

Federal Tax Authority and Practice Regarding Conservation Easements

A Guide for Field Use

The Law of Qualifying Conservation Purposes

III. "Outdoor Recreation"

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## **Quick Summary**

**The Code:** 26 U.S.C. § 170(h)(4)(A)(i) provides that a qualifying “conservation purpose” for a tax deductible conservation easement is “the preservation of land areas for outdoor recreation by, or the education of, the general public.”

**The Regulations:** 26 CFR § 1.170A-14(d)(2) includes two examples of outdoor recreation or education:

- 1) “the preservation of a water area for the use of the public for boating or fishing,” and
- 2) “a nature or hiking trail for the use of the public.”

The Regulations also specify that for “a donation of a... real property interest...for... outdoor recreation...or for the education of the general public” to meet the conservation purposes test outlined in 170(h), the general public must have access to the property. Access is defined as “substantial and regular use.”

Unlike “scenic” property [§ 170(h)(4)(A)(iii)(I)], where visual access by the general public is sufficient, a conservation contribution meant to qualify as an outdoor recreation or education property must provide for *physical* access to the property covered by the easement.

## **Practice in Private Letter Rulings:**

There are relatively few PLRs that have concluded that a contribution of property or of an interest in property is a qualified conservation contribution under the outdoor recreation test.

The following is a list of key factors or qualifying characteristics of “recreation” and the PLRs that cite them:

The proposed easement was to be used to enhance the public outdoor recreational and/or educational use of the property: PLR 8012026, PLR 9318027

The proposed easement was to provide and preserve a wild canoeing environment: PLR 8012026

The proposed easement was over property improved by campsites and a picnic area and camping, picnicking, and lake recreational facilities were to be available to the general public on a rental basis: PLR 8713018

In other situations where outdoor recreation or education would seem to be an appropriate qualifying purpose for a conservation easement, the IRS settled on alternative purposes. For example, PLR 200403044 deals with a tract of land that was to be conserved for, among other reasons, “public outdoor recreation.” The IRS

notes that the land had also been used for “recreational hunting.” In the PLR, the IRS listed the four possible conservation purposes under which a qualified conservation contribution can support a conservation easement: outdoor recreation, relatively natural habitat, open space, or historic structure. The PLR then states:

The conservation easement in the present case qualifies as a donation for the protection of an environmental system under § 170(h)(4)(A)(ii), the second of the four enumerated tests. Because of this, the remaining three tests will not be discussed.

## ***Expanded Guide***

### **The Statute**

The tax code provides in subsection 170(f)(3)(B)(iii) for the deductibility of “qualified conservation contributions.” Gifts of conservation easements can be qualified conservation contributions if made “to a qualified organization,” “exclusively for conservation purposes,” and must be “granted in perpetuity.”

The tax code specifies the kinds of conservation purposes that will be recognized as eligible for a deduction. In this volume of the “Guide,” we summarize the authorities that control the Internal Revenue Service’s administration of the Code provisions regarding one of those qualifying purposes: “the preservation of land areas for outdoor recreation by, or the education of, the general public.” 26 U.S.C. § 170(h)(4)(A)(i). In addition, we examine IRS practice in relation to that purpose as documented in Private Letter Rulings.

### **The Regulations**

26 CFR § 1.170A-14(d)(2)

**(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.

Under the access requirement, the general public must have *physical* access to the property for a donation to meet the requirements of a qualified conservation

contribution for the “recreation or education” conservation purpose. Visual access is not sufficient.

Furthermore, access means that the property must be available “for the substantial and regular use of the *general public*” (emphasis added). A donor that would like to make a donation of an easement for “public outdoor recreation or education” but limit access to a small group would not qualify for a conservation easement deduction. For the contribution to be deductible, its benefits must be available to more than a small, select group. Requiring payment for access is not prohibited. See PLR 8713018.

Opening the property for physical access of the public may lead to uses that are inconsistent with other conservation purposes or goals for the land. The “inconsistent use” rules [26 CFR 26 CFR § 1.170A-14(e)] indicate that a deduction will not be allowed if the contribution accomplishes one conservation purpose but allows the destruction of other significant conservation interests. The exception to this rule is that “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.” [§ 1.170 A-14(e)(3).] Hiking and camping are considered outdoor recreation, because they are given as specific examples in the regulations. The PLRs indicate that canoeing is also included.

### **Private Letter Rulings**

PLR 9318027 (5/7/1993)

The subject of this ruling was 1,200 acres of undeveloped land along a river. The property had flat topography and substantial amounts of timber. The woodlands and riverbank of the property supported several species of wildlife. The property was located in a city. The owner was concerned about preserving the natural beauty of the property for the use and enjoyment of the people of the city. To achieve this goal, the owner planned to convey an easement over the property to an organization incorporated by the city for purposes that include creating an attractive, wholesome, and healthy environment in the downtown area of the city, conducive to residential, recreational, commercial, and cultural activities. This organization’s powers included holding land that was preserved for outdoor recreation by the general public.

The IRS concluded that the contribution of the property qualified as a conservation contribution without examining any specific factors or identifying other aspects of the land that supported its decision. The PLR stated simply that, “based on the information submitted, we conclude that the contribution of the property will be a qualified conservation contribution under section 170(h) of the Code.” The PLR did not further clarify the reasoning behind the decision to grant the easement other than naming “outdoor recreation by, or education of, the general public” under 170(h)(4)(A)(i) as the conservation purpose.

PLR 8713018 (12/23/1986)

The property was a 150-acre tract of land adjacent to a 100-acre constructed lake. The property was improved by a campground with 200 campsites, a picnic area that accommodated 350 people, and a pavilion. The owners of the property made the camping, picnicking, and lake recreational facilities available to the general public on a rental basis, and proposed to donate a conservation easement to a qualified holder for the purpose of preserving the land for the outdoor recreational use of the public.

The property was also the natural habitat of many species of wildlife rarely found in the area, including bear and bobcat. An extensive fossil bed was also located on the property. The owners were concerned about preserving the natural beauty of the property for the camping public.

The IRS found that the proposed contribution fit within the meaning of the conservation purpose of “the preservation of land areas for outdoor recreation by . . . the general public.” The relevant factors that the IRS looked at were the preservation of the natural beauty of the property and the availability of the property for camping and picnicking, and the lake recreational activities.

PLR 8012026 (12/27/1979)

The property in question was a portion of the owner’s land. The owner wanted to grant a perpetual open space easement in gross for conservation purposes over the riverfront property, while retaining the upland property. The property was relatively undeveloped. This stretch of the river was not bordered by railroad runs, unlike much of the riverfront property in the area. The water had previously been badly polluted, but water quality was improving rapidly.

The Donee organization would use the land to further a project that was intended to provide and preserve a wild river canoeing environment. The proposed easement was “for the purposes of protecting the natural environmental systems of the Property, and preserving the natural, scenic, even and wooded condition of the Property for public view and public scenic enjoyment from the . . . River, and to thereby enhance public outdoor recreational and educational use of the . . . River.” The easement allowed for limited timber and forest management activities.

The IRS found that the conservation easement met the “outdoor recreation by, or the education of, the general public” standard and was a qualified conservation purpose under § 170(h).

PLR 8418032 (01/23/1984) (Example of a situation where “recreation” might have been an appropriate justification, but another conservation purpose was used. See

other examples: PLR 8302085, 8243125, 83313123, 200403044, 200208019, and 8450065)

The land was 1,950 acres of undeveloped forest abutting the corner of a large lake. Within the 1,950 acres were two mountains and three undeveloped ponds. The mountains were the only comparably sized mountains in the area that had not been impacted by the development of ski lifts, housing, and roads. One of the mountains had a trail that was a favorite for hikers and blueberry pickers. The public had access to all parts of the land by custom and hikers and skiers used the trails and wood roads on the property.

The IRS said that the conservation purpose “preservation of open space” was met here. The IRS specified that under this purpose, to satisfy the requirement of scenic enjoyment of the general public, visual, not physical, access by the general public to the property is sufficient.