurrence of NALT under a "consistency with conservation purposes" standard. But Congress did not grant holders the power to modify perpetual use restrictions or site potentially-destructive uses post-donation under such a standard. Given the significant potential for abuse in this partial interest donation context, Congress demanded far more protection for what has grown to be a multi-billion dollar federal taxpayer investment.[3] Deductible easements must satisfy §170(h) requirements at the time of donation, and an easement that grants the holder the power to modify perpetual use restrictions or site potentially-destructive uses post-donation under a consistency-with-conservation-purposes standard violates the no-inconsistent-use requirement.

[3] E.g., Colinvaux at 756; Looney, Adam, *Estimating the Rising Costs of a Surprising Tax Shelter: The Syndicated Conservation Easement*, Brookings Institution (Dec. 20, 2017), https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement/.

B. No-Inconsistent-Use Requirement

The amendment and certain reserved-rights provisions in PMP's easements violate the "no-inconsistent-use" requirement. Regulation §1.170A-14(e)(2) provides that, except as provided in paragraph (e)(3),[4] a deduction is barred if the contribution would accomplish an enumerated conservation purpose but permit destruction of other significant conservation interests. For example, preservation of farmland as open space will not qualify for deduction if a significant naturally-occurring ecosystem could be injured or destroyed by use of pesticides in farm operations.

Under Regulation §1.170A-14(e)(3), "[a] use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution." For example, deduction for an easement donation to preserve an archaeological site is allowed even if site excavation consistent with sound archaeological practices may impair the scenic view.

These Regulations divide conservation interests into two categories: "conservation interests that are the subject of the contribution" and "other significant conservation interests." A use destructive of conservation interests is permitted in

[4] Actual reference is "(e)(4)" but Treasury failed to update some cross-references when the Regulations were finalized. Prop. Treas. Reg. §1.170A-13, 48 Fed. Reg. 22941 (May 23, 1983).

only one limited circumstance: "if such use is necessary for the protection of the conservation interests that are the subject of the contribution." Accordingly, (1) a use destructive of "conservation interests that are the subject of the contribution" is never permitted (destruction being antithetical to protection), and (2) a use destructive of "other significant conservation interests" is permitted only if "necessary for the protection of the conservation interests that are the subject of the contribution" (the "no-inconsistent-use" requirement). A use is "destructive of" conservation interests if it impairs, injures, or destroys conservation interests. Treas. Reg. §1.170A-14(e)(2)-(3).

Baseline and donee notice, access, and enforcement requirements backstop the no-inconsistent-use requirement. Those requirements are designed to prevent impairment of "the conservation interests associated with the property," which are "protected in perpetuity by the easement" and the condition of which is documented "at the time of the gift." Treas. Reg. §1.170A-14(g)(5).

Importantly, although §170(h)(5)(A) establishes the general requirement that the "conservation purpose [be] protected in perpetuity," the no-inconsistent-use requirement is purposefully more fine-grained—it focuses on protection of the property's specific "conservation interests."

C. PMP's Amendment Provision Violates No-Inconsistent-Use Requirement

A conservation easement that permits uses destructive of "the conservation interests that are the subject of the contribution" violates the no-inconsistent-use requirement and is not deductible. Treas. Reg. §1.170A-14(e)(2)-(3). "Trade-off" amendments, described below, permit uses destructive of such conservation interests. Accordingly, an easement that contains an amendment provision that authorizes trade-off amendments violates the no-inconsistent-use requirement and is not deductible.

The 2005 easement's amendment provision authorizes trade-off amendments and, thus, renders that easement nondeductible.

1. Trade-Off Amendments

Trade-off amendments are those that have both negative and positive effects on an easement-encumbered-property's conservation interests but are deemed by the parties to, on balance, have a "net" neutral or enhancing effect and, thus, not be inconsistent with the easement's conservation purposes. For example, the parties may agree to amend an easement to allow additional residential development on part of the property, which would be destructive of conservation interests there, in exchange for owner's agreement to add use restrictions elsewhere on the property or add nearby land to the easement, which arguably would have offsetting positive

conservation effects. If the parties deem such an amendment to have a "net" neutral or enhancing effect on conservation interests, they could consider it "not inconsistent with the easement's conservation purposes" and thus, allowable under an amendment provision that authorizes them to agree to such amendments.[5]

However, trade-off amendments by definition involve injury to or destruction of conservation interests on the originally-protected property (the "negative effects"). Accordingly, an easement with an amendment provision authorizing trade-offs permits uses destructive of "the conservation interests that are the subject of the contribution" and thus violates the no-inconsistent-use requirement.

Congress specifically did not grant holders the power to modify perpetual use restrictions post-donation in ways that could be destructive of conservation interests that are the subject of the contribution. Rather, a deductible easement must be drafted so that those conservation interests (as well as "other significant conservation interests," with one limited exception) are protected in perpetuity. Treas. Reg. §1.170A-14(e)(2)-(3), -14(g)(5).

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[5] For a proposed trade-off amendment, see Thuermer Jr., Angus, *Ranch Owner Builds in Path of Pronghorn*, WyoFile (Jan. 3, 2017); Hatch, Cory, *Pronghorn Success Story Threatened by Cabin*, Jackson Hole News & Guide (Jan. 11, 2017); Lawton, Pete & Andrews, Laurie, *Land Trust Defends Path of Pronghorn Decision*, WyoFile (Jan. 24, 2017); Molvar, Erik, *Cline Cabin Erodes Easement Sanctity*, Jackson Hole News & Guide (Feb. 8, 2017); Thuermer Jr., Angus, *Cabin Removed from Path of the Pronghorn*, Wyofile (July 18, 2017). See also Land Trust Accreditation Commission, Accreditation Requirements Manual 82 (April 2013) (discussing trade-offs to accommodate landowner preferences or address violations).

This limitation on post-donation amendments is appropriate given that (1) owners requesting trade-offs may be motivated by development profits or personal desires rather than conservation, (2) in agreeing to trade-offs, holders may be motivated by avoidance of disputes with owners and anticipated cash donations, and (3) trade-offs would occur in a vacuum in which none of the deduction requirements or indirect policing that occurs in the IRS tax return review and audit process would apply.

2. 2005 Easement Authorizes Trade-Offs

The 2005 easement's amendment provision authorizes Owner and Holder, "in their sole discretion," to agree to amendments that "are not inconsistent with the Conservation Purposes." 2005 Easement at 25. "Conservation Purposes" are defined broadly as "[p]reservation of the [property] as a relatively natural habitat of fish, wildlife, or plants or similar ecosystem" and "as open space which provides scenic enjoyment to the general public." *Id.* at 2.

This amendment provision authorizes the parties to agree to trade-offs. It allows the parties to deem an amendment with both negative and purportedly offsetting positive effects on the encumbered-property's conservation interests to, on balance, have a "net" neutral or enhancing effect and thus not be "inconsistent with the Conservation Purposes." A trade-off amendment could, however, permit uses destructive of conservation interests that are the subject of the contribution,

such as additional residential development. The amendment provision thus causes the easement to violate the no-inconsistent-use requirement and be ineligible for deduction.[6]

D. Additional Tax Court Errors on Amendments

1. Deductible Easements Are Not Mere Contracts

Citing Restatement (Second) of Contracts §311, cmt. a (1981), the Tax Court majority stated:

> The 2007 easement involves a conveyance, which is a form of contract. Generally speaking, the parties to a contract are free to amend it, whether or not they explicitly reserve the right to do so…. Viewed from this perspective, [the amendment provision] is reasonably regarded as a limiting provision, confining the permissible subset of amendments to those that would not be "inconsistent with the Conservation Purposes."[7]

These statements reflect a flawed understanding of deductible easements. If deductible easements were mere contracts that parties were free to amend, then an amendment provision could itself be amended and would not be a limiting provision. In addition, requiring that an easement be drafted to comply with §170(h)'s carefully-constructed requirements at the time of donation would be pointless because the parties could freely change the terms of the easement post-donation.

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[6] The "savings clause" in the provision is not enforceable. *Belk v. Commissioner*, 774 F.3d 221, 228-230 (4th Cir.2014).

[7] *Pine Mountain Preserve, LLP v. Commissioner,* 151 T.C. No. 14, at *19 (2018) (emphasis in original), quoting PMP amendment provision.

When Congress enacted §170(h) in 1980, it clearly intended that (1) to be deductible, an easement must be drafted to comply with §170(h) requirements and (2) the terms of the easement would be binding on the parties under state law. At hearings on proposed §170(h), responding to concerns that donees might not properly enforce deductible easements, nineteen land trusts acknowledged that deductible easements are "charitable grants" subject to the power and duty of state courts and attorneys general to enforce such grants.[8] Congress thus imposed the requirements that a deductible easement be "granted in perpetuity" and its conservation purpose be "protected in perpetuity" with the understanding that the terms included in an easement to satisfy those requirements would be legally binding on the parties.

The Uniform Law Commission understood how Congress intended §170(h) to operate when it enacted the Uniform Conservation Easement Act (UCEA) in 1981. The UCEA was specifically designed to "enable[] the structuring of

[8] Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means, 96th Cong. 238, 242 (1980) (App. to Testimony of French and Pickering Creeks Conservation Trust, Brandywine Conservancy, and other Conservation Organizations in re H.R. 7318 on June 26, 1980). See also, e.g., *Carl J. Herzog Found. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997) (quoting *Lefkowitz v. Lebensfeld*, 417 N.Y.S.2d 715, 68 App.Div.2d 488, 495 (1979), *aff'd*, 51 N.Y.2d 442, 415 N.E.2d 919, 434 N.Y.S.2d 929 (1980) ("'The general rule is that … gifts to charitable corporations for stated purposes are [enforceable] at the instance of the [a]ttorney [g]eneral'").

transactions so as to achieve tax benefits which may be available under the Internal Revenue Code."[9] It "enables parties to create a conservation easement of unlimited duration subject to the power of a court to modify or terminate the easement in accordance with the principles of law and equity" and explains that "[a]llowing the parties to create such easements…enables them to fit within federal tax law requirements that the interest be 'in perpetuity' if certain tax benefits are to be derived."[10] Also, "independently of the Act, the Attorney General could have standing" to enforce a conservation easement.[11]

In *Carpenter v. Commissioner*, T.C. Memo. 2012-1, the Tax Court itself recognized that terms of a conservation easement may be binding on the parties, finding that the easements at issue were restricted charitable gifts, or "'contributions conditioned on the use of a gift in accordance with the donor's precise directions and limitations.'" *Id.* at *6.

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[9] Uniform Conservation Easement Act at 3 (2007).

[10] *Id*. at 6-7.

[11] *Id*. at 7. See also Burnett, K. King, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 Utah L. Rev. 773, 780 (§2(a)'s provision that an easement may be modified or terminated "in the same manner as other easements" speaks to procedural requirements—e.g., notarization; it was not intended to affect other laws limiting a holder's ability to agree to modify or terminate an easement, including laws governing charitable grants).

Thus, to be deductible, an easement must be drafted to comply with §170(h) requirements and its terms must be binding on the parties. An amendment provision may be included in the deed, but it too must comply with §170(h) requirements. A §170(h)-compliant amendment provision may authorize the parties to agree to protection-enhancing amendments,[12] but it may not authorize the parties to agree to amendments that remove land from the easement, permit uses destructive of conservation interests (e.g., trade-offs), or relax or eliminate provisions included in the easement to comply with other deduction requirements, such as the restriction-on-transfer, judicial-extinguishment, and division-of-proceeds requirements.

The IRS is charged with ensuring that deductible easements are drafted to comply with §170(h) requirements. Professor Colinvaux explains:

> The IRS can ensure that deductible conservation easements are drafted in such a way that they prevent holders from selling or otherwise transferring the easements, Treas. Reg. §1.170A-14(c)(2), and are extinguishable only in special circumstances. *Id*., §1.170A-14(g)(6). Enforcement of those terms then falls to the state attorney general.[13]

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[12] "Protection-enhancing" amendments enhance protection of the subject property's conservation interests and the easement's conservation purpose and do not involve trade-offs. Examples include adding acreage or restrictions, eliminating reserved rights, or updating language. Some protection-enhancing amendments may qualify as deductible gifts. *Strasburg v. Commissioner*, T.C. Memo. 2000-94.

[13] Colinvaux at 764 n.42.

Similarly, the IRS can ensure that an amendment provision included in the deed authorizes only protection-enhancing amendments. Enforcement of the amendment provision then falls to the state attorney general and state courts (i.e., the parties can be enjoined from agreeing to amendments that exceed the authority granted to them). Amendments exceeding the authority granted to the parties are not permitted or would require judicial approval in a proceeding in which the parties would be required to establish to the satisfaction of the court (an independent arbiter) that the amendment is necessary for the protection of the conservation interests that were the subject of the contribution or otherwise consistent with the purpose of the gift.

Also, Amici would be remiss if they did not point out that the Tax Court majority erroneously cited Restatement (Second) of Contracts §311—which does not mention conservation easements—to support its statement that a conservation easement is a form of contract that the parties are free to amend. The Tax Court fundamentally misunderstood the American Law Institute's position on conservation easements. "Conservation servitudes" are separately defined in the Restatement addressing servitudes and afforded "special protections" given the public interest and substantial public investment. Restatement (Third) of Property: Servitudes §1.6 cmt. b (2000). Most importantly, §7.11 of that Restatement applies a special set of rules based on the doctrine of cy pres and requires court approval for

modification or termination of conservation servitudes held by charitable or government entities. *Id*. §7.11 cmts. a-c. These special protections are completely inconsistent with the notion that conservation easements are mere contracts.

In conclusion, Amici respectfully request that this Court rectify the mistake made by the Tax Court majority in stating that the terms of deductible easements are freely amendable by the parties. To be deductible, an easement must be drafted to comply with §170(h) requirements. An amendment provision included in a deductible easement may authorize protection-enhancing amendments but cannot authorize amendments that remove land from the easement, permit uses destructive of conservation interests, or relax or eliminate provisions included in the easement to comply with other deduction requirements. If the law in a state were to treat deductible easements as mere contracts that the parties are free to amend, easement donations in that state should not be deductible.[14] To find otherwise would render meaningless §170(h)'s requirements for perpetual and meaningful conservation.

2. Not All Amendment Provisions Are The Same

In holding that PMP's amendment provision did not render the 2007 easement nondeductible, the Tax Court majority stated: "It appears that many conservation

[14] *Wachter v. Commissioner*, 142 T.C. 140 (2014) (conservation easements in North Dakota not deductible; maximum duration limited to 99 years).

deeds of easement include amendment provisions of this sort." *Pine Mountain* at *19. That statement was not supported.

The majority relied on an amicus brief that dissenting Tax Court Judge Morrison explained involved a different amendment provision and was unreliable. Judge Morrison was correct. No empirical evidence exists regarding numbers of easements that contain any amendment provision, much less one like that in *Pine Mountain*. In addition, provisions authorizing protection-enhancing amendments, but precluding amendments that are destructive of conservation interests, are being used. For example, Virginia Outdoors Foundation's template easement provides that no amendment shall be "inconsistent with the conservation purposes" *and* an amendment must "enhance the Property's conservation values or add to the restricted property" *and* "no amendment shall … reduce the protection of the conservation values."[15]

Just as fundamental and potentially-disqualifying differences exist in extinguishment and division-of-proceeds provisions,[16] there are fundamental and

[15] VOF Standard Template February 7, 2018, at 19-20, *Virginia Outdoors Foundation Document Library* (https://www.virginiaoutdoorsfoundation.org/resources/library/) *Easement Documents, VOF Easement Template* (accessed Oct. 5, 2019).

[16] *PBBM-Rose Hill Limited v. Commissioner*, 900 F.3d 193, 205-09 (5th Cir.2018); *Carroll v. Commissioner*, 146 T.C. 196, 211-221 (2016); *Carpenter v. Commissioner*, T.C. Memo. 2013-172.

potentially-disqualifying differences in amendment provisions. Each must be examined individually to see if it complies with deduction requirements.

3. Claimed Widespread Use of Noncompliant Provision Does Not Justify Upholding Its Use

Claimed widespread use of a provision that violates §170(h) requirements does not justify upholding its use. The opposite is true. Section 170(h) requirements are critical to the integrity and effectiveness of the deduction program. Holding that a provision violates such requirements promotes compliance and, thus, the integrity and effectiveness of the program. *PBBM-Rose Hill v. Commissioner,* 900 F.3d 193 (5th Cir.2018), so recognized, holding that a "division-of-proceeds" provision violated Regulation §1.170A-14(g)(6)(ii), despite claims that the provision was widely-used.

4. Consistency With Conservation Purposes And Holder's Tax-Exempt Status Do Not Ensure Compliance

The IRS argued that PMP's amendment provision enables the parties to remove land from easement-encumbered areas or permit residential construction within them. *Pine Mountain* at *19. The Tax Court majority dismissed this, stating: "it is hard to imagine how NALT could conscientiously find such amendments to be 'consistent with the conservation purposes'" and the IRS "appears to contend that the easement's restrictions should be deemed 'nonperpetual' at the outset because of

the risk that the qualified organization might be unfaithful to the charitable purposes on which its exemption rests." *Id.*

There are two problems with these statements. First, PMP's amendment provision authorizes trade-off amendments. Accordingly, the provision does authorize amendments that could increase residential construction or permit other destructive uses.

Second, it is fundamentally flawed to base compliance with §170(h) requirements (other than the eligible-donee requirement) on the holder's tax-exempt status.[17] The rules mandating that an easement be "granted in perpetuity" and its conservation purpose be "protected in perpetuity" are requirements of the §170(h) deduction, not of federal tax exemption.

Rules governing tax exemption have a different focus. They require that a holder's assets, or more particularly, the value of those assets, be dedicated to an exempt purpose. At the level of tax exemption, "a generic commitment by the organization to an exempt purpose is what matters and not the purpose of the property held." Colinvaux at 763-764. Thus, if a holder agreed to amend an easement

[17] While an "eligible donee" of a deductible easement must "have a commitment to protect the conservation purposes" and "resources to enforce the restrictions," in defining those requirements, the regulations simply restate the tax-exempt status standard and, thus, "this is not a new test but rather a reiteration of an existing one that bears little relation to the problem of resources and commitment." Colinvaux at 759.

to allow some development in exchange for compensation of equivalent value that it used to advance its charitable mission, it generally would not be "unfaithful to the charitable purposes on which its exemption rests." This is why Congress imposed the §170(h) requirements and did not rely on rules governing tax exemption. To ensure that a deductible easement will, for example, attach to a specific-defined parcel, be transferable only to another eligible donee, not permit uses destructive of conservation interests (with one limited exception), and be extinguishable only in a judicial proceeding,[18] the easement must be drafted to comply with §170(h) requirements, and state attorneys general and state courts are generally empowered to enforce the easement's terms.

5. *Simmons* And *Kaufman* Are Irrelevant

The Tax Court majority erroneously cited two façade easement decisions, *Commissioner v. Simmons,* 646 F.3d 6 (D.C. Cir.2011) and *Kaufman v. Shulman,* 687 F.3d 21 (1st Cir.2012), in holding that the amendment provision did not render the 2007 easement nondeductible. Those decisions are not relevant.

Neither *Simmons* nor *Kaufman* involved language like the PMP amendment provision, and neither addressed the no-inconsistent-use requirement. Those decisions were also based largely on factors totally unrelated to deductibility in *Pine Mountain*, including Regulation §1.170A-14(d)(5)(i), which applies only to façade

[18] I.R.C. §170(h)(2)(C); Treas. Reg. §1.170A-14(c)(2), (e)(2)-(3), (g)(6).

easements and permits a deduction if the easement requires any future development to "conform with appropriate local, state, or Federal standards for construction or rehabilitation."[19] No similar regulation applies to conservation easements on land.

Both the Fourth and Tenth Circuits have rejected attempts to extend *Simmons* and *Kaufman* to issues not addressed,[20] as has the Tax Court in some cases.[21] Simply put, *Simmons* and *Kaufman* are fact-specific and should not be relied on in addressing issues not addressed in those cases.

Finally, quoting the D.C. Circuit in *Simmons*, the Tax Court majority stated that "'[a]ny donee might fail to enforce a conservation easement, with or without a clause stating that it may consent or abandon its rights, and a tax-exempt organization would do so at its peril.'" *Pine Mountain* at *19. It is true that, if a donee failed to enforce an easement and thereby conveyed a tangible economic benefit to a private party, it would do so "at its peril" because it could be sanctioned under federal tax-exemption law. But if a donee is granted authority in an easement to agree to trade-off amendments, it would face no peril for doing so. The terms of

[19] *Simmons* at 11, aff'g T.C. Memo. 2009-208, at *5.

[20] *Belk v. Commissioner,* 774 F.3d 221, 227-228 (4th Cir.2014); *Mitchell v. Commissioner,* 775 F.3d 1243, 1253-1254 n.6 (10th Cir.2015).

[21] *Belk v. Commissioner,* T.C. Memo. 2013-154, *6; *Mitchell v. Commissioner,* T.C. Memo. 2013-204, *8-*9; *Carpenter v. Commissioner,* T.C. Memo 2013-172, *7-*8.

the deed would control, and the donee would be subject to sanction only if it exceeded the discretion granted to it in the deed.

6. Cases Not Addressing Issue Are Irrelevant

In support of its amendment holding, the Tax Court majority referenced *Butler v. Commissioner*, T.C. Memo 2012-72, and *Belk v. Commissioner,* 140 T.C. 1 (2013). *Pine Mountain* at *19 n.8. However, those cases do not constitute precedent regarding amendment provisions. Neither addressed whether an amendment provision rendered an easement nondeductible, and "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Also, the *Belk* amendment provision was not "virtually identical" to that in *Pine Mountain*. The *Belk* amendment provision authorizes amendments that "are not inconsistent with the Conservation Values" *or* "the purposes of this instrument,"[22] and thus is different from the *Pine Mountain* provision.

E. Reserved Rights Violate No-Inconsistent-Use Requirement

PMP's 2005 easement violates the no-inconsistent-use requirement because some reserved rights permit destructive uses outright; others prevent IRS (or court) verification of compliance with the requirement.

[22] *Belk*, 140 T.C. at 4 n.8.

For example, the 2005 easement permits construction of 10 piers plus one common boat launch facility with boat storage building and other improvements without specifying their location. 2005 Easement at 9. Owner is thus free to construct them anywhere. Depending on their location, these improvements could be destructive of "conservation interests that are the subject of the contribution." Accordingly, the easement permits destructive uses in violation of the no-inconsistent-use requirement. If the easement had required that these improvements be constructed in an area with little or no conservation value, the no-inconsistent-use requirement would not have been violated. *Pine Mountain* at *37 (clustering on man-made lakeshore would not harm habitat or scenic attributes).

In some instances, the 2005 easement permits potentially-destructive uses anywhere on the property, subject to NALT's approval. For example, the easement permits construction of a single-family dwelling and accessory structures within each of 10 one-acre "Building Areas" tentatively situated around a man-made lake but subject to relocation if, in NALT's "reasonable judgment," it would not adversely affect conservation purposes. *Id.* at *4. Depending on where the Building Areas are located, these uses could be destructive of conservation interests that are the subject of the contribution. That the location of these uses is subject to NALT's approval is irrelevant. The purpose of the no-inconsistent-use requirement is to enable the Commissioner (and courts) to verify, at the time of donation, that (1) the

specific uses permitted by an easement will not be destructive of "the conservation interests that are the subject of the contribution" and (2) any permitted use destructive of "other significant conservation interests" is "necessary for the protection of the conservation interests that are the subject of the contribution." The Commissioner and courts cannot engage in this verification process if the location or relocation of potentially-destructive uses is not identified in the easement.

Applying an analysis similar to that of the Fourth Circuit in *Belk*, it does not matter that the easement permits these potentially-destructive uses only in locations that NALT later approves. Even assuming the approval provision tracked the no-inconsistent-use regulation (which it does not), the purpose of the regulation is to enable the Commissioner, *not the donee or donor*, to verify compliance *at the time of donation*. Similar to the substitution provision that rendered the *Belk* easement nondeductible, the provision in the 2005 easement authorizing NALT to decide, post-donation, where potentially-destructive uses will be located places PMP "beyond the reach of the Commissioner in this regard."[23] Because the Commissioner

[23] *Belk v. Commissioner*, 774 F.3d 221, 226 (4th Cir.2014) ("It matters not that the Easement requires that the removed property be replaced with property of 'equal or greater value,' because the purpose of the appraisal requirement is to enable the Commissioner, *not* the donee or donor, to verify the value of a donation. The Easement's substitution provision places the Belks beyond the reach of the Commissioner in this regard.") (emphasis in original). Same problem arises as to Regulation §1.170A-14(d)(4)(v).

cannot ascertain whether certain reserved rights in the 2005 easement violate the no-inconsistent-use requirement, the easement does not qualify for a deduction.

Importantly, carrying PMP's argument to its logical extreme, if the regulations were interpreted to allow holders to verify, post-donation, that the location (or relocation) of potentially-destructive uses complies with the no-inconsistent-use requirement, there would be no reason not to allow holders to also verify, post-donation, that the type, size, and amount of proposed uses comply with this requirement. That is, developers could be eligible for multi-million dollar deductions for easement donations that allow them to engage in whatever uses in whatever locations that holders might from time to time decide comply with the no-inconsistent-use requirement. Nothing in the statute, Regulations, or legislative history suggests that Congress intended to grant holders that type of discretion. The opposite is true.

1. Examples Do Not Delegate Verification Process To Holders

The examples in the Regulations do not authorize holders to verify compliance with deduction requirements post-donation. Rather, in each case, specific restrictions and reserved rights are analyzed *at the time of donation* to determine compliance. Treas. Reg. §1.170A-14(f), Example 1 (easement providing for "no commercial, industrial, residential, or other development use" and restricting landowner from posting or otherwise objecting to public access qualifies for

deduction); Example 2 (easement "preventing any future development" qualifies for deduction); Example 3 (easement reserving right to subdivide 900 acres into 90-acre residential parcels does not qualify for deduction).[24] Even Example 4 of Regulation §1.170A-14(f) does not authorize this delegation to holders.

Example 4 involves an easement on 900 acres that permits "limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park and subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park." Example 4 additionally provides, however, that donor and donee "have already identified sites where limited cluster development would not be visible from the park or would not impair the view." The example concludes that the donation qualifies for a deduction.

An essential factor in Example 4 is that donor and donee "*have already identified* [at the time of donation] sites where limited cluster development *would not be visible from the park or would not impair the view*." Because such sites are identified at the time of donation, the Commissioner can verify that the permitted uses will not be destructive of conservation interests (i.e., compliance with the no-inconsistent-use requirement).

[24] See also Treas. Reg. §1.170A-14(d)(5)(v), Examples 1 and 2 (analyzing at donation the dates, times, and types of public access authorized in easements to assess compliance with public-access requirement).

To interpret Example 4 as allowing the donee to approve different sites for the clusters post-donation would read the "have already identified" factor out of the Example. Such an interpretation would be contrary to a basic canon of construction: "Regulations, like statutes, must be 'construed so that effect is given to all [their] provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *United States v. Citgo Petroleum Corp*., 801 F.3d 477, 485 (5th Cir.2015), quoting *Corley v. United States,* 556 U.S. 303, 314 (2009). Accordingly, the most sensible interpretation of Example 4 is that the donee's *post-donation* approval rights are limited to the siting and building plans of *the four houses within each cluster* and, no matter where those houses are located, the no-inconsistent-use requirement would be satisfied because the pre-identified cluster sites are either not visible from the park or would not impair the view.

Notably, Example 4 does not preclude a deduction for an easement that allows the donor and donee to identify, at the time of donation, more than five possible sites where cluster development "would not be visible from the park or would not impair the view," and the donee to later approve the five sites ultimately used. Donors and donees employ this and similar techniques to build flexibility into easements to address changing or unforeseen conditions while still allowing the Commissioner to verify, at time of donation, that the easements satisfy deduction requirements. Other techniques include identifying larger building areas than are needed to exercise

reserved rights, or designating already disturbed areas with little or no conservation value as "build zones" within which reserved rights can be exercised and remaining areas as "no-build zones."

The foregoing techniques and a provision authorizing protection-enhancing amendments provide the flexibility needed to address the "relatively unlikely" incidents noted in the Land Trust Alliance's amicus brief (at 15-17)—without granting holders discretion to agree to trade-offs or site potentially-destructive uses in unregulated and unsupervised post-donation transactions contrary to congressional intent.

2. Private Letter Rulings Are Neither Precedential Nor Persuasive

The private letter rulings (PLRs) PMP cites in support of its position are neither precedential nor persuasive. Initial Brief of Appellant at 49. PLRs may not be used or cited as precedent, I.R.C. §6110(k)(3), and adhering to this proscription is appropriate given the highly fact-specific nature of easements. In addition, three of the PLRs cited were issued before and do not address the Regulations.[25] The remaining two do not (1) reflect developing jurisprudence,[26] (2) address Regulation

[25] Regulations were published January 14, 1986. T.D. 8069, 1986-1 C.B. 89.
[26] McLaughlin, Nancy, Trying Times: Conservation Easements and Federal Tax Law, Appendix A (Oct. 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3384360.

§1.170A-14(e)(3), or (3) provide a persuasive rationale for deviating from Regulation §1.170A-14(f)'s Example 4, which they acknowledge provides that the donor and donee had already identified [at the time of donation] sites for cluster development. The Court "owes no deference to an agency's interpretation of its own ambiguous regulation if that interpretation is 'inconsistent with the regulation' or not the 'agency's fair and considered judgment.'" *PBBM-Rose Hill v. Commissioner*, 900 F.3d 193, 208-09 (11th Cir.2018), citing *Texas Clinical Labs, Inc. v. Sebelius,* 612 F.3d 771, 777 (5th Cir.2010). Finally, given the multi-billion dollar investment in deductible easements and the significant prospect for abuse given their partial interest nature, enforcement of §170(h) requirements should not be precluded based on two fact-specific nonprecedential PLRs issued fifteen and twenty-three years ago.

3. Irrelevancies

There is no evidence supporting PMP's assertion that the Tax Court's holding on movable building areas "will be applied to invalidate a great many recent easement donations." Initial Brief of Appellant at 20. Moreover, as discussed, claimed widespread use of a provision that violates deduction requirements is not a justification for upholding its use.

Also, no prior case has addressed whether reserved rights to locate building areas post-donation with holder's approval violates §170(h) requirements.

Accordingly, no prior case should be considered to constitute precedent on this important issue.

V. CONCLUSION

Because conservation easements are partial interests in property, holders have an inherent conflict of interest. While holders are supposed to enforce easements on the public's behalf, they also are highly motivated to maintain good relations with a perpetual succession of landowners, some (perhaps many) of whom may not be conservation-motivated and would benefit from the modification or release of easement restrictions and the ability to engage in potentially-destructive uses anywhere on the encumbered properties. Given the intense pressures placed on holders to acquiesce to owner demands, Congress wisely did not grant holders the power to agree to amendments or site potentially-destructive uses post-donation under a vague "conservation purposes" standard. Instead, Congress imposed strict requirements on the deduction designed to permanently protect the conservation interests on the subject properties and charged the Commissioner with verifying compliance with those requirements at the time of donation.

As a practical matter, the deduction requirements and the limits they place on the parties provide important support to holders to say "no" to aggressive landowners—and many holders welcome the constraints.

For the foregoing reasons, Amici urge the Court to affirm the Tax Court's disallowance of deductions for the 2005 and 2006 easements, and reverse the Tax Court's allowance of the deduction for the 2007 easement. Amici also respectfully request that the Court rectify the mistakes made by the Tax Court in its discussion of amendments.

DATED: October 7, 2019

By: */s/ Ann Taylor Schwing*
Attorney and Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Federal Rules of Appellate Procedure Rule 29(a)(5) because, excluding parts of the document exempted by Federal Rules of Appellate Procedure Rule 32(f), this document contains 6,489 words. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: October 7, 2019

By: */s/ Ann Taylor Schwing*
Attorney and Amicus Curiae

Ann Taylor Schwing (SA0957)
BEST BEST & KRIEGER, L.L.P.
500 Capitol Mall, 17th Floor
Sacramento, California 95814
(707) 666-2747 fax (916) 325-4010
Ann.Schwing@BBKlaw.com

CERTIFICATE OF SERVICE

This is to certify that on October 7, 2019, I electronically filed the foregoing Amicus Brief of K. KING BURNETT, ROGER COLINVAUX, JOHN ECHEVERRIA, JOHN LESHY, NANCY McLAUGHLIN, JANET MILNE, AND ANN TAYLOR SCHWING IN SUPPORT OF RESPONDENT AND IN SUPPORT OF AFFIRMANCE IN PART AND REVERSAL IN PART with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. In addition, I served the attorneys for the parties by email the same day, using the following email addresses:

David M. Wooldridge (dwooldridge@sirote.com)

Ronald Levitt (rlevitt@sirote.com)

Gregory P. Rhodes (grhodes@sirote.com)

Michelle A. Levin (mlevin@sirote.com)

Jacob Christensen (Jacob.E.Christensen@usdoj.gov)

Francesca Ugolini (francesca.ugolini@usdoj.gov)

Robert H. Levin (rob@roblevin.net)

DATED: October 7, 2019

By: */s/ Ann Taylor Schwing*
Attorney and Amicus Curiae

ADDENDUM

1. Internal Revenue Code §170(f)(3)(A) and (B)

2. Internal Revenue Code §170(h)

3. Treasury Regulation §1.170A-14

4. Senate Report No. 96-1007, 96th Cong. 2d Sess. 8 (1980)

change, or other disposition by the donee of applicable property—

(i) after the last day of the taxable year of the donor in which such property was contributed, and

(ii) before the last day of the 3-year period beginning on the date of the contribution of such property,

unless the donee makes a certification in accordance with subparagraph (D).

(C) Applicable property

For purposes of this paragraph, the term "applicable property" means charitable deduction property (as defined in section 6050L(a)(2)(A))—

(i) which is tangible personal property the use of which is identified by the donee as related to the purpose or function constituting the basis of the donee's exemption under section 501, and

(ii) for which a deduction in excess of the donor's basis is allowed.

(D) Certification

A certification meets the requirements of this subparagraph if it is a written statement which is signed under penalty of perjury by an officer of the donee organization and—

(i) which—

(I) certifies that the use of the property by the donee was substantial and related to the purpose or function constituting the basis for the donee's exemption under section 501, and

(II) describes how the property was used and how such use furthered such purpose or function, or

(ii) which—

(I) states the intended use of the property by the donee at the time of the contribution, and

(II) certifies that such intended use has become impossible or infeasible to implement.

(f) Disallowance of deduction in certain cases and special rules

(1) In general

No deduction shall be allowed under this section for a contribution to or for the use of an organization or trust described in section 508(d) or 4948(c)(4) subject to the conditions specified in such sections.

(2) Contributions of property placed in trust

(A) Remainder interest

In the case of property transferred in trust, no deduction shall be allowed under this section for the value of a contribution of a remainder interest unless the trust is a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664), or a pooled income fund (described in section 642(c)(5)).

(B) Income interests, etc.

No deduction shall be allowed under this section for the value of any interest in property (other than a remainder interest) transferred in trust unless the interest is in the form of a guaranteed annuity or the trust instrument specifies that the interest is a fixed percentage distributed yearly of the fair market value of the trust property (to be determined yearly) and the grantor is treated as the owner of such interest for purposes of applying section 671. If the donor ceases to be treated as the owner of such an interest for purposes of applying section 671, at the time the donor ceases to be so treated, the donor shall for purposes of this chapter be considered as having received an amount of income equal to the amount of any deduction he received under this section for the contribution reduced by the discounted value of all amounts of income earned by the trust and taxable to him before the time at which he ceases to be treated as the owner of the interest. Such amounts of income shall be discounted to the date of the contribution. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph.

(C) Denial of deduction in case of payments by certain trusts

In any case in which a deduction is allowed under this section for the value of an interest in property described in subparagraph (B), transferred in trust, no deduction shall be allowed under this section to the grantor or any other person for the amount of any contribution made by the trust with respect to such interest.

(D) Exception

This paragraph shall not apply in a case in which the value of all interests in property transferred in trust are deductible under subsection (a).

(3) Denial of deduction in case of certain contributions of partial interests in property

(A) In general

In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

(B) Exceptions

Subparagraph (A) shall not apply to—

(i) a contribution of a remainder interest in a personal residence or farm,

(ii) a contribution of an undivided portion of the taxpayer's entire interest in property, and

(iii) a qualified conservation contribution.

(4) Valuation of remainder interest in real property

For purposes of this section, in determining the value of a remainder interest in real prop-

(2) Limitations

(A) Amount

Paragraph (1) shall apply to amounts paid within the taxable year only to the extent that such amounts do not exceed $50 multiplied by the number of full calendar months during the taxable year which fall within the period described in paragraph (1). For purposes of the preceding sentence, if 15 or more days of a calendar month fall within such period such month shall be considered as a full calendar month.

(B) Compensation or reimbursement

Paragraph (1) shall not apply to any amount paid by the taxpayer within the taxable year if the taxpayer receives any money or other property as compensation or reimbursement for maintaining the individual in his household during the period described in paragraph (1).

(3) Relative defined

For purposes of paragraph (1), the term "relative of the taxpayer" means an individual who, with respect to the taxpayer, bears any of the relationships described in subparagraphs (A) through (G) of section 152(d)(2).

(4) No other amount allowed as deduction

No deduction shall be allowed under subsection (a) for any amount paid by a taxpayer to maintain an individual as a member of his household under a program described in paragraph (1)(A) except as provided in this subsection.

(h) Qualified conservation contribution

(1) In general

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

(A) of a qualified real property interest,

(B) to a qualified organization,

(C) exclusively for conservation purposes.

(2) Qualified real property interest

For purposes of this subsection, the term "qualified real property interest" means any of the following interests in real property:

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

(B) a remainder interest, and

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

(3) Qualified organization

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

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

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

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

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

(4) Conservation purpose defined

(A) In general

For purposes of this subsection, the term "conservation purpose" means—

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

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

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

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

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

and will yield a significant public benefit, or

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

(B) Special rules with respect to buildings in registered historic districts

In the case of any contribution of a qualified real property interest which is a restriction with respect to the exterior of a building described in subparagraph (C)(ii), such contribution shall not be considered to be exclusively for conservation purposes unless—

(i) such interest—

(I) includes a restriction which preserves the entire exterior of the building (including the front, sides, rear, and height of the building), and

(II) prohibits any change in the exterior of the building which is inconsistent with the historical character of such exterior,

(ii) the donor and donee enter into a written agreement certifying, under penalty of perjury, that the donee—

(I) is a qualified organization (as defined in paragraph (3)) with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and

(II) has the resources to manage and enforce the restriction and a commitment to do so, and

(iii) in the case of any contribution made in a taxable year beginning after the date of the enactment of this subparagraph, the taxpayer includes with the taxpayer's return for the taxable year of the contribution—

(I) a qualified appraisal (within the meaning of subsection (f)(11)(E)) of the qualified property interest,

(II) photographs of the entire exterior of the building, and

(III) a description of all restrictions on the development of the building.

(C) Certified historic structure

For purposes of subparagraph (A)(iv), the term "certified historic structure" means—

(i) any building, structure, or land area which is listed in the National Register, or

(ii) any building which is located in a registered historic district (as defined in

section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

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

(5) Exclusively for conservation purposes

For purposes of this subsection—

(A) Conservation purpose must be protected

A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.

(B) No surface mining permitted

(i) In general

Except as provided in clause (ii), in the case of a contribution of any interest where there is a retention of a qualified mineral interest, subparagraph (A) shall not be treated as met if at any time there may be extraction or removal of minerals by any surface mining method.

(ii) Special rule

With respect to any contribution of property in which the ownership of the surface estate and mineral interests has been and remains separated, subparagraph (A) shall be treated as met if the probability of surface mining occurring on such property is so remote as to be negligible.

(6) Qualified mineral interest

For purposes of this subsection, the term "qualified mineral interest" means—

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

(B) the right to access to such minerals.

(i) Standard mileage rate for use of passenger automobile

For purposes of computing the deduction under this section for use of a passenger automobile, the standard mileage rate shall be 14 cents per mile.

(j) Denial of deduction for certain travel expenses

No deduction shall be allowed under this section for traveling expenses (including amounts expended for meals and lodging) while away from home, whether paid directly or by reimbursement, unless there is no significant element of personal pleasure, recreation, or vacation in such travel.

(k) Disallowance of deductions in certain cases

For disallowance of deductions for contributions to or for the use of communist controlled organizations, see section 11(a)[2] of the Internal Security Act of 1950 (50 U.S.C. 790).

[2] See References in Text note below.

(*l*) Treatment of certain amounts paid to or for the benefit of institutions of higher education

(1) In general

For purposes of this section, 80 percent of any amount described in paragraph (2) shall be treated as a charitable contribution.

(2) Amount described

For purposes of paragraph (1), an amount is described in this paragraph if—

(A) the amount is paid by the taxpayer to or for the benefit of an educational organization—

(i) which is described in subsection (b)(1)(A)(ii), and

(ii) which is an institution of higher education (as defined in section 3304(f)), and

(B) such amount would be allowable as a deduction under this section but for the fact that the taxpayer receives (directly or indirectly) as a result of paying such amount the right to purchase tickets for seating at an athletic event in an athletic stadium of such institution.

If any portion of a payment is for the purchase of such tickets, such portion and the remaining portion (if any) of such payment shall be treated as separate amounts for purposes of this subsection.

(m) Certain donee income from intellectual property treated as an additional charitable contribution

(1) Treatment as additional contribution

In the case of a taxpayer who makes a qualified intellectual property contribution, the deduction allowed under subsection (a) for each taxable year of the taxpayer ending on or after the date of such contribution shall be increased (subject to the limitations under subsection (b)) by the applicable percentage of qualified donee income with respect to such contribution which is properly allocable to such year under this subsection.

(2) Reduction in additional deductions to extent of initial deduction

With respect to any qualified intellectual property contribution, the deduction allowed under subsection (a) shall be increased under paragraph (1) only to the extent that the aggregate amount of such increases with respect to such contribution exceed the amount allowed as a deduction under subsection (a) with respect to such contribution determined without regard to this subsection.

(3) Qualified donee income

For purposes of this subsection, the term "qualified donee income" means any net income received by or accrued to the donee which is properly allocable to the qualified intellectual property.

(4) Allocation of qualified donee income to taxable years of donor

For purposes of this subsection, qualified donee income shall be treated as properly allocable to a taxable year of the donor if such income is received by or accrued to the donee for

taxpayer must substantiate in accordance with the requirements of this section.

(15) *Substantiation of charitable contributions made by a partnership or an S corporation.* If a partnership or an S corporation makes a charitable contribution of $250 or more, the partnership or S corporation will be treated as the taxpayer for purposes of section 170(f)(8). Therefore, the partnership or S corporation must substantiate the contribution with a contemporaneous written acknowledgment from the donee organization before reporting the contribution on its income tax return for the year in which the contribution was made and must maintain the contemporaneous written acknowledgment in its records. A partner of a partnership or a shareholder of an S corporation is not required to obtain any additional substantiation for his or her share of the partnership's or S corporation's charitable contribution.

(16) *Purchase of an annuity.* If a taxpayer purchases an annuity from a charitable organization and claims a charitable contribution deduction of $250 or more for the excess of the amount paid over the value of the annuity, the contemporaneous written acknowledgment must state whether any goods or services in addition to the annuity were provided to the taxpayer. The contemporaneous written acknowledgment is not required to include a good faith estimate of the value of the annuity. See §1.170A–1(d)(2) for guidance in determining the value of the annuity.

(17) *Substantiation of matched payments*—(i) *In general.* For purposes of section 170, if a taxpayer's payment to a donee organization is matched, in whole or in part, by another payor, and the taxpayer receives goods or services in consideration for its payment and some or all of the matching payment, those goods or services will be treated as provided in consideration for the taxpayer's payment and not in consideration for the matching payment.

(ii) *Example.* The following example illustrates the rules of this paragraph (f)(17).

Example Taxpayer makes a $400 payment to Charity *L*, a donee organization. Pursuant to a matching payment plan, Taxpayer's employer matches Taxpayer's $400 payment with an additional payment of $400. In consideration for the combined payments of $800, *L* gives Taxpayer an item that it estimates has a fair market value of $100. *L* does not give the employer any goods or services in consideration for its contribution. The contemporaneous written acknowledgment provided to the employer must include a statement that no goods or services were provided in consideration for the employer's $400 payment. The contemporaneous written acknowledgment provided to Taxpayer must include a statement of the amount of Taxpayer's payment, a description of the item received by Taxpayer, and a statement that *L*'s good faith estimate of the value of the item received by Taxpayer is $100.

(18) *Effective date.* This paragraph (f) applies to contributions made on or after December 16, 1996. However, taxpayers may rely on the rules of this paragraph (f) for contributions made on or after January 1, 1994.

[T.D. 8002, 49 FR 50664 and 50666, Dec. 31, 1984, as amended by T.D. 8003, 49 FR 50659, Dec. 31, 1984; T.D. 8199, 53 FR 16080, May 5, 1988; 53 FR 18372, May 23, 1988; T.D. 8623, 60 FR 53128, Oct. 12, 1995; T.D. 8690, 61 FR 65952, Dec. 16, 1996]

§ 1.170A–14 Qualified conservation contributions.

(a) *Qualified conservation contributions.* A deduction under section 170 is generally not allowed for a charitable contribution of any interest in property that consists of less than the donor's entire interest in the property other than certain transfers in trust (see §1.170A–6 relating to charitable contributions in trust and §1.170A–7 relating to contributions not in trust of partial interests in property). However, a deduction may be allowed under section 170(f)(3)(B)(iii) for the value of a qualified conservation contribution if the requirements of this section are met. A qualified conservation contribution is the contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. To be eligible for a deduction under this section, the conservation purpose must be protected in perpetuity.

(b) *Qualified real property interest*—(1) *Entire interest of donor other than qualified mineral interest.* (i) The entire interest of the donor other than a qualified mineral interest is a qualified real property interest. A qualified mineral

interest is the donor's interest in subsurface oil, gas, or other minerals and the right of access to such minerals.

(ii) A real property interest shall not be treated as an entire interest other than a qualified mineral interest by reason of section 170(h)(2)(A) and this paragraph (b)(1) if the property in which the donor's interest exists was divided prior to the contribution in order to enable the donor to retain control of more than a qualified mineral interest or to reduce the real property interest donated. See Treasury regulations §1.170A–7(a)(2)(i). An entire interest in real property may consist of an undivided interest in the property. But see section 170(h)(5)(A) and the regulations thereunder (relating to the requirement that the conservation purpose which is the subject of the donation must be protected in perpetuity). Minor interests, such as rights-of-way, that will not interfere with the conservation purposes of the donation, may be transferred prior to the conservation contribution without affecting the treatment of a property interest as a qualified real property interest under this paragraph (b)(1).

(2) *Perpetual conservation restriction.* A ''perpetual conservation restriction'' is a qualified real property interest. A ''perpetual conservation restriction'' is a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude). For purposes of this section, the terms *easement*, *conservation restriction*, and *perpetual conservation restriction* have the same meaning. The definition of *perpetual conservation restriction* under this paragraph (b)(2) is not intended to preclude the deductibility of a donation of affirmative rights to use a land or water area under §1.170A–13(d)(2). Any rights reserved by the donor in the donation of a perpetual conservation restriction must conform to the requirements of this section. See *e.g.*, paragraph (d)(4)(ii), (d)(5)(i), (e)(3), and (g)(4) of this section.

(c) *Qualified organization*—(1) *Eligible donee.* To be considered an eligible donee under this section, an organization must be a qualified organization, have a commitment to protect the conservation purposes of the donation, and have the resources to enforce the restrictions. A conservation group organized or operated primarily or substantially for one of the conservation purposes specified in section 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence. A qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution. For purposes of this section, the term *qualified organization* means:

(i) A governmental unit described in section 170(b)(1)(A)(v);

(ii) An organization described in section 170(b)(1)(A)(vi);

(iii) A charitable organization described in section 501(c)(3) that meets the public support test of section 509(a)(2);

(iv) A charitable organization described in section 501(c)(3) that meets the requirements of section 509(a)(3) and is controlled by an organization described in paragraphs (c)(1) (i), (ii), or (iii) of this section.

(2) *Transfers by donee.* A deduction shall be allowed for a contribution under this section only if in the instrument of conveyance the donor prohibits the donee from subsequently transferring the easement (or, in the case of a remainder interest or the reservation of a qualified mineral interest, the property), whether or not for consideration, unless the donee organization, as a condition of the subsequent transfer, requires that the conservation purposes which the contribution was originally intended to advance continue to be carried out. Moreover, subsequent transfers must be restricted to organizations qualifying, at the time of the subsequent transfer, as an eligible donee under paragraph (c)(1) of this section. When a later unexpected change in the conditions surrounding the property that is the subject of a donation under paragraph (b)(1), (2), or (3) of this section makes impossible or impractical the continued use of the property for conservation purposes, the requirement of this paragraph will be met if the property is sold or exchanged and any proceeds are used by

the donee organization in a manner consistent with the conservation purposes of the original contribution. In the case of a donation under paragraph (b)(3) of this section to which the preceding sentence applies, see also paragraph (g)(5)(ii) of this section.

(d) *Conservation purposes*—(1) *In general.* For purposes of section 170(h) and this section, the term *conservation purposes* means—

(i) The preservation of land areas for outdoor recreation by, or the education of, the general public, within the meaning of paragraph (d)(2) of this section,

(ii) The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section,

(iii) The preservation of certain open space (including farmland and forest land) within the meaning of paragraph (d)(4) of this section, or

(iv) The preservation of a historically important land area or a certified historic structure, within the meaning of paragraph (d)(5) of this section.

(2) *Recreation or education*—(i) *In general.* The donation of a qualified real property interest to preserve land areas for the outdoor recreation of the general public or for the education of the general public will meet the conservation purposes test of this section. Thus, conservation purposes would include, for example, the preservation of a water area for the use of the public for boating or fishing, or a nature or hiking trail for the use of the public.

(ii) *Access.* The preservation of land areas for recreation or education will not meet the test of this section unless the recreation or education is for the substantial and regular use of the general public.

(3) *Protection of environmental system*—(i) *In general.* The donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test of this section. The fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied under this section if the fish, wildlife, or plants continue to exist there in a relatively natural state. For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond were a nature feeding area for a wildlife community that included rare, endangered, or threatened native species.

(ii) *Significant habitat or ecosystem.* Significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants; natural areas that represent high quality examples of a terrestrial community or aquatic community, such as islands that are undeveloped or not intensely developed where the coastal ecosystem is relatively intact; and natural areas which are included in, or which contribute to, the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or other similar conservation area.

(iii) *Access.* Limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

(4) *Preservation of open space*—(i) *In general.* The donation of a qualified real property interest to preserve open space (including farmland and forest land) will meet the conservation purposes test of this section if such preservation is—

(A) Pursuant to a clearly delineated Federal, state, or local governmental conservation policy and will yield a significant public benefit, or

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

An open space easement donated on or after December 18, 1980, must meet the requirements of section 170(h) in order to be deductible.

(ii) *Scenic enjoyment*—(A) *Factors.* A contribution made for the preservation

of open space may be for the scenic enjoyment of the general public. Preservation of land may be for the scenic enjoyment of the general public if development of the property would impair the scenic character of the local rural or urban landscape or would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, waterbody, trail, or historic structure or land area, and such area or transportation way is open to, or utilized by, the public. ''Scenic enjoyment'' will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Regional variations in topography, geology, biology, and cultural and economic conditions require flexibility in the application of this test, but do not lessen the burden on the taxpayer to demonstrate the scenic characteristics of a donation under this paragraph. The application of a particular objective factor to help define a view as *scenic* in one setting may in fact be entirely inappropriate in another setting. Among the factors to be considered are:

(*1*) The compatibility of the land use with other land in the vicinity;

(*2*) The degree of contrast and variety provided by the visual scene;

(*3*) The openness of the land (which would be a more significant factor in an urban or densely populated setting or in a heavily wooded area);

(*4*) Relief from urban closeness;

(*5*) The harmonious variety of shapes and textures;

(*6*) The degree to which the land use maintains the scale and character of the urban landscape to preserve open space, visual enjoyment, and sunlight for the surrounding area;

(*7*) The consistency of the proposed scenic view with a methodical state scenic identification program, such as a state landscape inventory; and

(*8*) The consistency of the proposed scenic view with a regional or local landscape inventory made pursuant to a sufficiently rigorous review process, especially if the donation is endorsed by an appropriate state or local governmental agency.

(B) *Access.* To satisfy the requirement of scenic enjoyment by the general public, visual (rather than physical) access to or across the property by the general public is sufficient. Under the terms of an open space easement on scenic property, the entire property need not be visible to the public for a donation to qualify under this section, although the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is visible to the public.

(iii) *Governmental conservation policy*—(A) *In general.* The requirement that the preservation of open space be pursuant to a clearly delineated Federal, state, or local governmental policy is intended to protect the types of property identified by representatives of the general public as worthy of preservation or conservation. A general declaration of conservation goals by a single official or legislative body is not sufficient. However, a governmental conservation policy need not be a certification program that identifies particular lots or small parcels of individually owned property. This requirement will be met by donations that further a specific, identified conservation project, such as the preservation of land within a state or local landmark district that is locally recognized as being significant to that district; the preservation of a wild or scenic river, the preservation of farmland pursuant to a state program for flood prevention and control; or the protection of the scenic, ecological, or historic character of land that is contiguous to, or an integral part of, the surroundings of existing recreation or conservation sites. For example, the donation of a perpetual conservation restriction to a qualified organization pursuant to a formal resolution or certification by a local governmental agency established under state law specifically identifying the subject property as worthy of protection for conservation purposes will meet the requirement of this paragraph. A program need not be funded to satisfy this requirement, but the program must involve a significant commitment by the government with respect to the conservation project. For example, a governmental program according preferential tax assessment or preferential zoning for certain property deemed worthy of protection for conservation purposes would constitute a

significant commitment by the government.

(B) *Effect of acceptance by governmental agency.* Acceptance of an easement by an agency of the Federal Government or by an agency of a state or local government (or by a commission, authority, or similar body duly constituted by the state or local government and acting on behalf of the state or local government) tends to establish the requisite clearly delineated governmental policy, although such acceptance, without more, is not sufficient. The more rigorous the review process by the governmental agency, the more the acceptance of the easement tends to establish the requisite clearly delineated governmental policy. For example, in a state where the legislature has established an Environmental Trust to accept gifts to the state which meet certain conservation purposes and to submit the gifts to a review that requires the approval of the state's highest officials, acceptance of a gift by the Trust tends to establish the requisite clearly delineated governmental policy. However, if the Trust merely accepts such gifts without a review process, the requisite clearly delineated governmental policy is not established.

(C) *Access.* A limitation on public access to property subject to a donation under this paragraph (d)(4)(iii) shall not render the deduction nondeductible unless the conservation purpose of the donation would be undermined or frustrated without public access. For example, a donation pursuant to a governmental policy to protect the scenic character of land near a river requires visual access to the same extent as would a donation under paragraph (d)(4)(ii) of this section.

(iv) *Significant public benefit*—(A) *Factors.* All contributions made for the preservation of open space must yield a significant public benefit. Public benefit will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution. No single factor will necessarily be determinative. Among the factors to be considered are:

(*1*) The uniqueness of the property to the area;

(*2*) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);

(*3*) The consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;

(*4*) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in §1.170A–14(c)(1), in close proximity to the property;

(*5*) The likelihood that development of the property would lead to or contribute to degradation of the scenic, natural, or historic character of the area;

(*6*) The opportunity for the general public to use the property or to appreciate its scenic values;

(*7*) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;

(*8*) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;

(*9*) The cost to the donee of enforcing the terms of the conservation restriction;

(*10*) The population density in the area of the property; and

(*11*) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.

(B) *Illustrations.* The preservation of an ordinary tract of land would not in and of itself yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation

of a unique land area for public employment would yield a significant public benefit. For example, the preservation of a vacant downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit. The following are other examples of contributions which would, absent countervailing factors, yield a significant public benefit: The preservation of farmland pursuant to a state program for flood prevention and control; the preservation of a unique natural land formation for the enjoyment of the general public; the preservation of woodland along a public highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway; and the preservation of a stretch of undeveloped property located between a public highway and the ocean in order to maintain the scenic ocean view from the highway.

(v) *Limitation.* A deduction will not be allowed for the preservation of open space under section 170(h)(4)(A)(iii), if the terms of the easement permit a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy that is being furthered by the donation. See §1.170A–14(e)(2) for rules relating to inconsistent use.

(vi) *Relationship of requirements*—(A) *Clearly delineated governmental policy and significant public benefit.* Although the requirements of ''clearly delineated governmental policy'' and ''significant public benefit'' must be met independently, for purposes of this section the two requirements may also be related. The more specific the governmental policy with respect to the particular site to be protected, the more likely the governmental decision, by itself, will tend to establish the significant public benefit associated with the donation. For example, while a statute in State X permitting preferential assessment for farmland is, by definition, governmental policy, it is distinguishable from a state statute, accompanied by appropriations, naming the X River as a valuable resource and articulating the legislative policy that the X River and the relatively natural quality of its surrounding be protected. On these facts, an open space easement on farmland in State X would have to demonstrate additional factors to establish ''significant public benefit.'' The specificity of the legislative mandate to protect the X River, however, would by itself tend to establish the significant public benefit associated with an open space easement on land fronting the X River.

(B) *Scenic enjoyment and significant public benefit.* With respect to the relationship between the requirements of ''scenic enjoyment'' and ''significant public benefit,'' since the degrees of scenic enjoyment offered by a variety of open space easements are subjective and not as easily delineated as are increasingly specific levels of governmental policy, the significant public benefit of preserving a scenic view must be independently established in all cases.

(C) *Donations may satisfy more than one test.* In some cases, open space easements may be both for scenic enjoyment and pursuant to a clearly delineated governmental policy. For example, the preservation of a particular scenic view identified as part of a scenic landscape inventory by a rigorous governmental review process will meet the tests of both paragraphs (d)(4)(i)(A) and (d)(4)(i)(B) of this section.

(5) *Historic preservation*—(i) *In general.* The donation of a qualified real property interest to preserve an historically important land area or a certified historic structure will meet the conservation purposes test of this section. When restrictions to preserve a building or land area within a registered historic district permit future development on the site, a deduction will be allowed under this section only if the terms of the restrictions require that such development conform with appropriate local, state, or Federal standards for construction or rehabilitation within the district. See also, §1.170A–14(h)(3)(ii).

(ii) *Historically important land area.* The term *historically important land area* includes:

(A) An independently significant land area including any related historic resources (for example, an archaeological site or a Civil War battlefield with related monuments, bridges, cannons, or houses) that meets the National Register Criteria for Evaluation in 36 CFR 60.4 (Pub. L. 89–665, 80 Stat. 915);

(B) Any land area within a registered historic district including any buildings on the land area that can reasonably be considered as contributing to the significance of the district; and

(C) Any land area (including related historic resources) adjacent to a property listed individually in the National Register of Historic Places (but not within a registered historic district) in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.

(iii) *Certified historic structure.* The term *certified historic structure*, for purposes of this section, means any building, structure or land area which is—

(A) Listed in the National Register, or

(B) Located in a registered historic district (as defined in section 48(g)(3)(B)) and is certified by the Secretary of the Interior (pursuant to 36 CFR 67.4) to the Secretary of the Treasury as being of historic significance to the district.

A *structure* for purposes of this section means any structure, whether or not it is depreciable. Accordingly easements on private residences may qualify under this section. In addition, a structure would be considered to be a certified historic structure if it were certified either at the time the transfer was made or at the due date (including extensions) for filing the donor's return for the taxable year in which the contribution was made.

(iv) *Access.* (A) In order for a conservation contribution described in section 170(h)(4)(A)(iv) and this paragraph (d)(5) to be deductible, some visual public access to the donated property is required. In the case of an historically important land area, the entire property need not be visible to the public for a donation to qualify under this section. However, the public benefit from the donation may be insufficient to qualify for a deduction if only a small portion of the property is so visible. Where the historic land area or certified historic structure which is the subject of the donation is not visible from a public way (*e.g.*, the structure is hidden from view by a wall or shrubbery, the structure is too far from the public way, or interior characteristics and features of the structure are the subject of the easement), the terms of the easement must be such that the general public is given the opportunity on a regular basis to view the characteristics and features of the property which are preserved by the easement to the extent consistent with the nature and condition of the property.

(B) Factors to be considered in determining the type and amount of public access required under paragraph (d)(5)(iv)(A) of this section include the historical significance of the donated property, the nature of the features that are the subject of the easement, the remoteness or accessibility of the site of the donated property, the possibility of physical hazards to the public visiting the property (for example, an unoccupied structure in a dilapidated condition), the extent to which public access would be an unreasonable intrusion on any privacy interests of individuals living on the property, the degree to which public access would impair the preservation interests which are the subject of the donation, and the availability of opportunities for the public to view the property by means other than visits to the site.

(C) The amount of access afforded the public by the donation of an easement shall be determined with reference to the amount of access permitted by the terms of the easement which are established by the donor, rather than the amount of access actually provided by the donee organization. However, if the donor is aware of any facts indicating that the amount of access that the donee organization will provide is significantly less than the amount of access permitted under the terms of the easement, then the amount of access afforded the public shall be determined with reference to this lesser amount.

(v) *Examples.* The provisions of paragraph (d)(5)(iv) of this section may be illustrated by the following examples:

Example 1. A and his family live in a house in a certified historic district in the State of X. The entire house, including its interior, has architectural features representing classic Victorian period architecture. A donates an exterior and interior easement on the property to a qualified organization but continues to live in the house with his family. A's house is surrounded by a high stone wall which obscures the public's view of it from the street. Pursuant to the terms of the easement, the house may be opened to the public from 10:00 a.m. to 4:00 p.m. on one Sunday in May and one Sunday in November each year for house and garden tours. These tours are to be under the supervision of the donee and open to members of the general public upon payment of a small fee. In addition, under the terms of the easement, the donee organization is given the right to photograph the interior and exterior of the house and distribute such photographs to magazines, newsletters, or other publicly available publications. The terms of the easement also permit persons affiliated with educational organizations, professional architectural associations, and historical societies to make an appointment through the donee organization to study the property. The donor is not aware of any facts indicating that the public access to be provided by the donee organization will be significantly less than that permitted by the terms of the easement. The 2 opportunities for public visits per year, when combined with the ability of the general public to view the architectural characteristics and features that are the subject of the easement through photographs, the opportunity for scholarly study of the property, and the fact that the house is used as an occupied residence, will enable the donation to satisfy the requirement of public access.

Example 2. B owns an unoccupied farmhouse built in the 1840's and located on a property that is adjacent to a Civil War battlefield. During the Civil War the farmhouse was used as quarters for Union troops. The battlefield is visited year round by the general public. The condition of the farmhouse is such that the safety of visitors will not be jeopardized and opening it to the public will not result in significant deterioration. The farmhouse is not visible from the battlefield or any public way. It is accessible only by way of a private road owned by B. B donates a conservation easement on the farmhouse to a qualified organization. The terms of the easement provide that the donee organization may open the property (via B's road) to the general public on four weekends each year from 8:30 a.m. to 4:00 p.m. The donation does not meet the public access requirement because the farmhouse is safe, unoccupied, and easily accessible to the general public who have come to the site to visit Civil War historic land areas (and related resources), but will only be open to the public on four weekends each year. However, the donation would meet the public access requirement if the terms of the easement permitted the donee organization to open the property to the public every other weekend during the year and the donor is not aware of any facts indicating that the donee organization will provide significantly less access than that permitted.

(e) *Exclusively for conservation purposes*—(1) *In general.* To meet the requirements of this section, a donation must be exclusively for conservation purposes. See paragraphs (c)(1) and (g)(1) through (g)(6)(ii) of this section. A deduction will not be denied under this section when incidental benefit inures to the donor merely as a result of conservation restrictions limiting the uses to which the donor's property may be put.

(2) *Inconsistent use.* Except as provided in paragraph (e)(4) of this section, a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a State program for flood prevention and control would not qualify under paragraph (d)(4) of this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.

(3) *Inconsistent use permitted.* A use that is destructive of conservation interests will be permitted only if such use is necessary for the protection of the conservation interests that are the subject of the contribution. For example, a deduction for the donation of an easement to preserve an archaeological site that is listed on the National Register of Historic Places will not be disallowed if site excavation consistent with sound archaeological practices may impair a scenic view of which the land is a part. A donor may continue a pre-existing use of the property that does not conflict with the conservation purposes of the gift.

(f) *Examples.* The provisions of this section relating to conservation purposes may be illustrated by the following examples.

Example 1. State S contains many large tract forests that are desirable recreation and scenic areas for the general public. The forests' scenic values attract millions of people to the State. However, due to the increasing intensity of land development in State S, the continued existence of forestland parcels greater than 45 acres is threatened. J grants a perpetual easement on a 100-acre parcel of forestland that is part of one of the State's scenic areas to a qualifying organization. The easement imposes restrictions on the use of the parcel for the purpose of maintaining its scenic values. The restrictions include a requirement that the parcel be maintained forever as open space devoted exclusively to conservation purposes and wildlife protection, and that there be no commercial, industrial, residential, or other development use of such parcel. The law of State S recognizes a limited public right to enter private land, particularly for recreational pursuits, unless such land is posted or the landowner objects. The easement specifically restricts the landowner from posting the parcel, or from objecting, thereby maintaining public access to the parcel according to the custom of the State. J's parcel provides the opportunity for the public to enjoy the use of the property and appreciate its scenic values. Accordingly, J's donation qualifies for a deduction under this section.

Example 2. A qualified conservation organization owns Greenacre in fee as a nature preserve. Greenacre contains a high quality example of a tall grass prairie ecosystem. Farmacre, an operating farm, adjoins Greenacre and is a compatible buffer to the nature preserve. Conversion of Farmacre to a more intense use, such as a housing development, would adversely affect the continued use of Greenacre as a nature preserve because of human traffic generated by the development. The owner of Farmacre donates an easement preventing any future development on Farmacre to the qualified conservation organization for conservation purposes. Normal agricultural uses will be allowed on Farmacre. Accordingly, the donation qualifies for a deduction under this section.

Example 3. H owns Greenacre, a 900-acre parcel of woodland, rolling pasture, and orchards on the crest of a mountain. All of Greenacre is clearly visible from a nearby national park. Because of the strict enforcement of an applicable zoning plan, the highest and best use of Greenacre is as a subdivision of 40-acre tracts. H wishes to donate a scenic easement on Greenacre to a qualifying conservation organization, but H would like to reserve the right to subdivide Greenacre into 90-acre parcels with no more than one single-family home allowable on each parcel. Random building on the property, even as little as one home for each 90 acres, would destroy the scenic character of the view. Accordingly, no deduction would be allowable under this section.

Example 4. Assume the same facts as in *example (3),* except that not all of Greenacre is visible from the park and the deed of easement allows for limited cluster development of no more than five nine-acre clusters (with four houses on each cluster) located in areas generally not visible from the national park and subject to site and building plan approval by the donee organization in order to preserve the scenic view from the park. The donor and the donee have already identified sites where limited cluster development would not be visible from the park or would not impair the view. Owners of homes in the clusters will not have any rights with respect to the surrounding Greenacre property that are not also available to the general public. Accordingly, the donation qualifies for a deduction under this section.

Example 5. In order to protect State S's declining open space that is suited for agricultural use from increasing development pressure that has led to a marked decline in such open space, the Legislature of State S passed a statute authorizing the purchase of ''agricultural land development rights'' on open acreage. Agricultural land development rights allow the State to place agricultural preservation restrictions on land designated as worthy of protection in order to preserve open space and farm resources. Agricultural preservation restrictions prohibit or limit construction or placement of buildings except those used for agricultural purposes or dwellings used for family living by the farmer and his family and employees; removal of mineral substances in any manner that adversely affects the land's agricultural potential; or other uses detrimental to retention of the land for agricultural use. Money has been appropriated for this program and some landowners have in fact sold their ''agricultural land development rights'' to State S. K owns and operates a small dairy farm in State S located in an area designated by the Legislature as worthy of protection. K desires to preserve his farm for agricultural purposes in perpetuity. Rather than selling the development rights to State S, K grants to a qualified organization an agricultural preservation restriction on his property in the form of a conservation easement. K reserves to himself, his heirs and assigns the right to manage the farm consistent with sound agricultural and management practices. The preservation of K's land is pursuant to a clearly delineated governmental policy of preserving open space available for agricultural use, and will yield a significant public benefit by preserving open space against increasing development pressures.

(g) *Enforceable in perpetuity*—(1) *In general.* In the case of any donation under this section, any interest in the property retained by the donor (and the donor's successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land records of the jurisdiction in which the property is located) that will prevent uses of the retained interest inconsistent with the conservation purposes of the donation. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

(2) *Protection of a conservation purpose in case of donation of property subject to a mortgage.* In the case of conservation contributions made after February 13, 1986, no deducion will be permitted under this section for an interest in property which is subject to a mortgage unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity. For conservation contributions made prior to February 14, 1986, the requirement of section 170(h)(5)(A) is satisfied in the case of mortgaged property (with respect to which the mortgagee has not subordinated its rights) only if the donor can demonstrate that the conservation purpose is protected in perpetuity without subordination of the mortgagee's rights.

(3) *Remote future event.* A deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible. See paragraph (e) of §1.170A–1. For example, a state's statutory requirement that use restrictions must be rerecorded every 30 years to remain enforceable shall not, by itself, render an easement nonperpetual.

(4) *Retention of qualified mineral interest*—(i) *In general.* Except as otherwise provided in paragraph (g)(4)(ii) of this section, the requirements of this section are not met and no deduction shall be allowed in the case of a contribution of any interest when there is a retention by any person of a qualified mineral interest (as defined in paragraph (b)(1)(i) of this section) if at any time there may be extractions or removal of minerals by any surface mining method. Moreover, in the case of a qualified mineral interest gift, the requirement that the conservation purposes be protected in perpetuity is not satisfied if any method of mining that is inconsistent with the particular conservation purposes of a contribution is permitted at any time. See also §1.170A–14(e)(2). However, a deduction under this section will not be denied in the case of certain methods of mining that may have limited, localized impact on the real property but that are not irremediably destructive of significant conservation interests. For example, a deduction will not be denied in a case where production facilities are concealed or compatible with existing topography and landscape and when surface alteration is to be restored to its original state.

(ii) *Exception for qualified conservation contributions after July 1984.* (A) A contribution made after July 18, 1984, of a qualified real property interest described in section 170(h)(2)(A) shall not be disqualified under the first sentence of paragraph (g)(4)(i) of this section if the following requirements are satisfied.

(*1*) The ownership of the surface estate and mineral interest were separated before June 13, 1976, and remain so separated up to and including the time of the contribution.

(*2*) The present owner of the mineral interest is not a person whose relationship to the owner of the surface estate is described at the time of the contribution in section 267(b) or section 707(b), and

(*3*) The probability of extraction or removal of minerals by any surface mining method is so remote as to be negligible.

Whether the probability of extraction or removal of minerals by surface mining is so remote as to be negligible is a question of fact and is to be made on a case by case basis. Relevant factors to be considered in determining if the probability of extraction or removal of minerals by surface mining is so remote as to be negligible include: Geological, geophysical or economic data showing the absence of mineral reserves on the property, or the lack of commercial feasibility at the time of the contribution of surface mining the mineral interest.

(B) If the ownership of the surface estate and mineral interest first became separated after June 12, 1976, no deduction is permitted for a contribution under this section unless surface mining on the property is completely prohibited.

(iii) *Examples.* The provisions of paragraph (g)(4)(i) and (ii) of this section may be illustrated by the following examples:

Example 1. K owns 5,000 acres of bottomland hardwood property along a major watershed system in the southern part of the United States. Agencies within the Department of the Interior have determined that southern bottomland hardwoods are a rapidly diminishing resource and a critical ecosystem in the south because of the intense pressure to cut the trees and convert the land to agricultural use. These agencies have further determined (and have indicated in correspondence with K) that bottomland hardwoods provide a superb habitat for numerous species and play an important role in controlling floods and purifying rivers. K donates to a qualified organization his entire interest in this property other than his interest in the gas and oil deposits that have been identified under K's property. K covenants and can ensure that, although drilling for gas and oil on the property may have some temporary localized impact on the real property, the drilling will not interfere with the overall conservation purpose of the gift, which is to protect the unique bottomland hardwood ecosystem. Accordingly, the donation qualifies for a deduction under this section.

Example 2. Assume the same facts as in *Example (1)*, except that in 1979, K sells the mineral interest to A, an unrelated person, in an arm's-length transaction, subject to a recorded prohibition on the removal of any minerals by any surface mining method and a recorded prohibition against any mining technique that will harm the bottomland hardwood ecosystem. After the sale to A, K donates a qualified real property interest to a qualified organization to protect the bottomland hardwood ecosystem. Since at the time of the transfer, surface mining and any mining technique that will harm the bottomland hardwood ecosystem are completely prohibited, the donation qualifies for a deduction under this section.

(5) *Protection of conservation purpose where taxpayer reserves certain rights*—(i) *Documentation.* In the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. Such documentation may include:

(A) The appropriate survey maps from the United States Geological Survey, showing the property line and other contiguous or nearby protected areas;

(B) A map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads, buildings, fences, or gravel pits), vegetation and identification of flora and fauna (including, for example, rare species locations, animal breeding and roosting areas, and migration routes), land use history (including present uses and recent past disturbances), and distinct natural features (such as large trees and aquatic areas);

(C) An aerial photograph of the property at an appropriate scale taken as close as possible to the date the donation is made; and

(D) On-site photographs taken at appropriate locations on the property. If the terms of the donation contain restrictions with regard to a particular natural resource to be protected, such as water quality or air quality, the condition of the resource at or near the time of the gift must be established. The documentation, including the

maps and photographs, must be accompanied by a statement signed by the donor and a representative of the donee clearly referencing the documentation and in substance saying ''This natural resources inventory is an accurate representation of [the protected property] at the time of the transfer.''.

(ii) *Donee's right to inspection and legal remedies.* In the case of any donation referred to in paragraph (g)(5)(i) of this section, the donor must agree to notify the donee, in writing, before exercising any reserved right, *e.g.* the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the qualified real property interest. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspecting the property to determine if there is compliance with the terms of the donation. Additionally, the terms of the donation must provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings, including but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

(6) *Extinguishment.* (i) In general. If a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.

(ii) *Proceeds.* In case of a donation made after February 13, 1986, for a deduction to be allowed under this section, at the time of the gift the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right, immediately vested in the donee organization, with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift, bears to the value of the property as a whole at that time. See §1.170A–14(h)(3)(iii) relating to the allocation of basis. For purposes of this paragraph (g)(6)(ii), that proportionate value of the donee's property rights shall remain constant. Accordingly, when a change in conditions give rise to the extinguishment of a perpetual conservation restriction under paragraph (g)(6)(i) of this section, the donee organization, on a subsequent sale, exchange, or involuntary conversion of the subject property, must be entitled to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction, unless state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction.

(h) *Valuation*—(1) *Entire interest of donor other than qualified mineral interest.* The value of the contribution under section 170 in the case of a contribution of a taxpayer's entire interest in property other than a qualified mineral interest is the fair market value of the surface rights in the property contributed. The value of the contribution shall be computed without regard to the mineral rights. See paragraph (h)(4), *example (1),* of this section.

(2) *Remainder interest in real property.* In the case of a contribution of any remainder interest in real property, section 170(f)(4) provides that in determining the value of such interest for purposes of section 170, depreciation and depletion of such property shall be taken into account. See §1.170A–12. In the case of the contribution of a remainder interest for conservation purposes, the current fair market value of the property (against which the limitations of §1.170A–12 are applied) must take into account any pre-existing or contemporaneously recorded rights limiting, for conservation purposes, the use to which the subject property may be put.

(3) *Perpetual conservation restriction*—(i) *In general.* The value of the contribution under section 170 in the case of a charitable contribution of a perpetual conservation restriction is the

fair market value of the perpetual conservation restriction at the time of the contribution. See §1.170A–7(c). If there is a substantial record of sales of easements comparable to the donated easement (such as purchases pursuant to a governmental program), the fair market value of the donated easement is based on the sales prices of such comparable easements. If no substantial record of market-place sales is available to use as a meaningful or valid comparison, as a general rule (but not necessarily in all cases) the fair market value of a perpetual conservation restriction is equal to the difference between the fair market value of the property it encumbers before the granting of the restriction and the fair market value of the encumbered property after the granting of the restriction. The amount of the deduction in the case of a charitable contribution of a perpetual conservation restriction covering a portion of the contiguous property owned by a donor and the donor's family (as defined in section 267(c)(4)) is the difference between the fair market value of the entire contiguous parcel of property before and after the granting of the restriction. If the granting of a perpetual conservation restriction after January 14, 1986, has the effect of increasing the value of any other property owned by the donor or a related person, the amount of the deduction for the conservation contribution shall be reduced by the amount of the increase in the value of the other property, whether or not such property is contiguous. If, as a result of the donation of a perpetual conservation restriction, the donor or a related person 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 or a related person 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 or reasonably expected to be received by the donor or the related person. For purposes of this paragraph (h)(3)((i), related person shall have the same meaning as in either section 267(b) or section 707(b). (See *Example (10)* of paragraph (h)(4) of this section.)

(ii) *Fair market value of property before and after restriction.* If before and after valuation is used, the fair market value of the property before contribution of the conservation restriction must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use. Further, there may be instances where the grant of a conservation restriction may have no material effect on the value of the property or may in fact serve to enhance, rather than reduce, the value of property. In such instances no deduction would be allowable. In the case of a conservation restriction that allows for any development, however limited, on the property to be protected, the fair maket value of the property after contribution of the restriction must take into account the effect of the development. In the case of a conservation easement such as an easement on a certified historic structure, the fair market value of the property after contribution of the restriction must take into account the amount of access permitted by the terms of the easement. Additionally, if before and after valuation is used, an appraisal of the property after contribution of the restriction must take into account the effect of restrictions that will result in a reduction of the potential fair market value represented by highest and best use but will, nevertheless, permit uses of the property that will increase its fair market value above that represented by the property's current use. The value of a perpetual conservation restriction shall not be reduced by reason of the existence of restrictions on transfer designed solely to ensure that the conservation restriction will be

dedicated to conservation purposes. See §1.170A–14 (c)(3).

(iii) *Allocation of basis.* In the case of the donation of a qualified real property interest for conservation purposes, the basis of the property retained by the donor must be adjusted by the elimination of that part of the total basis of the property that is properly allocable to the qualified real property interest granted. The amount of the basis that is allocable to the qualified real property interest shall bear the same ratio to the total basis of the property as the fair market value of the qualified real property interest bears to the fair market value of the property before the granting of the qualified real property interest. When a taxpayer donates to a qualifying conservation organization an easement on a structure with respect to which deductions are taken for depreciation, the reduction required by this paragraph (h)(3)(ii) in the basis of the property retained by the taxpayer must be allocated between the structure and the underlying land.

(4) *Examples.* The provisions of this section may be illustrated by the following examples. In examples illustrating the value or deductibility of donations, the applicable restrictions and limitations of §1.170A–4, with respect to reduction in amount of charitable contributions of certain appreciated property, and §1.170A–8, with respect to limitations on charitable deductions by individuals. must also be taken into account.

Example 1. A owns Goldacre, a property adjacent to a state park. A wants to donate Goldacre to the state to be used as part of the park, but A wants to reserve a qualified mineral interest in the property, to exploit currently and to devise at death. The fair market value of the surface rights in Goldacre is $200,000 and the fair market value of the mineral rights in $100.000. In order to ensure that the quality of the park will not be degraded, restrictions must be imposed on the right to extract the minerals that reduce the fair market value of the mineral rights to $80,000. Under this section, the value of the contribution is $200,000 (the value of the surface rights).

Example 2. In 1984 B, who is 62, donates a remainder interest in Greenacre to a qualifying organization for conservation purposes. Greenacre is a tract of 200 acres of undeveloped woodland that is valued at $200,000 at its highest and best use. Under §1.170A–12(b), the value of a remainder interest in real property following one life is determined under §25.2512–5 of this chapter (Gift Tax Regulations). (See §25.2512–5A of this chapter with respect to the valuation of annuities, interests for life or term of years, and remainder or reversionary interests transferred before May 1, 1999.) Accordingly, the value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is $55,996 ($200,000×.27998).

Example 3. Assume the same facts as in *Example (2)*, except that Greenacre is B's 200-acre estate with a home built during the colonial period. Some of the acreage around the home is cleared; the balance of Greenacre, except for access roads, is wooded and undeveloped. See section 170(f)(3)(B)(i). However, B would like Greenacre to be maintained in its current state after his death, so he donates a remainder interest in Greenacre to a qualifying organization for conservation purposes pursunt to section 170 (f)(3)(B)(iii) and (h)(2)(B). At the time of the gift the land has a value of $200,000 and the house has a value of $100,000. The value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is computed pursuant to §1.170A–12. See §1.170A–12(b)(3).

Example 4. Assume the same facts as in *Example (2)*, except that at age 62 instead of donating a remainder interest B donates an easement in Greenacre to a qualifying organization for conservation purposes. The fair market value of Greenacre after the donation is reduced to $110,000. Accordingly, the value of the easement, and thus the amount eligible for a deduction under section 170(f), is $90,000 ($200,000 less $110,000).

Example 5. Assume the same facts as in *Example (4)*, and assume that three years later, at age 65, B decides to donate a remainder interest in Greenacre to a qualifying organization for conservation purposes. Increasing real estate values in the area have raised the fair market value of Greenacre (subject to the easement) to $130,000. Accordingly, the value of the remainder interest, and thus the amount eligible for a deduction under section 170(f), is $41,639 ($130,000×.32030).

Example 6. Assume the same facts as in *Example (2)*, except that at the time of the donation of a remainder interest in Greenacre, B also donates an easement to a different qualifying organization for conservation purposes. Based on all the facts and circumstances, the value of the easement is determined to be $100,000. Therefore, the value of the property after the easement is $100,000 and the value of the remainder interest, and thus the amount eligible for deduction under section 170(f), is $27,998 ($100,000×.27998).

Example 7. C owns Greenacre, a 200-acre estate containing a house built during the colonial period. At its highest and best use, for home development, the fair market value of Greenacre is $300,000. C donates an easement (to maintain the house and Green acre in their current state) to a qualifying organization for conservation purposes. The fair market value of Greenacre after the donation is reduced to $125,000. Accordingly, the value of the easement and the amount eligible for a deduction under section 170(f) is $175.000 ($300,000 less $125,000).

Example 8. Assume the same facts as in *Example (7)* and assume that three years later, C decides to donate a remainder interest in Greenacre to a qualifying organization for conservation purposes. Increasing real estate values in the area have raised the fair market value of Greenacre to $180.000. Assume that because of the perpetual easement prohibiting any development of the land, the value of the house is $120,000 and the value of the land is $60,000. The value of the remainder interest, and thus the amount eligible for an income tax deduction under section 170(f), is computed pursuant to §1.170A–12. See §1.170A–12(b)(3).

Example 9. D owns property with a basis of $20,000 and a fair market value of $80,000. D donates to a qualifying organization an easement for conservation purposes that is determined under this section to have a fair market value of $60,000. The amount of basis allocable to the easement is $15,000 ($60,000/$80,000=$15,000/$20,000). Accordingly, the basis of the property is reduced to $5,000 ($20,000 minus $15,000).

Example 10. E owns 10 one-acre lots that are currently woods and parkland. The fair market value of each of E's lots is $15,000 and the basis of each lot is $3,000. E grants to the county a perpetual easement for conservation purposes to use and maintain eight of the acres as a public park and to restrict any future development on those eight acres. As a result of the restrictions, the value of the eight acres is reduced to $1,000 an acre. However, by perpetually restricting development on this portion of the land, E has ensured that the two remaining acres will always be bordered by parkland, thus increasing their fair market value to $22,500 each. If the eight acres represented all of E's land, the fair market value of the easement would be $112,000, an amount equal to the fair market value of the land before the granting of the easement (8×$15,000=$120,000) minus the fair market value of the encumbered land after the granting of the easement (8×$1,000=$8,000). However, because the easement only covered a portion of the taxpayer's contiguous land, the amount of the deduction under section 170 is reduced to $97,000 ($150,000–$53,000), that is, the difference between the fair market value of the entire tract of land before ($150,000) and after ((8×$1,000)+(2× $22,500)) the granting of the easement.

Example 11. Assume the same facts as in *example (10).* Since the easement covers a portion of E's land, only the basis of that portion is adjusted. Therefore, the amount of basis allocable to the easement is $22,400 ((8×$3,000)×($112,000/$120,000)). Accordingly, the basis of the eight acres encumbered by the easement is reduced to $1,600 ($24,000–$22,400), or $200 for each acre. The basis of the two remaining acres is not affected by the donation.

Example 12. F owns and uses as professional offices a two-story building that lies within a registered historic district. F's building is an outstanding example of period architecture with a fair market value of $125,000. Restricted to its current use, which is the highest and best use of the property without making changes to the facade, the building and lot would have a fair market value of $100,000, of which $80,000 would be allocable to the building and $20,000 woud be allocable to the lot. F's basis in the property is $50,000, of which $40,000 is allocable to the building and $10,000 is allocable to the lot. F's neighborhood is a mix of residential and commercial uses, and it is possible that F (or another owner) could enlarge the building for more extensive commercial use, which is its highest and best use. However, this would require changes to the facade. F would like to donate to a qualifying preservation organization an easement restricting any changes to the facade and promising to maintain the facade in perpetuity. The donation would qualify for a deduction under this section. The fair market value of the easement is $25,000 (the fair market value of the property before the easement, $125,000, minus the fair market value of the property after the easement, $100,000). Pursuant to §1.170A–14(h)(3)(iii), the basis allocable to the easement is $10,000 and the basis of the underlying property (building and lot) is reduced to $40,000.

(i) *Substantiation requirement.* If a taxpayer makes a qualified conservation contribution and claims a deduction, the taxpayer must maintain written records of the fair market value of the underlying property before and after the donation and the conservation purpose furthered by the donation and such information shall be stated in the taxpayer's income tax return if required by the return or its instructions. See also §1.170A–13(c) (relating to substantiation requirements for deductions in excess of $5,000 for charitable contributions made after 1984), and section 6659 (relating to additions to tax in the case of valuation overstatements).

(j) *Effective date*. Except as otherwise provided in §1.170A–14(g)(4)(ii), this section applies only to contributions made on or after December 18, 1980.

[T.D. 8069, 51 FR 1499, Jan. 14, 1986; 51 FR 5322, Feb. 13, 1986; 51 FR 6219, Feb. 21, 1986, as amended by T.D. 8199, 53 FR 16085, May 5, 1988; T.D. 8540, 59 FR 30105, June 10, 1994; T.D. 8819, 64 FR 23228, Apr. 30, 1999]

§1.171–1 Bond premium.

(a) *Overview*—(1) *In general*. This section and §§1.171–2 through 1.171–5 provide rules for the determination and amortization of bond premium by a holder. In general, a holder amortizes bond premium by offsetting the interest allocable to an accrual period with the premium allocable to that period. Bond premium is allocable to an accrual period based on a constant yield. The use of a constant yield to amortize bond premium is intended to generally conform the treatment of bond premium to the treatment of original issue discount under sections 1271 through 1275. Unless otherwise provided, the terms used in this section and §§1.171–2 through 1.171–5 have the same meaning as those terms in sections 1271 through 1275 and the corresponding regulations. Moreover, unless otherwise provided, the provisions of this section and §§1.171–2 through 1.171–5 apply in a manner consistent with those of sections 1271 through 1275 and the corresponding regulations. In addition, the anti-abuse rule in §1.1275–2(g) applies for purposes of this section and §§1.171–2 through 1.171–5.

(2) *Cross-references*. For rules dealing with the adjustments to a holder's basis to reflect the amortization of bond premium, see §1.1016–5(b). For rules dealing with the treatment of bond issuance premium by an issuer, see §1.163–13.

(b) *Scope*—(1) *In general*. Except as provided in paragraph (b)(2) of this section and §1.171–5, this section and §§1.171–2 through 1.171–4 apply to any bond that, upon its acquisition by the holder, is held with bond premium. For purposes of this section and §§1.171–2 through 1.171–5, the term *bond* has the same meaning as the term *debt instrument* in §1.1275–1(d).

(2) *Exceptions*. This section and §§1.171–2 through 1.171–5 do not apply to—

(i) A bond described in section 1272(a)(6)(C) (regular interests in a REMIC, qualified mortgages held by a REMIC, and certain other debt instruments, or pools of debt instruments, with payments subject to acceleration);

(ii) A bond to which §1.1275–4 applies (relating to certain debt instruments that provide for contingent payments);

(iii) A bond held by a holder that has made a §1.1272–3 election with respect to the bond;

(iv) A bond that is stock in trade of the holder, a bond of a kind that would properly be included in the inventory of the holder if on hand at the close of the taxable year, or a bond held primarily for sale to customers in the ordinary course of the holder's trade or business; or

(v) A bond issued before September 28, 1985, unless the bond bears interest and was issued by a corporation or by a government or political subdivision thereof.

(c) *General rule*—(1) *Tax-exempt obligations*. A holder must amortize bond premium on a bond that is a tax-exempt obligation. See §1.171–2(c) *Example 4*.

(2) *Taxable bonds*. A holder may elect to amortize bond premium on a taxable bond. Except as provided in paragraph (c)(3) of this section, a taxable bond is any bond other than a tax-exempt obligation. See §1.171–4 for rules relating to the election to amortize bond premium on a taxable bond.

(3) *Bonds the interest on which is partially excludable*. For purposes of this section and §§1.171–2 through 1.171–5, a bond the interest on which is partially excludable from gross income is treated as two instruments, a tax-exempt obligation and a taxable bond. The holder's basis in the bond and each payment on the bond are allocated between the two instruments based on a reasonable method.

(d) *Determination of bond premium*—(1) *In general*. A holder acquires a bond at a premium if the holder's basis in the bond immediately after its acquisition by the holder exceeds the sum of all amounts payable on the bond after the acquisition date (other than payments

Calendar No. 1135

96TH CONGRESS
2d Session

SENATE

REPORT
No. 96-1007

TAX TREATMENT EXTENSION ACT OF 1980

REPORT

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

ON

H.R. 6975

SEPTEMBER 30 (legislative day, JUNE 12), 1980.—Ordered to be printed

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96TH CONGRESS 2d Session } SENATE { REPORT No. 96-1007

TAX TREATMENT EXTENSION ACT OF 1980

SEPTEMBER 30 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. LONG, from the Committee on Finance, submitted the following

REPORT

[To accompany H.R. 6975]

The Committee on Finance, to which was referred the bill (H.R. 6975) for the elimination of duties on wood veneers, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is shown in the text of the bill in italic.

House bill.—H.R. 6975, as it passed the House, would eliminate the duties on wood veneers.

Committee bill.—The committee amendment deletes the provision relating to the elimination of duties on wood veneers, and adds provisions extending the expiration dates of certain tax provisions, dealing with the tax treatment of certain Federal scholarship grants, and revising the rules allowing deductions for contributions made for conservation purposes.

I. SUMMARY

As passed by the House, this bill would eliminate the duties on wood veneers. In lieu of this provision (the substance of which was added by the committee to H.R. 5047), the committee added as an amendment in the nature of a substitute the following tax provisions.

Sec. 1. Employment Tax Status of Independent Contractors

In general, under present law, taxpayers who had a reasonable basis for not treating workers as employees in prior years may continue to do so for periods ending before January 1, 1981, without incurring employment tax liabilities. The bill would extend present law through June 30, 1982.

Sec. 2. Extension of Provisions Relating to Historic Preservation

Under present law, taxpayers may amortize over a 60-month period the capital expenditures incurred in a certified rehabilitation of a certified historic structure. Alternatively, taxpayers may use accelerated depreciation methods to depreciate substantially rehabilitated historic structures. In general, taxpayers may not deduct the costs of or any loss sustained in the demolition of a certified historic structure or a structure located in a registered historic district. Present law also provides that accelerated depreciation methods may not be used with respect to real property constructed on a site that has been occupied by a certified historic structure (or by any structure in a registered historic district, except in limited circumstances) that has been demolished or substantially altered (other than by virtue of a certified rehabilitation). The bill would extend these provisions through December 31, 1983.

Sec. 3. 60-Month Amortization for Expenditures to Rehabilitate Low-Income Rental Housing

Under present law, certain expenditures made to rehabilitate low-income rental housing may, at the election of the taxpayer, be depreciated over a 60-month period. Rehabilitation expenditures made pursuant to a binding contract entered into before January 1, 1982 qualify for this special treatment. The bill would extend this provision to any qualifying rehabilitation expenditures made through December 31, 1983 (including rehabilitations which had begun before that date and are still in process after that date).

Sec. 4. Extension of Credit or Refund of Tax on Fuels Used in Certain Taxicabs

Under present law, certain taxicab use of motor fuels is exempt (through refund or credit) from the 4-cents per gallon excise taxes on gasoline and other motor fuels. This exemption currently applies for calendar years 1979 and 1980. The bill would extend the present fuels tax exemption for qualified taxicab services through December 31, 1982.

Sec. 5. Certain Federal Scholarship Grants and National Research Service Awards

Present law generally excludes from gross income amounts received as scholarship or fellowship grants unless, as a condition to receiving such amounts, the recipient must agree to perform services for the grantor. In addition, temporary legislation provides tax-exempt treatment as scholarships or fellowships for National Research Service Awards made through 1980.

The bill, in general, would exclude from gross income scholarships received under Federal programs which require future Federal service by the recipients. In addition, the bill would extend the tax-exempt treatment of National Research Service Awards as scholarships or fellowships through 1981.

Sec. 6. Deductions for Contributions for Conservation Purposes

This provision revises the provisions of current law allowing deductions for charitable contributions of easements and other partial interests in real estate contributed for conservation purposes. The provision would expand the types of partial interests which qualify to

include the entire interest of the donor in real property other than the rights to subsurface minerals. It also would limit contributions eligible for the deduction to those contributed to a governmental unit, publicly supported charitable organization, or an entity controlled by one of these two kinds of organizations. Conservation purposes, as amended by this provision, would be defined as: (1) the preservation of land areas for outdoor recreation by, or the education of, the general public; (2) the protection of a relatively natural habitat of fish, wildlife, or plants, or of a similar ecosystem; (3) the preservation of open space (including farmland and forest land) where such preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, State or local governmental policy and will yield a significant public benefit; or (4) the preservation of a historically important land area or a certified historic structure. Finally, the bill would make these provisions permanent.

II. EXPLANATION OF THE BILL

A. 18-Month Extension of Provisions Relating to Employment Status for Employment Taxes: Independent Contractor Interim Relief (Sec. 1 of the bill)

Present law

The Revenue Act of 1978 provided interim relief for certain taxpayers involved in controversies with the IRS concerning the proper classification of workers for employment tax purposes. In general, the Act terminated taxpayers' potential liabilities for Federal income tax withholding, social security and FUTA taxes in cases where taxpayers have a reasonable basis for treating workers other than as employees. In addition, the Act prohibited the issuance of Treasury regulations and revenue rulings on common law employment status before 1980.

The temporary prohibition on reclassifications and the issuance of new rulings or regulations by the Internal Revenue Service was extended through December 31, 1980, by Public Law 96–167.

Reasons for change

Because of the complexity of developing a permanent, substantive solution to the controversy about employment tax status rules, the committee believes the temporary, interim relief legislation should be extended to protect taxpayers until the Congress adopts new classification rules.

Explanation of provision

The bill extends the temporary interim relief legislation and the prohibition on the issuance of new rulings or regulations by the Internal Revenue Service for 18 months, through June 30, 1982.

Effective date

The bill will be effective upon enactment and will extend the present law relief provisions through June 30, 1982.

Revenue effect

The revenue effect of this provision cannot be estimated because the provisions affect IRS asserted employment tax liabilities which were

contested by taxpayers in both administrative and judicial proceedings.

B. Extension of Historic Structures Provisions (sec. 2 of the bill and secs. 167(n), 167(o), 191 and 280B of the Code)

Present law

In 1976, rules were enacted to create tax incentives for the preservation of historic structures and reduce the tax advantages of the demolition of historic structures and construction of replacement structures. These provisions expire in 1981.

Under one of the provisions, taxpayers may amortize over a 60-month period the capital expenditures incurred in a certified rehabilitation of a certified historic structure (Code sec. 191). This provision applies with respect to additions to capital account made after June 14, 1976, and before June 15, 1981. Alternatively, taxpayers may use accelerated depreciation methods to depreciate substantially rehabilitated historic structures (Code sec. 167(o)). This provision applies with respect to additions to capital account occurring after June 30, 1976, and before July 1, 1981.

In addition, taxpayers may not deduct (except under limited circumstances) the costs of or any loss sustained in the demolition of a certified historic structure or, except in limited circumstances, a structure located in a registered historic district (Code sec. 280B). This provision applies to demolitions commencing after June 30, 1976, and before January 1, 1981. Present law also provides that accelerated depreciation methods may not be used with respect to real property constructed on a site that has been occupied by a certified historic structure (or by any structure in a registered historic district, except in limited circumstances) that has been demolished or substantially altered (other than by virtue of a certified rehabilitation) (Code sec. 167(n)). This provision applies to that portion of the basis attributable to construction, reconstruction, or erection after December 31, 1975, and before January 1, 1981.

Reasons for change

The committee believes the preservation of historic structures is important, and preliminary data indicates that these provisions have encouraged the preservation of historic structures throughout the country. Therefore, the committee agreed to extend the provisions for three years, which will allow the Departments of Interior and Treasury to complete a study of the provisions currently in progress.

Explanation of bill

The bill extends through December 31, 1983, the sunset dates for provisions enacted in 1976 that encourage the preservation of historic structures (Code secs. 167(n), 167(o), 191, and 280B).

Effective date

The provisions in the bill will be effective upon enactment.

Revenue estimate

This provision is expected to reduce fiscal year budget receipts by $2 million in 1981, $21 million in 1982, $66 million in 1983, $111 million in 1984, and $131 million in 1985.

C. Five-Year Amortization for Low-Income Rental Housing (sec. 3 of the bill and sec. 167(k) of the Code)

Present law

Under the Code, special depreciation rules are provided for expenditures to rehabilitate low-income rental housing (sec. 167(k)). Low-income rental housing includes buildings or other structures that are used to provide living accommodations for families and individuals of low or moderate income. Occupants of a dwelling unit are considered families and individuals of low or moderate income only if their income does not exceed certain limits, as determined by the Secretary of Treasury in a manner consistent with the limits established for the Leased Housing Program under section 8 of the United States Housing Act of 1937, as amended.

Under the special depreciation rules for low-income rental property, taxpayers can elect to compute depreciation on certain rehabilitation expenditures under a straight-line method over a period of 60 months if the additions or improvements have a useful life of 5 years or more. Under present law, only the aggregate rehabilitation expenditures for any housing which do not exceed $20,000 per dwelling unit qualify for the 60-month depreciation. In addition, for the 60-month depreciation to be available, the sum of the rehabilitation expenditures for 2 consecutive taxable years—including the taxable year—must exceed $3,000 per dwelling unit.

Reasons for change

The special tax incentive for rehabilitation expenditures for low- and moderate-income rental housing under present law expires on December 31, 1981. In order to avoid discouraging this rehabilitation, the committee believes that the special depreciation provision for low-income rental housing should be extended for an additional two years.

Explanation of provision

The bill provides a two-year extension of the special 5-year depreciation rule for expenditures to rehabilitate low-income rental housing. Under the bill, rehabilitation expenditures that are made pursuant to a binding contract entered into before January 1, 1984, will qualify for the 5-year depreciation rule even though the expenditures actually are made after December 31, 1983.

Effective date

The two-year extension applies to expenditures paid or incurred with respect to low- and moderate-income rental housing after December 31, 1981, and before January 1, 1984 (including expenditures made pursuant to a binding contract entered into before January 1, 1984).

Revenue effect

This provision will have no effect on budget receipts in fiscal year 1981 but will reduce them by $1 million in fiscal year 1982, $8 million in 1983, $18 million in 1984, and $26 million in 1985.

D. Two-Year Extension of Fuels Tax Exemption for Certain Taxicabs (sec. 4 of the bill and sec. 6427(e) of the Code)

Present law

Under present law (enacted in the Highway Revenue Act of 1978), certain taxicab use of motor fuels is exempt (through refund or credit) from the 4 cents a gallon excise tax on gasoline and other motor fuels. The fuel is exempt if (1) taxicabs are not prohibited from ride sharing (under company policy or the rules of a Federal, State or local authority having jurisdiction over a substantial portion of the transportation) and (2) for 1978 and later model taxicabs acquired after 1978, the fuel economy of the model type of vehicle must exceed the fleet average fuel economy standard applicable under the Motor Vehicle Information and Cost Savings Act, as amended. However, the latter requirement does not apply to vehicles manufactured by certain small manufacturers (that is, those that produce less than 10,000 vehicles per year and which have been granted an exemption under section 502(c) of that Act).

A purchaser who uses the fuel for qualified taxicab services may file for a refund for the first three quarters of his taxable year if the refund of tax due is $50 or more as of the end of a quarter. Any amounts not otherwise refunded may be claimed as a credit on the purchaser's tax return.

The exemption applies for calendar years 1979 and 1980. Under the conference report for the Highway Revenue Act of 1978, a Treasury report is to be submitted concerning the effectiveness of the exemption in encouraging more energy-efficient taxicabs and in removing barriers to ride sharing.

Reasons for change

Due to time lags necessary to collect and evaluate data, the Treasury Department has not yet submitted its report on the effectiveness of this provision. Accordingly, the committee decided to extend this exemption for two years so that ample time would be available for the Treasury Department to collect data and for the Congress to evaluate thoroughly the effectiveness of this exemption.

Explanation of provision

The bill will extend the present fuels tax exemption for qualified taxicab services for two years, or through December 31, 1982.

Effective date

The bill applies to fuels used after December 31, 1980, and before January 1, 1983.

Revenue Effect

It is estimated that this bill will reduce budget receipts by $10 million in fiscal year 1981, $30 million in fiscal year 1982, $20 million in fiscal year 1983, and a negligible amount thereafter. These receipts otherwise would remain in the Highway Trust Fund.

E. Extension of Certain Provisions Relating to Exclusion of Scholarship Income (sec. 5 of the bill and sec. 117 of the Code)

Present law

Section 117 provides that amounts received as scholarships at educational institutions and up to $300 per month for 36 months of any amounts received as fellowship grants generally are excluded from gross income. This exclusion also applies to incidental amounts received to cover expenses for travel, research, clerical help, and equipment. However, the exclusion for scholarships and fellowship grants is restricted to educational grants by relatively disinterested grantors who do not require any significant consideration from the recipient. Educational grants are not excludable from gross income if they represent compensation for past, present, or future services, or if the studies or research are primarily for the benefit of the grantor or are under the supervision of the grantor (Treas. Reg. § 1.117–4(c)).

Special legislation provides that members of a uniformed service participating in the Armed Forces Health Professions Scholarship Program, the Public Health Services Program, and similar programs may exclude from gross income amounts received as scholarships under these programs. Participants in these programs must agree to work for their funding service after completion of their studies. This temporary exclusion will not apply to scholarships awarded students entering these programs after December 31, 1980.

Under a separate provision applicable to National Research Service Awards made through 1980, the recipients of such awards may treat them as excludible scholarships or fellowships.

Reasons for change

The committee believes that Federal awards granted in return for future services generally should be excludable to the extent they are used for direct educational expenses. The committee believes that the temporary special tax rules governing National Research Service awards should be extended for another year so that appropriate permanent rules for their treatment can be developed.

Explanation of the bill

General rule.—The bill provides that an amount which is received by an indivdual as a grant under a Federal program and which would be excludable from gross income as a scholarship or fellowship grant, but for the fact that the recipient must perform future service as a Federal employee, is not includable in gross income if the individual establishes that the amount was used for qualified tuition and related expenses.

The excludable qualified tuition and related expenses are the amount used for tuition and fees required for the enrollment or attendance of the student at an institution of higher education and for fees, books, supplies, and equipment required for courses of instruction at that institution.

The bill defines an "institution of higher education" as a public or other nonprofit educational institution in any State which: (1) admits as regular students only individuals who have a certificate of graduation from a high school (or the recognized equivalent of such a certificate); (2) is legally authorized within the State to provide a program of education beyond high school; and (3) provides an educational program for which it awards a bachelor's or higher degree, provides a program which is acceptable for full credit toward such a degree, or offers a program of training to prepare students for gainful employment in a recognized health profession.

National Research Service Awards.—The bill extends for one year the temporary treatment of National Research Service Awards as excludable scholarships or fellowships.

Effective date

The exclusion provided for Federal grants requiring future services applies to taxable years beginning after December 31, 1980.

The extension of the special provision for National Research Service Awards applies to awards made during calendar year 1981.

Revenue effect

The exclusion from gross income for amounts received as scholarships under the Armed Forces Health Professions Scholarship Program, the Public Health Services Program and similar programs will reduce budget receipts by $3 million in fiscal year 1981, $8 million in fiscal year 1982, $14 million in fiscal year 1983, $20 million in fiscal year 1984, and $24 million in fiscal year 1985.

It is estimated that the one-year extension for National Research Service Awards will reduce budget receipts by less than $1 million in fiscal year 1981, $8 million in fiscal year 1982, $8 million in fiscal year 1983, and less than $5 million in fiscal year 1984.

F. Charitable Deduction for Certain Contributions of Real Property for Conservation Purposes (sec. 6 of the bill and sec. 170 of the Code)

Present law

As a general rule, a deduction is not allowed for income, estate, or gift tax purposes for contributions to charity of less than the taxpayer's entire interest in the contributed property. This restriction was enacted by Congress in the Tax Reform Act of 1969 to prevent certain tax-avoidance transactions in which the taxpayer could obtain a deduction for a gift to a charity of the use of part of his property. Exceptions allowing deductions for charitable contributions of partial interests in property were provided in the 1969 Act for the contribution of (1) a remainder interest in a personal residence or farm; (2) an undivided portion of the taxpayer's entire interest in the property; (3) certain interests in trust; and (4) interests not transferred in trust that would be deductible if made in trust (Code secs. 170(f), 2055(e)(2), and 2522(c)(2)).

The Conference Report on the Tax Reform Act of 1969 states that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property if the easement is in perpetuity. On the basis of that Conference Report language, the Internal Revenue Service issued Regulations providing that a deduction would be al-

lowed for the value of a restrictive easement gratuitously conveyed to a charitable organization in perpetuity whereby the donor agrees to restrictions on the use of his property, such as restrictions on the type and height of buildings that may be erected, the removal of trees, the erection of utility lines, the dumping of trash, and the use of signs (Treas. Reg. § 1.170A–7(b)(1)(ii)). In addition, the IRS has issued public rulings allowing deductions, under the undivided interest exception, for contributions of certain kinds of perpetual easements, including open space, historical, and recreational easements.[1] The undivided interest exception did not, however, extend to situations where taxpayers transferred their fee interest in property to a charitable organization while retaining valuable mineral rights.[2]

Explicit statutory exceptions for charitable contributions made "exclusively for conservation purposes" were provided in the Tax Reform Act of 1976 (and modified by the Tax Reduction and Simplification Act of 1977). Under these exceptions, a deduction is permitted for the contribution to a charitable organization, exclusively for conservation purposes, of (a) lease on, option to purchase, or easement with respect to real property granted in perpetuity or (b) a remainder interest in real property.[3] (Code secs. 170(f)(3)(B)(iii) and (iv).) The exceptions for these partial interests contributed for conservation purposes only apply to contributions made before June 14, 1981.

Regulations have not yet been promulgated under the explicit deductions for conservation easements added to the Code by the 1976 and 1977 Acts, and the Regulations promulgated under the Tax Reform Act of 1969 and in accordance with the Conference Report language are still outstanding (Treas. Reg. § 1.170A–7(b)(1)(ii)). It is unclear whether Congress intended the statutory provisions enacted in 1976 and modified in 1977 to supersede the statements made in the 1969 Conference Report.

Reasons for change

The committee believes that the preservation of our country's natural resources and cultural heritage is important, and the committee recognizes that conservation easements now play an important role in preservation efforts. The committee also recognizes that it is not in the country's best interest to restrict or prohibit the development of all land areas and existing structures. Therefore, the committee believes that provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures. Accordingly, the committee has agreed to extend the expiring provisions of present law on a permanent basis and modify those provisions in several respects.

In particular, the committee found it appropriate to expand the types of transfers which will qualify as deductible contributions in certain cases where the contributions are likely to further significant conservation goals without presenting significant potential for abuse. In

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[1] Rev. Rul. 74–583, 1974–2 C.B. 80; Rev. Rul. 75–358, 1975–2 C.B. 76; Rev. Rul. 75–373, 1975–2 C.B. 77.

[2] Compare Rev. Rul. 76–331, 1976–2 C.B. 52 with Rev. Rul. 77–148, 1977–1 C.B. 63 and Rev. Rul. 75–373, 1975–2 C.B. 77.

[3] Prior to their modification by the 1977 Act, the provisions added by the 1976 Act also allowed deductions for term easements having a duration of at least 30 years.

addition, the committee bill would restrict the qualifying contributions where there is no assurance that the public benefit, if any, furthered by the contribution would be substantial enough to justify the allowance of a deduction. In addition, the committee decided that the treatment of open space easements should be clarified.

Explanation of provision

Qualified real property interests

Under the bill, the types of partial interests which may qualify as a deductible conservation contribution are expanded to include the contribution of a taxpayer's entire interest in real property other than his interest in subsurface oil, gas, or other minerals and the right of access to such minerals. The committee intends that a contribution will not qualify under this new provision if the donor has reduced his "entire interest in real property" before the contribution is made by, for example, transferring part of his interest in the real property to a related person in order to retain control of more than a qualified mineral interest in the real property or reduce the real property interest donated.[4]

The types of partial interests which may qualify for a charitable deduction are also modified by replacing the present category covering a lease on option to purchase, or easement on real property granted in perpetuity with a general category covering "a restriction (granted in perpetuity) on the use which may be made of the real property." This new language would cover easements and other interests in real property that under State property laws have similar attributes (e.g., a restrictive covenant). The bill does not modify the other category of partial interests, remainder interests in real property, which may qualify for a deductible conservation contribution.

Conservation purpose

The bill revises in several respects the present definition of conservation purposes. The bill defines the term "conservation purpose" to include four objectives. Although many contributions may satisfy more than one of these objectives (it is possible, for example, that the protection of a wild and scenic river could further more than one of the objectives), it is only necessary for a contribution to further one of the four.

First, conservation purpose includes the preservation of land areas for outdoor recreation by the general public or for the education of the general public. Thus, conservation purposes would include, for example, the preservation of a water area for the use of the public for boating or fishing, or a nature or hiking trail for the use of the public.

Second, conservation purpose includes the protection of a relatively natural fish, wildlife or plant habitat, or similar ecosystem. Under this provision, a contribution would be considered to be made for conservation purposes if it will operate to protect or enhance the viability of an area or environment in which a fish, wildlife, or plant community normally lives or occurs. It would include the preservation of a habitat or environment which to some extent had been altered by human activity if the fish, wildlife, or plants exist there in a relatively natural state; for example, the preservation of a lake formed by a man-made

[4] See e.g., Treas. Reg. § 1.170A–7(a)(2)(i).

dam or a salt pond formed by a man-made dike if the lake or pond is a natural feeding area for a wildlife community that includes rare, endangered or threatened native species. The committee intends that contributions for this purpose will protect and preserve significant natural habitats and ecosystems, in the United States. Examples include habitats for rare, endangered, or threatened native species of animals, fish or plants; natural areas that represent high quality examples of a native ecosystem terrestrial community, or aquatic community; and natural areas which are included in, or which contribute to the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area or other similar conservation area. These natural habitats and ecosystems might be protected by easements or other restrictions regarding, for example, the development or use of property that would affect the habitat or ecosystem to be protected.

Third, conservation purposes would include the preservation of open space (including farmland and forest land) where such preservation (1) is for the scenic enjoyment of the general public and will yield a significant public benefit or (2) is pursuant to a clearly delineated Federal, State, or local governmental conservation policy and will yield a significant public benefit. The requirements of this conservation purpose are intended to insure that deductions are permitted only for open space easements that provide significant benefits to the public. The bill permits a deduction for an open space easement only if it meets the requirements imposed by this provision. Thus, a deduction for an open space easement in gross is not allowable under the undivided portion exception in Code section 170(f)(3)(B)(ii).

To satisfy the requirement of scenic enjoyment by the general public, visual, not physical, access by the general public to the property is sufficient. Thus, preservation of land may be for the scenic enjoyment of the general public if development of the property would interfere with a scenic panorama that can be enjoyed from a park, nature preserve, road, waterbody, trail, historic structure or land area, and such area or transportation way is open to, or utilized by, the public.

Open space easements also may qualify even if the property has no significant scenic value as long as the preservation or conservation of the property is pursuant to a clearly delineated Federal, State, or local governmental preservation or conservation policy. This provision is intended to protect the types of property identified by representatives of the general public as worthy of preservation or conservation. For example, this requirement would be satisfied by a Federal executive order pursuant to a Federal statute establishing a conservation program or a state statute or local ordinance establishing a funded conservation program for a scenic river or other identified conservation project. A program need not be funded to satisfy this requirement, but the program must involve a significant commitment by the government with respect to the conservation project. A broad declaration by a single official, (for example, a county executive) or a legislative body, for example (a state legislature), that land should be conserved is not sufficient, but the governmental conservation policy need not be a certification program that identifies particular lots or small parcels of individually owned property.

All contributions made for the preservation of open space must yield a significant public benefit. Public benefit will be evaluated by considering all information germane to the contribution; factors germane to the evaluation of public benefit from one contribution may be irrelevant in determining public benefit from another contribution. Factors that may be considered include (but are not limited to) the following:

(1) the uniqueness of the property;

(2) the intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);

(3) the consistency of the proposed open space use with public programs (whether Federal, State, or local) for conservation in the region, including programs for water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area; and

(4) the opportunity for the general public to enjoy the use of the property or to appreciate its scenic values.

The preservation of an ordinary tract of land would not, in and of itself, yield a significant public benefit, but the preservation of ordinary land areas in conjunction with other factors that demonstrate significant public benefit or the preservation of a unique land area for public enjoyment would yield a significant public benefit. For example, the preservation of a vacant downtown lot would not by itself yield a significant public benefit, but the preservation of the downtown lot as a public garden would, absent countervailing factors, yield a significant public benefit. The following are other examples of contributions which would, absent countervailing factors, yield a significant public benefit: (1) the preservation of farmland pursuant to a State program for flood prevention and control; (2) the preservation of a unique natural land formation for the enjoyment of the general public; (3) the preservation of woodland along a Federal highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway; and (4) the preservation of a stretch of undeveloped oceanfront property located between a public highway and the ocean so as to maintain the scenic ocean view from the highway.

Finally, conservation purpose also includes the preservation of an historically important land area or a certified historic structure. The term "historically important land area" is intended to include independently significant land areas (for example, a civil war battlefield) and historic sites and related land areas, the physical or environmental features of which contribute to the historic or cultural importance and continuing integrity of certified historic structures such as Mount Vernon, or historic districts, such as Waterford, Virginia, or Harper's Ferry, West Virginia. For example, the integrity of a certified historic structure may be protected under this provision by perpetual restrictions on the development of such a related land area. The term "certified historic structure" for purposes of this charitable contribution deduction generally has the same meaning as in present Code section 191(d)(1) (dealing with 5-year amortization of expenditures incurred in the rehabilitation of certified historic structures). However,

a "structure" for this purpose means any structure whether or not it is depreciable. Thus, for example, easements on private residences may qualify under this provision. In addition, a structure would be considered to be a certified historic structure if it satisfied the certification requirements either at the time the transfer was made or at the due date (including extensions) for filing the donor's return for the year in which the contribution was made.

In view of the need of potential donors to be secure in their knowledge that a contemplated contribution will qualify for a deduction, the committee expects that taxpayers may obtain a prior administrative determination as to whether the contemplated contribution will be considered to have been made for a qualifying conservation purpose. In addition, the committee expects that regulations under this section will be classified among those regulation projects having the highest priority, and that, to the extent possible, issues that may arise in the interpretation of the statute will be resolved before publication of regulations by the issuance of administrative determinations.

Exclusively for conservation purposes

The bill retains the present law requirement that contributions be made "exclusively for conservation purposes." Moreover, the bill explicitly provides that this requirement is not satisfied unless the conservation purpose is protected in perpetuity. The contribution must involve legally enforceable restrictions on the interest in the property retained by the donor that would prevent uses of the retained interest inconsistent with the conservation purposes. In the case of a contribution of a remainder interest, the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contribution.

In addition, this requirement is not met if the contribution would accomplish one of the enumerated conservation purposes, but would allow uses of the property that would be destructive of other significant conservation interests. For example, the preservation of farmland would not qualify under the open space purpose if a natural ecosystem has been or, under the terms of the contribution, can be significantly injured or destroyed by the use of pesticides in the operation of the farm. This requirement is not intended to prohibit uses of the property, such as the selective cutting of timber or farming, if under the circumstances they are not destructive of significant conservation interests.

In the case of a qualified mineral interest gift, the requirement that the conservation purpose be protected in perpetuity is not satisfied if any method of mining, removal, or extraction that is inconsistent with the particular conservation purposes of a contribution is permitted at any time. Some methods of mining, removal, or extraction may have temporary, localized impact on the real property contributed that is not destructive of significant conservation interests, and this requirement may be satisfied even though such methods are permitted. In addition, the bill specifically states that this requirement is not met if at any time the minerals may be removed or extracted by any surface mining method.

By requiring that the conservation purpose be protected in perpetuity, the committee intends that the perpetual restrictions must be enforceable by the donee organization (and successors in interest) against all other parties in interest (including successors in interest). Generally, the committee contemplates that the restrictions would be recorded. The committee does not, by the requirement that the conservation purpose be protected in perpetuity, intend that a recipient of a conservation contribution must set aside funds for the enforcement of the contribution.

The committee does intend, however, to limit the deduction only to those cases where the conservation purposes will in practice be carried out. The committee contemplates that the contributions will be made to organizations which have the commitment and the resources to enforce the perpetual restrictions and to protect the conservation purposes. The requirement that the conservation purpose be protected in perpetuity also is intended to limit deductible contributions to those transfers which require that the donee (or successor in interest) hold the conservation easement (or other restriction) or other property interests exclusively for conservation purposes (i.e., that they not be transferable by the donee except to other qualified organizations that also will hold the perpetual restriction or property exclusively for conservation purposes).

Qualified organizations

In general, the bill restricts eligible recipients of contributions of partial interests for conservation purposes to governments and publicly supported charities. Thus, a governmental unit (described in Code sec. 170(b)(1)(A)(v)) would be an eligible recipient, as would a charitable organization (described in Code sec. 501(c)(3)) that is publicly supported within the meaning of either Code section 170(b)(1)(A)(vi) or Code section 509(a)(2). In addition, an organization that is not itself publicly supported but nevertheless is qualified as a "public charity" (under Code sec. 509(a)(3)) would be eligible if it is controlled by a government or publicly supported organization. Thus, for example, an organization created as a title-holding subsidiary of a public supported charitable organization would be an eligible recipient if it is controlled by the parent organization.

Valuation

In general, a deduction is allowed for a charitable contribution in the amount of the fair market value of the contributed property, defined as the price at which the property would change hands between a willing buyer and a willing seller. Thus, the amount of the deduction for the contribution of a conservation easement or other restriction is the fair market value of the interest conveyed to the recipient. However, because markets generally are not well established for easements or similar restrictions, the willing buyer/willing seller test may be difficult to apply (although it may become increasingly possible to determine the value of conservation easements by reference to amounts paid for such interests in easement acquisition programs as such programs increase). As a consequence, conservation easements are typically (but not necessarily) valued indirectly as the difference

between the fair market value of the property involved before and after the grant of the easement. (See Rev. Rul. 73–339, 1973–2 C.B. 68 and Rev. Rul. 76–376, 1976–2 C.B. 53.) Where this test is used, however, the committee believes it should not be applied mechanically.

For example, where before and after valuation is used, the fair market value of the property before contribution of the easement should take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would be developed. Where applicable, valuation of the property before contribution should take into account zoning, conservation, or historic preservation laws that would restrict development of the property. Valuation of the transfer should take into account the impact of the transfer on other property, as in the case where restrictions on one parcel of property serve to increase the value of adjacent property. Also, there may be instances in which the grant of an easement may serve to enhance, rather than reduce, the value of property, and in such instances no deduction would be allowable; for example, where there is a premium in value on property of a historic nature. Similarly, in a case where the owners of a high-rise oceanfront condominium make a contribution of an open space easement that prohibits further development of the property between the high-rise structure and the shoreline but does not allow the public access to the beach and does not diminish the value of the property overall, there would be no deductible amount. (In this example, it is questionable, absent other considerations, whether the gift of such a beach easement with limited public scenic value and without public access to the beach would qualify under the requirements of the open space provision.) The committee also intends that, as the use of conservation easements increases, valuation would increasingly take into account the selling price value, in arm's-length transactions, of other properties burdened with comparable restrictions.

Study by Treasury

The committee found that it was hindered to some extent in its analysis of the present provisions relating to conservation contributions and its consideration of the proposed legislation by the absence of a comprehensive data base concerning the nature and scope of conservation easements and remainder interests. To permit Congress to evaluate more precisely the effectiveness of the conservation contribution provisions and the need, if any, to modify them at some future date, the committee requests that the Administration undertake a study on conservation easements and remainders to be submitted to Congress by 1985. The committee contemplates that, if possible, the Internal Revenue Service will devise a method by which to collect information on the number and characteristics of interests for which deductions are claimed under this section, possibly through the use of forms required to be submitted with the tax return on which a deduction is claimed.

Effective date

The provisions of the bill apply to transfers made after the date of enactment in taxable years ending after such date.

Revenue effect

It is estimated that this provision will reduce budget receipts by $5 million annually.

III. COSTS OF CARRYING OUT THE BILL AND VOTE OF THE COMMITTEE IN REPORTING H.R. 6975

Budget Effects

In compliance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate, the following statement is made relative to the budget effects of H.R. 6975, as reported.

Budget Receipts

The table below summarizes the estimates of decreases in budget receipts resulting from the provisions of the bill for fiscal years 1981–1985.

The Treasury Department agrees with this statement.

ESTIMATED REVENUE EFFECTS OF H.R. 6975, TAX TREATMENT EXTENSION ACT OF 1980, AS REPORTED BY THE COMMITTEE ON FINANCE

[Millions of dollars]

Section	Fiscal years				
	1981	1982	1983	1984	1985
1. Employment tax status of independent contractors	(1)	(1)	(1)	(1)	(1)
2. Extension of provisions relating to historic preservation	−2	−21	−66	−111	−131
3. 60-month amortization for expenditures to rehabilitate low-income housing		−1	−8	−18	−26
4. Extension of credit or refund of tax on fuels used in certain taxicabs	−10	−30	−20	(2)	(2)
5. Certain Federal scholarship grants and National Research Service Awards [3]	−4	−16	−22	−23	−24
6. Deductions for contributions for conservation purposes	−5	−5	−5	−5	−5
Total [3]	−21	−73	−121	−157	−186

[1] The revenue effect of this provision cannot be estimated because the provisions affect IRS asserted employment tax liabilities which were contested by taxpayers in both administrative and judicial proceedings.

[2] Negligible.

[3] The provisions estimated at "less than $1 million" and "less than $5 million" were included in this table for budget scorekeeping as $1 million and $3 million, respectively.

Vote of the Committee

In compliance with paragraph 7(c) of Rule XXVI of the Standing Rules of the Senate, the following statement is made relative to the vote by the committee on the motion to report the bill. H.R. 6975, as amended, was ordered favorably reported by voice vote.

IV. REGULATORY IMPACT OF THE BILL AND OTHER MATTERS TO BE DISCUSSED UNDER SENATE RULES

Regulatory Impact

Pursuant to paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the committee makes the following statement concerning the regulatory impact that might be incurred in carrying out the provisions of this bill.

A. *Numbers of individuals and businesses who would be regulated.*—The bill does not involve new or expanded regulation of individuals or businesses.

B. *Economic impact of regulation on individuals, consumers and business.*—The bill does not involve economic regulation.

C. *Impact on personal privacy.*—This bill does not relate to the personal privacy of taxpayers.

D. *Determination of the amount of paperwork.*—This bill will have little impact on the amount of paperwork of taxpayers involved since most of the provisions merely extend present law treatment.

Consultation with Congressional Budget Office on Budget Estimates

In accordance with section 403 of the Budget Act, the committee advises that the Director of the Congressional Budget Office has examined the committee's budget estimates and agrees with the methodology used and the resulting dollar amounts.

New Budget Authority

In compliance with section 308(a)(1) of the Budget Act, and after consultation with the Director of the Congressional Budget Office, the committee states that the bill does not create new budget authority.

Tax Expenditures

In compliance with section 308(a)(2) of the Budget Act with respect to tax expenditures, and after consultation with the Director of the Congressional Budget Office, the committee makes the following statement.

The bill creates new tax expenditures in (1) the exclusion for Federal scholarship grants, (2) the extensions of the provisions relating to historic structures and rehabilitation of low-income housing, to the extent that certain expenditures made after the expiration date of the provisions may qualify for favorable tax treatment, and (3) the deduction for contributions for conservation purposes.

Increased tax expenditures include (1) the extension of provisions relating to historic preservation, (2) the extension of provisions relating to the 60-month amortization of expenditures to rehabilitate low-income rental housing, (3) the extension of the excise tax exemption for certain taxicab use of motor fuels, (4) the extension of tax-

exempt scholarship treatment of National Research Service Awards, and (5) the provision making permanent certain qualified conservation deductions.

The estimated effects on budget receipts of each new or increased tax expenditure is presented in Part III of this report, Revenue Effects.

V. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In the opinion of the committee, it is necessary in order to expedite the business of the Senate, to dispense with the requirements of subsection 4 of rule XXIX of the Standing Rules of the Senate (relating to the showing of changes in existing law made by the bill, H.R. 6975, as reported by the committee).

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