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THE IMPACT OF THE TAX REFORM ACT OF 1986 ON LIFETIME TRANSFERS OF APPRECIATED PROPERTY FOR CONSERVATION PURPOSES

Charitable institutions dependent on gifts of appreciated property, such as colleges and universities, hospitals, museums, and land-protection trusts, have been deeply concerned about the impact of recent tax reform[1] on gifts of appreciated property.[2] This concern is based on the belief that tax reform affects giving most directly through donors' responses to changes in the after-tax cost of giving.[3] Charitable institutions fear that, by increasing the after-tax cost of giving, tax reform has decreased the incentive to give, and thus ultimately will decrease the amount of charitable giving.[4]

This Note will analyze the impact of the Tax Reform Act of 1986 ("TRA '86")[5] on transfers of appreciated property for charitable purposes,[6] by applying TRA '86 to one area of charitable giving:

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[1] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981) [hereinafter ERTA '81] (decreasing the maximum tax rate from 70% to 50%) and Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) [hereinafter TRA '86] (decreasing the maximum tax rate from 50% to an effective rate of 33%).

[2] *See, e.g., Tax Reform Proposals: XI (Professional Organizations and Charitable Contributions): Hearings on H.R. 3838 Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. (1985); Note, *The Implications of Changing the Current Law on Charitable Deductions—Maintaining Incentives for Donating Art to Museums*, 47 OHIO STATE L.J. 773 (1986) (authored by Susan E. Wagner); Dennis, *Proposed Minimum Tax Will Reduce Charitable Giving*, 29 TAX NOTES 855 (1985); Comment, *Tax Incentives for Support of the Arts: In Defense of the Charitable Deduction*, 85 DICK. L. REV. 663 (1981) (authored by Pamela J. Lajennessi). For purposes of this article, "appreciated property" is real property that has a fair market value in excess of the donor's basis in the property (low-basis/high-gain property).

[3] Auten & Rudney, *Tax Reform and the Price of Donating Appreciated Property*, 33 TAX NOTES 285, 285 (1986).

[4] When ERTA '81 reduced the top marginal rates from 70 percent to 50 percent in 1981, some studies found that the amounts received by charitable organizations were less than they would have been had the rate reduction not taken place, presumably because of the increase in the after-tax cost of giving. *See* Fullerton & Goodman, *The Economic Recovery Tax Act of 1981: Implications for Charitable Giving*, 16 TAX NOTES 1027 (1982); Clotfelter & Salamon, *The Impact of the 1981 Tax Act on Individual Charitable Giving*, 35 NAT'L TAX J. 171 (1982).

ERTA '81 also increased the after-tax costs for estate tax purposes of charitable contributions of appreciated property by reducing the top rate of tax from 70 percent to 50 percent, by increasing the unified credit, by allowing an unlimited marital deduction, and by allowing the possibility of thinning an estate by the development of a program making full use of the $10,000 annual exclusion. *See* S. KESS & B. WESTLIN, CCH EST. PLAN. GUIDE 152 (1982).

[5] Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[6] The impact of TRA '86 on testamentary transfers of appreciated property for charitable purposes and on the comparative tax advantages of lifetime (intervivos) versus testamentary transfers of appreciated property for charitable purposes is beyond the scope of this Note. For an analysis of the choice between lifetime and testamentary

lifetime (inter vivos) donations of appreciated property for conservation purposes.[7] Part I of the Note will briefly trace the evolution of national tax policy concerning charitable contributions of land for conservation purposes, and will discuss the social policy rationale for allowing deductions from income for such gifts. This section will show that Congress has recognized the social importance of land preservation, and the wisdom of using the tax system to achieve this goal. Part II of the Note will examine the general impact of TRA '86 on the cost of charitable giving. Part III will analyze the impact of TRA '86 on general contributions of appreciated capital gain property. Part IV will analyze the specific impact of TRA '86 on several forms of lifetime transfers of appreciated property for conservation purposes. These sections will demonstrate how, notwithstanding congressional power, TRA '86 has increased the after-tax cost to all income groups of complete or partial donations of appreciated property for conservation purposes. Thus, to the extent that potential donors respond to changes in the after-tax cost of giving, TRA '86 will decrease lifetime donations of appreciated property for conservation purposes.[8] In conclusion, the Note will suggest two responses to the problem of reduced donations. First, private land-preservation trusts must launch fund drives aimed at convincing potential donors of the nontax benefits of such dona-

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charitable contributions, *see, e.g.*, O'Sullivan & LaGree, *Choice Must be Made Between Income and Estate Tax for Charitable Contributions*, 16 TAX. FOR LAW. 202 (1988).

[7] For purposes of this Note, "conservation purposes" means the preservation of land for outdoor recreation or education, for habitat or ecosystem protection, for open space, or because of historical value.

These four objectives are the objectives required under the "conservation purposes" test of I.R.C. § 170(h)(4) (CCH 1988), which reads:

> CONSERVATION PURPOSES 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.

[8] The detrimental effect of TRA '86 on gifts of real property for conservation purposes is already occurring, forcing such large land-preservation organizations as The Nature Conservancy and the Trust for Public Land to shelve some land-preservation projects. Celis, *Tax Changes Hit Groups in Land Conservation*, Wall St. J., Jan. 26, 1988, at 39, col. 2.

tions.[9] Second, Congress and state legislatures must provide more direct support to federal and state-sponsored land preservation programs.

I
CONSERVATION AND NATIONAL TAX POLICY

Congress has wide discretion in using its taxing power to further nonrevenue national objectives.[10] A former Commissioner of the Internal Revenue Service, Mortimer Caplin, has suggested that the following basic preconditions should be met before Congress exercises its discretion to use the tax system to promote nonrevenue ends: (1) the particular goal must be of overriding importance to society; and (2) the objective in question can be achieved most effectively and simply through the tax system.[11]

A. The Evolution of Congressional Policy Recognizing the Importance of the Preservation of Land for Conservation Purposes

Congress has made the basic policy decision that the preservation of land for conservation purposes is a worthy goal[12] and one that is appropriate to encourage through the medium of the tax code.[13] The tax law of the United States has allowed a deduction from income for charitable contributions, including contributions of

9 The Nature Conservancy is presently considering a $250 million, five-year campaign, only its second fund drive in the group's 40-year history. *Id.*

10 *See, e.g.*, Deputy v. duPont, 308 U.S. 488, 497 (1940); Welch v. Henry, 305 U.S. 134, 150 (1938); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934) ("Whether and to what extent deduction shall be allowed depends upon legislative grace."); Helvering v. Independent Life Insurance Co., 292 U.S. 371, 381 (1934) ("Unquestionably Congress has power to condition, limit or deny deductions from gross income in order to arrive at the net that it chooses to tax.").

11 Kliman, *The Use of Conservation Restrictions on Historic Properties as Charitable Donations for Federal Income Tax Purposes*, 9 B.C. ENVT'L. AFF. L. REV. 513, 516 (1981).

12 For example, Congress declared in the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 42 U.S.C. § 4321 (1969), that the preservation and elimination of damage to the environment stimulates the health and welfare of man and enriches the understanding of ecological systems and natural resources important to the nation.

13 *See* Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL EST. L.J. 304, 305 (1979). The Treasury Department, however, continues to have lingering doubts about the wisdom of allowing tax deductions for conservation easements. In a December 1987 report, it concluded that a mix of direct government purchases of conservation easements and grants to private non-profit conservation groups for the purchase of easements might be a more efficient way to provide social benefits than the current practice of allowing tax deductions for donations of easements of natural areas and historic structures. U.S. DEP'T OF TREASURY, REPORT TO THE CONGRESS ON THE USE OF TAX DEDUCTIONS FOR DONATIONS OF CONSERVATION EASEMENTS (Dec. 1987). *See also* Rosenthal, *Treasury Suggests Replacing Deduction for Conservation Easements with Direct Outlays*, 38 TAX NOTES 8 (1988).

appreciated property, since 1917,[14] just four years after the establishment of the income tax itself.[15] Under the deduction scheme as first enacted, the tax law treated gifts of appreciated property as the equivalent of a donation of cash equal to the fair market value of the property.[16]

Congress shaped the current national tax policy toward charitable contributions for conservation purposes during the sixteen year period from 1964 to 1980.[17] Congressional and Treasury debate centered on extending the charitable contribution deduction to include partial property interests.[18] The Internal Revenue Service, and later Congress, opened the way for the eventual explosion in private land-preservation organizations[19] by allowing a charitable contribution deduction for open space or scenic easements. In

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14 *See* War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330. The Act provided a deduction for:

> Contributions or gifts actually made . . . to corporations or associations organized and operated exclusively for religious, charitable, scientific or educational purposes, or to societies for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of fifteen per centum of the taxpayer's taxable net income . . . .

Id.

15 Revenue Act of 1913, ch. 16, 38 Stat. 114. The original purpose of the charitable contribution deduction was to encourage continued philanthropic giving by insulating it from the high income-tax rates beginning to emerge at the time of World War I. Proponents of the charitable contribution deduction feared that if taxpayers' "surplus" income was diverted to taxes, the flow of private philanthropy would dry up, necessitating governmental funding for philanthropy generated through yet greater taxation. Wallace & Fisher, *The Charitable Deduction Under Section 170 of the Internal Revenue Code*, in 4 RESEARCH PAPERS SPONSORED BY THE COMM'N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2131 (1977); Comment, *supra* note 2, at 666. *See* McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 229 n.1 (1984).

16 "Fair market value" is defined by the regulations as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 1.170-1(c)(1) (1988).

17 For a complete discussion of the legislative history concerning gifts of land for conservation purposes, especially gifts of conservation easements, during this period, *see* Browne, *Taxes as a Form of Public Financing: Treasury's Open Space Protection Program*, in LAND-SAVING ACTION 150-53 (R. Brenneman & S. Bates eds. 1984); Brenneman, *Gifts of Partial Interests in Real Property*, in *id.* at 166-68; Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 125-37 (1983); Kliman, *supra* note 11, at 519-24; Hambrick, *Charitable Donations of Conservation Easements: Valuation, Enforcement and Public Benefit*, 59 TAXES 347, 348-51 (1981); Teitell & Johnson, *Subcommittee Report of the Committee on Charitable Gifts, Trusts and Foundations, Probate and Trust Division, Tax Incentives for Sensible Land Use Through Gifts of Conservation Easements*, 15 REAL. PROP. PROB. & TR. J. 1, 4-9 (1980); Small, *The Tax Benefits of Donating Easements in Scenic and Historic Property*, 7 REAL EST. L.J. 304, 306-318 (1979); Browne & Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX LAW. 69, 69-85 (1975).

18 *See* Brenneman, *supra* note 17, at 166-68.

19 *See infra* note 42 and accompanying text.

1964 the Internal Revenue Service promulgated Revenue Ruling 64-205,[20] which held that an open space or scenic easement constituted a cognizable and valuable interest in real property under state law sufficient to support a deduction under section 170 of the Code. The position of the Service was reinforced the following year in an I.R.S. news release announcing the availability of income tax deductions for gifts of scenic easements for the purpose of fostering natural beauty.[21]

The Tax Reform Act of 1969[22] nearly eliminated the availability of deductions for donations of open space easements through creation of section 170(f)(3)(B)(ii). This section limited the deductibility of partial interests with the following two exceptions: (1) a gift of a remainder interest in a personal residence or farm qualified for the deduction; and (2) a gift of an undivided portion of the taxpayer's entire interest in the property.[23] The Conference Committee Report on the Act, however, preserved the charitable deduction for the donation of conservation easements by creating a legal fiction that equated an open space easement in gross (granted in perpetuity) with an undivided property interest.[24]

The Tax Reform Act of 1976[25] amended the Code to provide a statutory basis for an easement for conservation purposes.[26] The 1976 act is also noteworthy in imposing an additional requirement for the deductibility of gifts of the interests described—the interest must be created for "conservation purposes."[27]

20 1964-2 C.B. 62.

21 I.R.S. News Release IR-65-785 (Nov. 15, 1965). Scenic easements would serve to protect and preserve a scenic view.

22 Pub. L. No. 91-172, 83 Stat. 487 (1969).

23 I.R.C. § 170(f)(3)(B)(ii) (1969).

24 The relevant sentence reads: "The Conferees on the part of both Houses intend that a gift of an open space easement in gross is to be considered a gift of an undivided interest in property where the easement is in perpetuity." H.R. REP. No. 782, 91st Cong., 1st Sess. 294 (1969). For the authoritative study on the Tax Reform Act of 1969 and subsequent changes in the law as to partial interest donations, *see* Browne & Van Dorn, *supra* note 17.

25 Pub. L. No. 95-455, 90 Stat. 1520 (1976).

26 Specifically, section 2124 of the Act added as an additional exception to the partial interest rule of 170(f)(3)(B) the allowance of a deduction for the contribution of "a lease on, option to purchase, or easement with respect to real property of not less than 30 years' duration granted to an organization described in subsection (b)(1)(A) exclusively for conservation purposes." I.R.C. § 170(f)(3)(B) (1976).

The deduction for the thirty-year term easement was short-lived. The Tax Reduction and Simplification Act of 1977 further amended the Code to require that a deductible easement must be "granted in perpetuity." Pub. L. No. 95-30, 91 Stat. 126 (1977). For a discussion of the legislative history of the 1976 and 1977 acts, see Small, *supra* note 17, at 310-18.

27 Section 170(f)(3)(C) (1976) defined "conservation purposes" as follows:

The Tax Treatment Extension Act of 1980[28] established the present characteristics of the Code through yet another comprehensive revision. The deductions for an undivided portion of the taxpayer's entire interest and for a remainder interest in a personal residence or farm were retained as they had been since 1969.[29] However, the Act repealed the language in sections 170(f)(3)(B) and (C) referring to "conservation purposes," that had been added by the 1976 Act, and substituted a new subsection (B)(iii) in its place; a deduction is now allowed for a "qualified conservation contribution," the prerequisites of which are set forth in a new section 170(h).[30] The new type of contribution deduction applies to transfers for both historic preservation and land conservation purposes,

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(C) CONSERVATION PURPOSES DEFINED—For purposes of subparagraph (B), the term "conservation purposes" means—

(i) the preservation of land areas for public outdoor recreation, or scenic enjoyment;

(ii) the preservation of historically important land areas or structures; or

(iii) the protection of natural environmental systems.

28 Pub. L. No. 96-541, 94 Stat. 3204 (1980).

29 I.R.C. § 170(f)(3)(B)(i), (ii) (1980).

30 The text of I.R.C. § 1970(h) (1980) appears below:

(h) QUALIFIED CONSERVATION CONTRIBUTION.—

(I) 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 purpose 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 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 509(a)(3), and is controlled by an organization described in subparagraph (A) or in clause (i) of this subparagraph.

(4) CONSERVATION PURPOSES DEFINED.

(A) IN GENERAL.—For purposes of this subsection, the term "conservation purpose" means—

(i) the preservation of land areas for outdoor research 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 governprovided that the restriction is "granted" in perpetuity.[31] Finally, the "purpose" test was amplified and elaborated upon in 1980 to require that the transfer be for a particular conservation purpose.[32] The regulations to the 1980 Act were published in 1986.[33]

Unlike the tax acts discussed above, TRA '86[34] does not specifically address charitable contributions for conservation purposes. Instead, TRA '86 attempts to shift a significant portion of the federal tax burden from individuals to corporations, to reduce the tax liabilities of low-income individuals, and to eliminate many long-standing tax loopholes in exchange for lower and fewer tax rates.[35] The legislative history of TRA '86 contains no discussion of its likely effect on charitable contributions for conservation purposes.[36] It can be fairly implied, then, that Congress, because it did not indicate otherwise in TRA '86, intended to continue to recognize the

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mental 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) CERTIFIED HISTORIC STRUCTURE.—For purposes of subparagraph (A)(iv), the term "certified historic structure" means any building, structure, or land area which—

(i) is listed in the National Register, or

(ii) is located in a registered historic district (as defined in section 191(d)(2)) 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 PURPOSES MUST BE PROTECTED.—A contribution shall not be treated as exclusively for conservation purposes unless the conservation purposes is protected in perpetuity.

(B) NO SURFACE MINING PERMITTED.—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.

(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.

31 I.R.C. § 170(h)(2)(C) (1980).

32 I.R.C. § 170(h)(4) (1980).

33 Treas. Reg. § 1.170A-14 (1986). For a detailed analysis of these regulations, see S. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS (1986); Small, *Final Regs on Conservation Donations Provide Some Clarification*, J. TAX'N. 250 (Oct. 1986).

34 *See supra* note 1.

35 *See generally* CONFERENCE REPORT ON THE TAX REFORM ACT OF 1986, H.R. REP. NO. 841, 99TH CONG., 2D SESS. (1986).

36 *See* B. REAMS & M. MCDERMOTT, TAX REFORM 1986: A LEGISLATIVE HISTORY OF THE TAX REFORM ACT OF 1986: THE LAW, REPORTS, HEARINGS, DEBATES AND RELATED DOCUMENTS (1988); FED. TAXES (P-H), A COMPLETE GUIDE TO THE TAX REFORM ACT OF 1986: EXPLANATION, CODE SECTIONS AS AMENDED, COMMITTEE REPORTS, INDEX (1986).

overriding importance to society of the preservation of land for conservation purposes.

B. The Wisdom of Using the Tax System to Encourage Preservation of Land for Conservation Purposes

The public value of preserving land for conservation purposes is well-accepted.[37] On the federal level, Congress and the President have made land preservation, particularly habitat preservation, a national goal.[38] On the state level, state legislatures have protected land through open space[39] and natural area heritage programs.[40] On the private level, land-preservation trusts, such as the Trustees of Reservations in Massachusetts, have been in existence since before the enactment of the federal income tax in 1913.[41] The number of private land-preservation trusts has increased significantly in the last twenty years[42] in response to diminishing open space and ecologically significant lands[43] and to increasingly liberal attitudes in the Internal Revenue Service toward charitable contributions for conservation purposes.[44]

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37 COUNCIL ON ENVTL. QUALITY ANN. REP. 1-2 (1981); Rev. Rul. 76-204, 1976-1 C.B. 152 ("it is generally recognized that efforts to preserve and protect the natural environment for the benefit of the public serve a charitable purpose"); RESTATEMENT (SECOND) OF TRUSTS § 375 (1959).

38 This goal is evident in such acts as the National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966), the Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968), the Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972), the Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973), and through executive orders such as the Protection and Enhancement of the Cultural Environment, Exec. Order No. 11,593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. § 470 at 549-50 (1982), and the Protection of Wetlands, Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (1977), *amended by* Exec. Order No. 12,608, 52 Fed. Reg. 34,617 (1987), *reprinted in* 42 U.S.C.A. § 4321 at 171-72 (West Supp. 1988).

39 *See, e.g.*, Washington State Open Space Act, WASH. REV. CODE § 84.34.200 (1987).

40 *See, e.g.*, the Washington State Natural Area Preserves Act, WASH. REV. CODE § 79.70 (1987).

41 Revenue Act of 1913, ch. 16, 38 Stat. 114.

42 Browne, *Taxes as a Form of Public Financing: Treasury's Open Space Protection Program*, in LAND-SAVING ACTION 149 (R. Brenneman & S. Bates eds. 1984). Before 1950 there were 36 organizations. By 1965 the number of such organizations had reached 100. Between 1965 and 1975 an additional 174 land trusts were established. In the six-year period from 1976 to 1981, another 100 appeared, bringing the total to 418. *Id.* Land trusts now number more than 700. Land Trust Exchange, *A Celebration of Diversity*, 7(3) LAND TR. EXCHANGE 1 (1988).

43 It is estimated that up to one quarter of living species may be lost in the next 25 years. *See* BIODIVERSITY (E. Wilson ed. 1988); THE PRESERVATION OF SPECIES: THE VALUE OF BIOLOGICAL DIVERSITY (B. Norton ed. 1986).

The Nature Conservancy is one of the largest private land-preservation organizations in the United States. For a description of its efforts to protect ecologically valuable land, *see* Grove, *Quietly Conserving Nature*, 174(6) NAT. GEOG. MAG. 818 (Dec. 1988).

44 *See supra* notes 17-33 and accompanying text.

It seems clear, then, that preservation of land for conservation purposes is a national goal. Nevertheless, it must still be determined whether it is more effective to use the tax system or direct budget outlays to promote such nonrevenue ends.[45] Although this evaluation is complex and expert opinion is divided on the issue,[46] the following considerations suggest that the tax expenditure is preferable to the direct budget outlay.[47] First, the charitable contribution deduction relieves the federal government of the full market cost of land protection by requiring landowner contribution.[48] In effect, the federal government, through the tax incentive of the charitable contribution, provides land-preservation organizations with the means of acquiring land at below-market costs.[49] Saving the federal government money is especially important given the se-

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45 Under this evaluation, the charitable contribution deduction is viewed as a tax expenditure (an indirect subsidy) designed to encourage private contributions to charity. It is a substitute for taxing contributors and making up for the reduction in private giving by direct budget outlays. *See generally* S. SURREY, P. MCDANIEL, H. AULT & S. KOPPELMAN, FEDERAL INCOME TAXATION 543-45 (1986).

46 *See, e.g.*, Weidenbeck, *Charitable Contributions: A Policy Perspective*, 50 MO. L. REV. 85 (1985); COMM'N ON PRIVATE PHILANTHROPY & PUBLIC NEEDS GIVING IN AMERICA (1975); Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37 (1972); McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377 (1972); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

47 Professor Weidenbeck argues that three considerations generally make the charitable deduction tax expenditure preferable to the direct budget outlay. First, a tax incentive to encourage private support for the services traditionally provided by charitable organizations may be necessary in part because of constitutional restraints on governmental action (such as the "establishment" and "taking" clauses). Second, the best available economic research indicates that the tax deduction is more efficient, in that it increases gifts to charity by more than it decreases tax collections. Third, the charitable contribution deduction encourages cultural and associational pluralism. Weidenbeck, *supra* note 46, at 95-97.

48 This argument in support of a charitable contribution deduction for conservation gifts is best stated in Browne, *supra* note 17, at 147. To illustrate the cost to the federal government of acquiring a parcel of land via the charitable deduction route, assume the parcel has a fair market value of $1,000 and a zero cost basis to the owner who has a contribution base in excess of $3,333 and has an effective marginal tax bracket of 33 percent. In the event of a charitable contribution of the parcel, the fair market value of $1,000 is fully deductible and the resulting tax benefit or tax reduction is $330. That is also an acquisition cost to the federal government. The remaining $670 (or 67 percent of the fair market value of the property) is the landowner's contribution. *Id.* at 154 n.I.

49 *Id.* at 153. This bargain element—the 67 percent or more private contribution—is what gives the federal government's tax incentive program its principal appeal over other federal programs that pay full fair market value. "The public dollar goes farther; private initiative and involvement is encouraged; and the requirement that the landowner make a partial contribution restrains an acquisition program that is not otherwise subject to normal budget restraints." *Id.*

vere budgetary constraints now faced by governments.[50]

Second, the charitable contribution deduction also relieves the federal government of stewardship responsibilities and their attendant costs for managing the preserved property.[51] Qualifying charitable organizations are likely to have far more resources, time, and skills than the government to establish and administer specific programs that meet the diverse needs of donors.[52] Furthermore, because such organizations are smaller than most government agencies, they remain more intimately connected with the programs and may be better able to manage the properties acquired.[53]

The use of the charitable contribution as a method for protecting land is not completely satisfactory, however. Commentators have noted at least two criticisms. First, contributors may abuse the allowance of a charitable deduction through aggressively high valuations claimed in connection with the charitable gift.[54] Second, tax

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50 Recently, with the increase in the price of land, the whole system of government land acquisition, including partial interests, has been challenged as being too costly. Kliman, *supra* note 11, at 517. *See* COMPTROLLER OF THE UNITED STATES, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED (1979).

51 Browne, *supra* note 17, at 153.

52 Kliman, *supra* note 11, at 517.

53 *Id.* at 518.

54 Coughlin, *Increased Tax Penalties for Valuation Overstatements*, LAND-SAVING ACTION 210 (R. Brenneman & S. Bates eds. 1984); Madden, *supra* note 17, at 137-43; Hambrick, *supra* note 17, at 351-53. The Treasury Department expressed its concern about the potential for aggressive and abusive valuation in charitable gifts of easements in its testimony opposing legislation that would allow charitable gifts of easements for conservation purposes under I.R.C. § 170(h). Coughlin, *supra*, at 213 n.4. The Senate Committee on Finance reiterated this concern in its report accompanying the Tax Treatment Extension Act of 1980. Coughlin, *supra*, at 213 n.4.

In recent tax reform, Congress attacked the problem of excessive evaluations. First, Congress increased the interest rate of tax deficiencies. I.R.C. § 6621 (1988). ERTA '81 § 711 increased the interest rate on tax deficiencies from 90 percent to 100 percent of the prime rate. 95 Stat. 172, 340. TRA '86 § 1511(a) changed the interest rate on tax deficiencies to 2 percentage points above the short-term Federal rate. 100 Stat. 2085, 2744.

Second, Congress increased the penalty for underpayments due to negligence. I.R.C. § 6553(a) (1988). ERTA '81 § 722(b) increased the penalty for underpayments of tax due to nonfraudulent "negligence or intentional disregard of rnles and regulations." ERTA retained the 5 percent negligence penalty and added an additional penalty equal to 50 percent of the interest rate payable on that portion of the tax deficiency attributable to negligence or intentional disregard of rules and regulations. 95 Stat. 172, 342-43. TRA '86 § 1503(a) amended the Code provision by expanding the definition of negligence to include not only careless, reckless or intentional disregard of rules and regulations, but also any failure to make a reasonable attempt to comply with the provisions of the Code. 100 Stat. 2085, 2742.

Finally, Congress established penalties for "valuation overstatements". I.R.C. § 6659 (1988). ERTA '81 § 722 imposed a penalty upon individuals, closely held corporations, and personal service corporations who have tax underpayments attributable to valuation overstatements. Valuation overstatements occur "if the value of any property, or the adjusted basis of any property, claimed on any return exceeds 150 percent of the amount determined to be the correct amount of such valuation or adjusted basis (as the incentives in the form of a deduction are more valuable to the higher bracket taxpayer, and may be meaningless to a class of taxpayers who have land to donate, but not enough income to take advantage of the deduction.[55] Some critics have recommended substituting a charitable tax credit for the present tax deduction as a way of solving this problem.[56]

II
CHANGES IN THE TAX TREATMENT OF APPRECIATED PROPERTY AND THEIR EFFECT ON THE COST OF CHARITABLE GIVING

A. The Cost of Charitable Giving

Economists who study the effect of taxes on charitable contributions agree that makers of charitable contributions, particularly upper-income donors, are sensitive to the after-tax cost of giving.[57] They disagree, however, on how to calculate the after-tax cost of giving, and whether it alone is the proper measure of the incentives affecting a taxpayer.

Tax economists have put forward at least two methods of calculating the after-tax cost of giving. Under the first method, the after-tax cost of a charitable gift is equal to the gross value of the gift less (1) the capital gains tax avoided and (2) the value of the regular tax deduction.[58] Under the second method, the after-tax cost of a charitable gift is equal only to the gross value of the gift less the value of

case may be)." 95 Stat. 172, 342. The penalty, in the form of an addition to tax, ranges from 10 percent of the additional tax owed where the valuation claimed is 150 percent but not more than 200 percent of the correct valuation to 30 percent of the additional tax owed where the claimed valuation exceeds 250 percent of the correct valuation. The section does not apply to underpayments of less than $1,000 or to property that has been held by the taxpayer for longer than five years.

The Deficit Reduction Act (or Tax Reform Act) of 1984, § 155(c)(1)(B), amended I.R.C. § 6659 by establishing an overvaluation penalty for charitable contributions under § 6659(f). 98 Stat. 494, 691-95. This charitable deduction overvaluation penalty applies if the valuation claimed on the taxpayer's return is 150% or more of the correct valuation. The penalty amounts to a payment of 30% of the additional tax liability attributable to a valuation overstatement.

55 Browne, *supra* note 17, at 154; Weidenbeck, *supra* note 46, at 99-102; Madden, *supra* note 17, at 145-147; Surrey, *supra* note 46, 83 HARV. L. REV. at 720-25.

56 *See, e.g.*, Browne, *supra* note 42, at 154; Madden, *supra* note 17, at 146-47; Asher, *Public Needs, Public Policy, and Philanthropy: An Analysis of the Basic Issues and Their Treatment by the Commission on Private Philanthropy and Public Needs*, in 2 RESEARCH PAPERS SPONSORED BY THE COMM'N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 1069, 1084-85 (1977). For a contrary view, see Weidenbeck, *supra* note 46, at 100-02.

57 Lindsey, *Gifts of Appreciated Property; More to Consider*, 34 TAX NOTES 67, 67 (1987). *See also* Feldstein, *The Income Tax and Charitable Contributions*, 28 NAT'L TAX J. 81, 97 (1975); Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Institutions*, 28 NAT'L TAX J. 209 (1975).

58 Auten & Rudney, *supra* note 3, at 285.

the regular tax deduction.[59]

Proponents of the first method argue that potential donors generally take into account, when contemplating a contribution of appreciated property, the tax that would be paid on the sale of the appreciated property as an offset to the giving away of the property.[60] This practice of considering capital gains tax avoidance is encouraged by professional fundraisers who use it as an argument to encourage donors to make contributions of appreciated property.[61] Thus, the argument goes, the value of the capital gains avoided should be imputed into the calculation of the after-tax cost of a charitable gift.

Proponents of the second method argue that this behavioral claim lacks general validity. When contemplating a contribution of appreciated property, potential donors may consider any or all of the various alternative uses of the property.[62] Consideration of capital gains taxes has an effect only on the incentive to give rather than to sell an asset. It has no effect at all on the incentive to give rather than bequeath an asset because the capital gains tax will not be collected in either case.[63] Furthermore, taxpayers have important nontax reasons for making contributions of cash and/or appreciated property, such as convenience of giving or concern for preservation of the unique features of the property. Thus, it is unlikely that the taxpayer is facing only a discrete choice between a donation and a sale of the property.[64] Therefore, except when that choice is clear, the value of the capital gains tax avoided should not be imputed into the calculation of the after-tax cost of a charitable gift.[65]

This study generally utilizes the second method of analysis in its examination of the impact of TRA '86 on lifetime transfers of appreciated property for conservation purposes because it takes into account all of the alternatives facing a potential donor. This study considers the value of the capital gains tax avoided only when the choice between a sale and a donation seems clear[66] or when comparing the net cost to the donor of the various techniques for contributing property.[67]

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59 Lindsey, *supra* note 57.

60 *See* Auten & Rudney, *supra* note 3, at 285, 286.

61 Auten & Rudney, *Comment on Donations of Appreciated Property*, 34 TAX NOTES 71 (1987).

62 Lindsey, *supra* note 57, at 67-69.

63 *Id.* at 68.

64 *Id.* at 69; Abbin, *Tax Reform will Affect Charitable Giving of Appreciated Property—A Response*, 33 TAX NOTES 675, 675 (1986).

65 Lindsey, *supra* note 57; *Abbin*, *supra* note 64.

66 *See infra* notes 119-23 and accompanying text.

67 *See* Tables 12-13.

B. Direct Effects of TRA '86 on the Act of Charitable Giving

TRA '86 has directly affected the tax treatment of gifts of appreciated property. Section 301(a) of the act repealed the special capital gain deduction found in I.R.C. Section 1202,[68] thus taxing capital gains at the same rates as ordinary income. The taxation of long-term capital gains as ordinary income increases the incentive to contribute appreciated long-term capital gain property, as opposed to cash or ordinary income property, to charitable institutions.[69]

Under TRA '86, the qualifying deduction for a charitable gift of appreciated capital gain property remains its fair market value at the time of transfer.[70] However, the appreciation component of the charitable contribution is now subject to the alternative minimum tax provisions.[71] Under I.R.C. Section 57(a)(6),[72] the alternative minimum tax calculations include as a tax preference item the amount of appreciation allowed as a deduction in the current year.

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68 100 Stat. 2085, 2216. Prior law allowed taxpayers a 60 percent deduction on net capital gain. The relevant portion of repealed I.R.C. § 1202 reads: "[i]f for any taxable year a taxpayer other than a corporation has a net capital gain, 60 percent of the amount of the net capital gain shall be a deduction from gross income."

69 *See* Sanders & Toolson, *Planning for Charitable Giving after the Tax Reform Act of 1986*, 65 TAXES 359 (1987).

70 Treas. Reg. § 170A-1(c)(1) (1988). The regulations define "fair market value" as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Treas. Reg. § 1.170A-1(c)(2) (1988).

71 TRA '86 § 701(a), 100 Stat. 2085, 2320. Congress originally enacted the alternative minimum tax ("AMT") as part of the Tax Reform Act of 1969 to ensure that "all taxpayers are required to pay siguificant amounts of tax on their economic income." Note, *supra* note 2, at 792. Noncorporate taxpayers, whose regular tax liabilities are substantially reduced by tax preferences are, in effect, subject to the AMT in lieu of the regular income tax. *Id.*

Under I.R.C. § 55(a) (1988), individuals are subject to the AMT which is payable, in addition to all other tax liabilities, to the extent that it exceeds the individual's regular tax owed. The tax is imposed at a flat rate of 21 percent on alternative minimum taxable income ("AMTI") in excess of the exemption amount. I.R.C. § 55(b)(1) (1988). The AMTI is generally equal to regular tax adjusted gross income, as determined with the adjustments provided in I.R.C. §§ 56 and 58 and increased by certain tax preferences under I.R.C. § 57. I.R.C. § 55(b)(2) (1988). The exemption amount, which is subtracted from the AMTI before applying the 21 percent rate, is $40,000 for joint returns, $20,000 for married individuals filing separately, and $30,000 for single returns. I.R.C. § 55(d)(1) (1988). These exemption amounts, in turn, are reduced by 25 percent of the AMTI in excess of $150,000 for joint returns, $75,000 for married individuals filing separately, and $112,500 for single returns. I.R.C. § 55(d)(3) (1988).

72 I.R.C. § 57(a)(6) (1988) provides:

> (6) APPRECIATED PROPERTY CHARITABLE DEDUCTION.—
>
> (A) IN GENERAL.—The amount by which the deduction allowable under section 170 would be reduced if all capital gain property were taken into account at its adjusted basis.
>
> (B) CAPITAL GAIN PROPERTY.—For purposes of subparagraph (A), the term "capital gain property" has the meaning given to such term by section 170(b)(1)(C)(iv). Such term shall not include any property to which an election under section 170(b)(1)(C)(iii) applies.

Thus, the inclusion by TRA '86 of the appreciation component of a charitable contribution in the alternative minimum tax base *reduces* the incentive for contributions of appreciated long-term capital gain property by upper-income donors.[73]

TRA '86 has also made it more critical for charitable institutions, such as land-preservation organizations, to maintain their preferred tax exempt status under I.R.C. Section 501(c)(3)[74] as publicly supported charities, supporting organizations, or private operating foundations.[75] A charitable institution which loses its preferred tax exempt status under I.R.C. Section 501(c)(3) falls under the more restrictive Code provisions governing private non-operating foundations.[76] TRA '86 denies such private non-operating foundations any deduction for the appreciation component of most contributions of appreciated property, except for qualified appreciated stock.[77] Thus, a charitable institution which loses its preferred tax

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[73] Lindsey, *supra* note 57, at 69; Hoyt, *How to Avoid the AMT When Making Charitable Gifts of Appreciated Property*, 37 TAX NOTES 633, 638 (1987).

[74] I.R.C. § 501(c)(3) (1988) lists as exempt organizations "corporations . . . organized and operated exclusively for . . . charitable . . . or education purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Land trusts usually claim exemption as charitable organizations under this provision. Fremont-Smith & Koontz, *Becoming and Remaining a Tax-Exempt Organization*, in LAND-SAVING ACTION 29, 29 (R. Brenneman & S. Bates eds. 1984). A 1976 revenue ruling has held that the purposes of a typical land trust are "charitable" and thus exempt under § 501(c)(3). Rev. Rul. 76-204, 1976-1 C.B. 152.

[75] A land trust will qualify as a "public charity" under I.R.C. § 170(b)(1)(A)(vi) and 509(a)(1)(2) (1988) if it normally receives one-third of its support from the government and the general public. *See generally* Treas. Reg. §§ 1.170A-9(e)(2), (6), (7) (1988).

A land trust will qualify as a "supporting organization" under I.R.C. § 509(a)(3) (1988) if it is formed and operated exclusively for the benefit of, to perform the function of, or carry out the purposes of a specified public charity or governmental agency. The organization does not need to meet any public support test and can be quite flexible in its operations so long as the necessary relationship is demonstrated. It cannot be controlled by one or more substantial contributors. *See* Fremont-Smith & Koontz, *supra* note 74, at 32. *See generally* Treas. Reg. § 1.509(a)-4 (1988).

A land trust will qualify as a "private operating foundation" under I.R.C. § 509(a)(2) (1988) if it spends directly for the conduct of actual activities constituting the purposes or function for which it was organized tbe lesser of 85 percent of its adjusted net income or its minimum investment return. Gifts of land are *not* considered part of adjusted net income. Fremont-Smith & Koontz, *supra* note 74, at 31-32. Private operating foundations are not "qualified organizations" within the meaning of I.R.C. § 170(h) (1988), and therefore are not eligible to receive deductible gifts of partial interests such as conservation easements.

[76] *See* I.R.C. § 509(a) (1988).

[77] I.R.C. §§ 170(e)(1)(B)(ii) and 170(e)(5)(A) (1988). TRA '86 § 301(b)(2) is a conforming amendment to the repeal of the deduction for capital gains by individuals. 100 Stat. 2085, 2217. *See* H. R. CONF. REP. No. 99-841, 99th Cong., 2d Sess. II-105, n.1 (1986).

exempt status under I.R.C. Section 501(c)(3) will likely lose as well contributions of appreciated property from potential donors who are counting on the tax savings resulting from the appreciated component of the property.[78]

Finally, under I.R.C. Section 170(b)(1)(C)(iii),[79] the taxpayer can elect to reduce the amount deductible in any one year in exchange for being able to take a maximum deduction equal to 50 percent (rather than 30 percent) of the taxpayer's contribution base and thereby deduct a higher amount in any given year. Under TRA '86, the amount deductible, if this election is made, is now limited to basis only rather than basis plus 60 percent of the appreciation.[80] Thus, the utility of the election under I.R.C. Section 170(b)(1)(C)(iii) has been substantially diminished by TRA '86, and generally will not be useful except in the case of gifts of high-basis (low-gain) property.[81]

C. Indirect Effects of TRA '86 on the Cost of Charitable Giving

TRA '86 also has indirectly affected the after-tax cost of charitable giving. TRA '86 replaced the numerous, graduated tax brackets for individuals, which ranged from 11 percent to 50 percent, with a compressed and streamlined structure with only two tax rates, 15 percent and 28 percent.[82] Taxpayers whose marginal rate is lower under TRA '86, the vast majority of donors, will reap a smaller benefit from their charitable deductions than they did under prior law.[83] Thus, the general effect of these across-the-board rate reductions is

78 *See* Slaughter, *1986 Act Squeezes some Charitable Contributions of Appreciated Property*, 33 TAX NOTES 505 (1986); Chiechi, Atkinson, & Galston, *Impact of the 1986 Tax Reform Act on Exempt Organizations*, 66 J. TAX'N 344, 345 (1987).

79 I.R.C. § 170(b)(1)(C)(iii) (1988).

80 TRA '86 § 301(b)(2), 100 Stat. 2085, 2217. The amount deductible is limited to basis as a result of the elimination of the capital gain exclusion. I.R.C. § 1202 (1988). *See supra* notes 68-69 and accompanying text.

81 *See* Slaughter, *supra* note 78, at 505; Chiechi, Atkinson & Galston, *supra* note 78, at 345.

82 TRA '86 § 101(a), 100 Stat. 2085, 2096. Under I.R.C. § 1(g) (1988), an additional 5 percent tax is placed on taxable incomes between $71,900 and $149,250 (for those married and filing jointly) in order to phase out the benefits of the 15 percent tax bracket at high taxable income levels. For individuals in this high income group, the effective tax rate is actually 33 percent instead of 28 percent.

83 By contrast, those taxpayers who are subject to a higher marginal tax rate under TRA '86 due, for example, to changes in the rules for tax shelters and for the alternative minimum tax, will find their after-tax cost of charitable giving decreased. *See* Chiechi, Atkinson & Galston, *supra* note 78, at 344. Because these taxpayers are in the minority and probably do not significantly contribute to charitable institutions anyway, this Note does consider them.

to increase the after-tax cost of charitable giving.[84]

Finally, TRA '86 did not extend I.R.C. Section 170(i), the provision enacted in 1981 and expiring after 1986, that permitted nonitemizers to deduct part or all of their charitable contributions.[85] Thus, the Federal income tax no longer provides any incentive for charitable contributions by nonitemizers. The importance of the elimination of the deduction for nonitemizers is amplified because the number of taxpayers who itemize deductions will be significantly reduced.[86] The reduction in the number of itemizers results from the increase in the personal exemption,[87] the increase in the zero bracket amount (standard deduction),[88] and the elimination or reduction of some current itemized deductions.[89] This change in the tax law, however, will not significantly affect contributions of appreciated property because taxpayers who make such contributions are almost exclusively middle- and upper-income donors who itemize their deductions.[90]

III
Impact of TRA '86 on General Contributions of Appreciated Capital Gain Property

Tax analysts disagree about the ultimate impact on charitable giving of the new rules for contributions of appreciated capital gain property.[91] Their inability to predict the impact of TRA '86 on charitable giving of appreciated property results primarily from two factors. First, it is difficult to determine all of a donor's important nontax reasons for making such gifts. Second, it is difficult to foresee the interaction of the new capital gain property rules with other tax law changes, such as the general reduction of tax rates and the inclusion of the appreciation component of a charitable contribu-

84 *See* Lindsey, *supra* note 57; Auten & Rudney, *supra* note 3; Abbin, *supra* note 64; Sanders & Toolson, *supra* note 69; Chiechi, Atkinson & Galston, *supra* note 78.

85 I.R.C. § 170(i) (1988). Section 170(i)(4) terminates the deduction for nonitemizers for contributions made after December 31, 1986.

86 *See* Auten & Rudney, *supra* note 3, at 285.

87 TRA '86 § 103(a) amended I.R.C. § 151(d) by raising the personal exemption for an individual, the individual's spouse, and each dependent to $1,900 for 1989, $1,950 for 1988, and $2,000 for 1989. 100 Stat. 2085, 2102. By contrast, each personal exemption was $1,080 for tax year 1986. I.R.C. § 151(d) (1988).

88 TRA '86 § 102(a) amended I.R.C. § 63 by replacing the zero bracket amount with the standard deduction and by increasing the standard deduction. 100 Stat. 2085, 2099.

89 TRA '86 § 134, for example, repealed the deduction for state and local general sales taxes under former I.R.C. § 164(a)(4). 100 Stat. 2085, 2116.

90 *See* Auten & Rudney, *supra* note 3, at 286.

91 *See* Lindsey, *supra* note 57; Auten & Rudney, *supra* note 3; Abbin, *supra* note 64; Sanders & Toolson, *supra* note 69; Chiechi, Atkinson & Galston, *supra* note 78.

tion in the alternative minimum tax.[92]

Although tax analysts dispute the magnitude of the effect, they agree that TRA '86 will generally have a detrimental effect on charitable giving. First, TRA '86 will generally reduce the incentive for making donations of appreciated property[93] because it has increased the net after-tax cost for all income groups of donations of highly appreciated property to a charity.[94] However, when the cost of the capital gains tax to be avoided is included in calculating the net after-tax cost, TRA '86 has increased the cost of donating highly appreciated property for moderate (Adjusted Gross Income (A.G.I.) of $40,000/year) and very high income groups (A.G.I. of $250,000/year), but has actually decreased the cost of donating highly appreciated property for high income groups (A.G.I. of $100,000/year).[95] This is because the increase in capital gains tax is more than the reduction in tax rates on ordinary income for high income groups.[96]

Second, while the increase in the capital gains tax rate and the reduction in other tax rates have combined to increase the attractiveness of making gifts of appreciated property instead of gifts of cash,[97] the new alternative minimum tax provisions probably eliminate this added incentive for very high income donors.[98] This is because the minimum tax provisions tax the appreciation element in gifts at about the same rate as the taxpayer would have paid on the capital gain had he sold the asset instead of giving it away.[99]

IV
Impact of TRA '86 on Lifetime Transfers of Appreciated Property for Conservation Purposes

This section illustrates the impact of TRA '86 by examining its effect on each of several possible forms of lifetime transfers of ap-

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92 *See* Chiechi, Atkinson & Galston, *supra* note 78, at 344; Lindsey, *supra* note 57.

93 Lindsey, *supra* note 57; Auten & Rudney, *supra* note 3.

94 Lindsey, *supra* note 57, at 67; Auten & Rudney, *supra* note 3, at 285.

95 *See* Table 1 for a discussion of TRA '86's impact on the cost of contributions of 100% appreciated property. *See also* Auten & Rudney, *supra* note 3, at 286.

96 Auten & Rudney, *supra* note 3, at 286.

97 See Table 2 for examples of tax savings generated by TRA '86 for donations of appreciated property. Lindsey, *supra* note 57, at 67; Sanders & Toolson, *supra* note 69.

98 *See* Lindsey, *supra* note 57, at 69.

99 Prior to TRA '86, the taxpayer would have been taxed at 20% of the appreciated value of the capital gain property had he sold it (40% tax rate on capital gain × 50% marginal tax rate). I.R.C. § 1202. After TRA '86, the taxpayer is taxed at 21% of the appreciated value of the capital gain property under the alternative minimum tax. I.R.C. § 55(b)(1) (1988).

preciated property.[100] The study will discuss the general tax advantage of each form of transfer and its tax advantages remaining after TRA '86.

To determine how TRA '86 affects differently situated taxpayers, this study examines three categories of taxpayers:[101]

(1) Very high income—$250,000/year adjusted gross income;

(2) High income—$100,000/year adjusted gross income; and

(3) Moderate income—$40,000/year adjusted gross income.

Since there is some indication that the impact of TRA '86 depends on whether or not the property is highly appreciated or relatively unappreciated, donations involving two types of property are examined:

(1) Highly appreciated long-term capital property (low-basis/high-gain property)—contributions of property with 100 percent appreciation; and

(2) Relatively unappreciated long-term capital property (high-basis/low-gain property)—contributions of property with 20 percent appreciation.

This study assumes that potential donors, from each of the three income groups, will on the average contribute up to 30 percent of their adjusted gross income, the maximum level allowed under I.R.C. Section 170(b)(1)(B)(i).[102] Thus, the value of donated property used for comparisons between the three income groups in the following tables is based upon this 30 percent limit.

Finally, in all discussions of the tax ramifications of various forms of land transfers, this study assumes that the charity meets the Internal Revenue Code's requirements for a public charity or a private operating foundation and that the donor is an individual, not a corporation.

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100 Descriptions of the various transfers in this section are taken generally from Osgood & Koontz, *A Summary of Forms and Tax Consequences of Land Acquisition by a Charity*, in LAND-SAVING ACTION 135 (R. Brenneman & S. Bates eds. 1984).

101 The following assumptions are made in order to simplify the calculations: (1) The taxpayers are married, filing jointly; (2) The taxpayers are taking no other exemptions other than one for charitable contributions; (3) Rates for 1988 are in effect; (4) The only itemized deduction is the fair market value (FMV) of the contribution; and (5) The only preference item for alternative minimum tax (AMT) purposes is appreciation of contributions.

102 I.R.C. § 170(b)(1)(B)(i) (1988). It is probably unlikely that most taxpayers will donate up to the 30 percent limit but this study makes the assumption for the sake of simplicity.

A. Unrestricted Gifts of Appreciated Property[103]

1. *Land to be Preserved*

A donor may contribute property in fee simple[104] to a charity in order to both protect the property in perpetuity and take advantage of federal tax incentives.[105]

a. *General tax advantages*[106]

The tax advantages to the donor of donating land in fee simple include relief from property tax,[107] avoidance of capital gains,[108] conveyance,[109] estate[110] and gift taxes,[111] and the ability to take appropriate income tax deductions.[112] The value of the parcel of land

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[103] These gifts are unrestricted in the sense that all property interests are transferred.

[104] Fee simple means a total transfer of land and all rights attached to it, so that no elements of ownership remain with any other party. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 26 (2d ed. 1988).

[105] The after-tax cost of a donation of unique property is likely to receive a fair degree of attention by the donor. This attention is due largely to the activities of the donee who may have a particular interest in the asset and may expend considerable resources to convince the donor of its value to the charity and of its tax benefits to the donor. Lindsey, *supra* note 57, at 69.

[106] To ensure that she gains these advantages, the donor of the appreciated property should *avoid* placing any unnecessary language in the deed conveying the property to the charity. By inadvertently placing unnecessary language in the deed, such as "to be used for," the donor risks litigation over a constructional question. In resolving the constructional question, a court may construe the language as imposing a restriction in the form of a condition or a covenant on the use of the property, and, therefore, may classify the donation as a donation of a partial interest and not a full fee simple absolute. *See, e.g.*, Opinion of the Justices to the Senate, 369 Mass. 979, 338 N.E.2d 806 (1975); Hill v. Townson Realty, Inc., 221 Md. 389, 157 A.2d 796 (1960); Edward John Noble Hospital of Gouverneur v. Board of Foreign Mission of Presbyterian Church in U.S., 13 Misc. 2d, 176 N.Y.S.2d 157 (1958); Abel v. Girard Trust Co., 365 Pa. 34, 73 A.2d 682 (1950).

[107] Real property is subject to local assessment and taxation under state law. *See, e.g.*, WASH. REV. CODE § 84.36.005 (1987). When the land is transferred to a charity, the donor is no longer subject to the corresponding property taxes. The savings from not paying property taxes, when considered over the span of a lifetime, may be significant.

The donee land-preservation organization typically is exempted from paying property taxes on the donated property. *See, e.g.*, WASH. REV. CODE § 84.36.260 (1987) which exempts from taxation property used for conservation of ecological systems, natural resources, or open space.

[108] Gains derived from the sale of property are considered income for federal tax purposes. I.R.C. § 61(a)(3) (1988). TRA '86 repealed the deduction for such capital gains, and hence they are taxed under I.R.C. § 1(j) (1988) at the same rate as ordinary income. *See supra* notes 68-69 and accompanying text.

[109] Conveyances of real property are subject to state excise tax on real property sales. *See, e.g.*, WASH. REV. CODE § 82.45 (1987).

[110] Upon donation, the property is no longer part of the donor's gross estate. Therefore, it is no longer subject to federal and state estate and transfer taxes. I.R.C. § 2031(a) (1988). *See, e.g.*, WASH. REV. CODE § 82.100 (1987).

[111] I.R.C. § 2522 (1988).

[112] I.R.C. § 170(a) (1988).

for the purposes of a charitable deduction is based on its fair market value, as determined by an appraiser.[113] A donor who has owned the land for at least one year may deduct up to 30 percent of the value of the gift from his adjusted gross income.[114] Any undeducted balance is carried forward and may be deducted in each of the five years after the year of donation.[115]

b. *Tax Advantages After TRA '86*

The net after-tax cost of donating highly appreciated and relatively unappreciated property to a charity has increased for the three categories of taxpayers after enactment of TRA '86.[116] The percentage increase is greatest for very high income donors.[117] If the net cash return after taxes is compared to that received if the land were sold instead of donated, the net cost of the donation also has increased for high and very high income donors, but has actually decreased for moderate income donors of highly appreciated property.[118]

2. *Gifts of Asset (Trade) Land*

"Asset land," or "trade land" is property given to a charity to sell, with the receipts used for charitable purposes, or to exchange for parcels that the charity wishes to preserve.[119] A donor contributes "trade land" to gain the extra tax advantages that result from a contribution of the property, as opposed to a sale of the property, accompanied by payment of the appropriate taxes and contribution of the balance.[120]

a. *General tax advantages*

The donor will receive all of the tax advantages that a donor of

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113 Treas. Reg. § 1.170-1 (1988).

114 I.R.C. § 170(b)(1)(C)(i) (1988).

115 I.R.C. § 170(b)(1)(C)(ii) (1988).

116 See Table 3 for a description of the impact of TRA '86 on the net after-tax costs to donors of highly appreciated property.

117 The percentage increase for very high income donors may be even greater than Table 3 suggests. In this example, the AMT looks inconsequential. In reality, the new minimum tax provisions may significantly affect very high income donors of appreciated property. Simulations of the effect of the new tax law, holding donor behavior unchanged, show that 6,300 of the 13,400 donors of property worth $50,000 or more will be subject to the minimum tax. The probability of being subject to the minimum tax rises as the size of the gift rises. For example, more than 75 percent of the 980 gifts of $1 million or more will be made by people who will be subject to the minimum tax. By value, 63 percent of the gifts of $50,000 or more will be made by taxpayers subject to the minimum tax. *See* Lindsey, *supra* note 57, at 69; *see also* Hoyt, *supra* note 73.

118 *See* Table 12.

119 Osgood & Koontz, *supra* note 101, at 136.

120 *Id.*

land for preservation would receive as discussed above.[121] For developed land, the capital gains savings may be greater because of increased appreciation.[122] The savings on real estate taxes may also be higher, but if the charity intends to sell the developed land and not use it for its charitable purposes, it may not qualify for abatements of real estate taxes.[123]

b. *Tax Advantages After TRA '86*

By donating highly appreciated property (or even relatively unappreciated property), the donor will still be able to make a larger contribution after enactment of TRA '86 than if he sold the property, paid the appropriate taxes, and contributed the balance.[124] The benefits of doing so have somewhat increased for moderate income donors, but have somewhat decreased for high and very high income donors.

B. Impact of TRA '86 on Unrestricted Purchases of Appreciated Property

All of the procedures discussed under this heading involve the acquisition of land by a charity without any restrictions on its use or disposition.[125] Except for the first subsection, all of the methods are compromises with a seller interested in land preservation, or devices for minimizing the charity's costs.

1. *Purchases at Fair Market Value (FMV)*

A seller of property to a charity at fair market value generally realizes more directly from the sale than he would through a contribution of the property to a charity.[126] Most charities, however, are unable or unwilling to pay full price for land.[127]

a. *General Tax Advantages*

There are no tax advantages to selling property to a charity at fair market value. The fact that a charity is the purchaser in a sale of property at fair market value does not affect the tax consequences

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121 *See supra* notes 107-12 and accompanying text.

122 Osgood & Koontz, *supra* note 100, at 136.

123 *Id.*

124 See Tables 4 and 5 for a description of the impact of TRA '86 on contributions of moderately and highly appreciated property.

125 It should be noted, however, that the tax consequences examined here are those falling on the seller, rather than the purchasing charity.

126 This is because the seller only receives a maximum of 33% of the fair market value of the property in the form of reduced taxes in any one year. I.R.C. § 1 (1988).

127 Osgood & Koontz, *supra* note 100, at 137.

for the seller, who must pay taxes and who receives no charitable deduction.

b. *Tax Advantages After TRA '86*

The net after-tax gain to a seller of highly appreciated or relatively unappreciated property has decreased for the three categories of taxpayers after enactment of TRA '86, although it has decreased much less significantly for relatively unappreciated property.[128] The detrimental effect of TRA '86 on sales is greatest for persons of moderate income.

2. *Bargain Sale*

A bargain sale[129] is part sale and part gift of land; it is a sale of land at less than its fair market value. The seller may treat the difference between the sale price and the fair market value as a charitable contribution.[130] Thus, by making a bargain sale, the potential donor can reduce income taxes, eliminate property taxes, and still receive the minimal financial return he feels is essential.[131]

a. *General Tax Advantages*

The major advantage to the seller, aside from the protection of the land, is the combination of tax savings and return of capital invested.[132] In addition to the charitable deduction, the seller's capital gains tax is reduced.[133] Although appreciation in value of the property may still be taxable, some of the capital gains will be assigned to the gift portion of the conveyance.[134]

b. *Tax Advantages After TRA '86*

The net after-tax cost of making a bargain sale of highly appreciated property to a charity has increased for the three categories of taxpayers after enactment of TRA '86.[135] The detrimental effect of

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128 *See* Tables 6 and 7.

129 Treas. Reg. § 1.170(A)-4(c)(2)(ii) (1988) defines a bargain sale as "a transfer of property which is in part a sale or exchange of the property and in part a charitable contribution, as defined in § 170(c), of the property."

130 I.R.C. §§ 170(a) and 170(e)(1) (1988).

131 Osgood & Koontz, *supra* note 100, at 137. *See* Wood, *Charitable Contributions of Property: Making Bargain Sales*, 14 J. OF REAL EST. TAX. 359 (1987).

132 Osgood & Koontz, *supra* note 100, at 137.

133 I.R.C. § 1011(b) (1988); Treas. Reg. Sections 1.170A-4(c)(2) and 1.1011-2(a) (1988).

134 *Id.*

135 *See* Table 8. This study assumes a 60% bargain sale because the savings have generally been greatest for the seller at this figure. *See* HOOSE, BUILDING AN ARK: TOOLS FOR THE PRESERVATION OF NATURAL DIVERSITY THROUGH LAND PROTECTION 111-13 (1981).

TRA '86 on bargain sales of highly appreciated property is greatest for very high donors. On the other hand, the net after-tax cost of making a bargain sale of relatively unappreciated property to a charity has actually decreased for the three categories of taxpayers after enactment of TRA '86.[136] If the net cash return after taxes is compared to that received if the land were sold at full market value instead of at 60 percent market value, the net cost of the donation of highly appreciated property also has increased for high and very high income donors, but has actually decreased for moderate income donors.[137]

3. *Installment Sales*

An installment sale[138] is a sale where the seller sells the property outright to the charity, but the charity pays for it over a period of years.

a. *General Tax Advantages*

Installment sales, under I.R.C. Section 453,[139] allow the seller to spread capital gains over more than one year, while still receiving full value for the property. The seller may receive any portion of the sale price in any year. Therefore, the seller can, for example, split the capital gains between two years by receiving half the price in December and half in January.[140] The use of a mortgage back to the seller, or other security for payment, does not prevent the seller from having a qualifying installment sale.[141] As long as the buyer uses the new property for charitable purposes, no property taxes are due because the property itself is wholly transferred at the time of the sale.[142]

b. *Tax Advantages After TRA '86*

The effect of TRA '86 on installment sales is the same as on sales at fair market value.[143] The net after-tax gain to a seller of highly appreciated or relatively unappreciated property has decreased for the three categories of taxpayers, although it has de-

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136 *See* Table 9.

137 *See* Table 12.

138 I.R.C. § 453(b)(1) (1988) defines installment sale as "a disposition of property where at least 1 payment is received after the close of the taxable year in which the disposition occurs."

139 I.R.C. § 453 (1988).

140 I.R.C. § 453(c) (1988).

141 *See* Treas. Reg. §§ 1.453-4 to 1.453-6 (1988).

142 *See supra* note 107.

143 *See* Tables 6 and 7. The effect is the same because installment sales provide the seller with full value for the property, and merely allow the seller to spread capital gains over more than one year. I.R.C. § 453 (1988).

creased much less significantly for relatively unappreciated property. The detrimental effect of TRA '86 on installment sales is greatest for persons of moderate income.

C. Impact of TRA '86 on Restricted Gifts of Appreciated Property

All of the conveyances discussed under this heading involve the transfer of partial interests in property to the donee, and the retention of partial interests by the donor.

I.R.C. Section 170(f)(3) generally denies a deduction for contributions of partial interests in property.[144] Unless a donor divests himself of his entire interest in the contributed property, therefore, no charitable contribution is allowed. Through I.R.C. section 170(f)(3)(B)[145] and section 170(h),[146] the Code, however, makes exceptions to this general rule for the following three contributions:

> (1) an undivided portion of the taxpayer's entire interest in the contributed property;[147]
>
> (2) a remainder interest if the remainder interest is in a personal residence or farm,[148] or if it meets the requirements of a qualified conservation contribution;[149] and

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144 I.R.C. § 170(f)(3) (1988) provides:

(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.

The Code's bias against contributions of partial property interests stems from a concern about the property owner who takes an income tax deduction, then sits on the back porch looking over the unspoiled acreage that was the subject of the deduction. This donor of a partial property interest is actually receiving a double benefit: an income tax deduction and continued (albeit somewhat limited) use of the property. By tightening the requirements for taking an income tax deduction for contributions of partial property interests, Congress and the Treasury are attempting to ensure that the long-term public benefit outweighs the private benefit associated with the donation. S. Small, The Federal Tax Law of Conservation Easements §§ 2-2 - 2-3 (1986).

145 I.R.C. § 170(f)(3)(B) (1988).

146 I.R.C. § 170(h) (1988).

147 I.R.C. § 170(f)(3)(B)(ii) (1980).

148 I.R.C. §§ 170(f)(30(B)(i) and 170(h)(2)(B) (1988).

149 I.R.C. §§ 170(f)(3)(B)(i)(iii) and 170(h)(2)(B) (1988).

(3) a restriction on the use of real property if it meets the requirements of a qualified conservation contribution.[150]

Under I.R.C. Section 170(h)(1),[151] a qualified conservation contribution is the donation of a qualified real property interest (of the type discussed above) to a qualified organization,[152] exclusively for conservation purposes. The "conservation purposes" test requires, in part, that the property be granted in perpetuity, and that any reserved rights be consistent with the conservation purpose of the gift.[153] This latter requirement may prevent the donor from reserving the right to even "limited" development of the property.[154]

1. *Gifts of Undivided Interests (Installment Gifts)*

A donor of an undivided interest[155] contributes a percentage of his total ownership interest in the property and not any specific portion. A donor may use installment gifts of undivided interests to convey a piece of land over several years.[156] For example, a donor could contribute one-third of his ownership interest every other year for six years. In the interim, the donor shares ownership with the charity as tenants in common.[157]

a. *General Tax Advantages*

When a donor contributes an undivided interest in property to

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150 I.R.C. §§ 170(f)(3)(B)(iii) and 170(h)(2)(C) (1988). A "perpetual conservation restriction" is defined in Treas. Reg. § 1.170A-14(b)(2) (1988) as follows:

> 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.

151 I.R.C. § 170(h)(1) (1988); Treas. Reg. 1.170A-14 (1988).

152 For example, a Section 501(c)(3) organization as opposed to a Section 509(a) private non-operating foundation.

153 I.R.C. § 170(h)(4)(5) (1988); Treas. Reg. § 1.170A-14(e) (1988).

154 *See* S. SMALL, *supra* note 144, at §§ 9-5 - 9-7 (arguing that the limitation statute in the regulation does not provide meaningful guidance to taxpayers) and §§ 12-2 - 12-3 (arguing that the "inconsistent use" rule, as expressed in the committee reports is a good example of something desirable, but difficult to articulate in a tax regulation in a useful way); *also see* Small, *supra* note 33, at 251 (arguing that published letter rulings appear to achieve a balance between allowing some limited development and protecting the relevant conservation interests).

155 An undivided portion must consist of a fraction or percentage of every substantial interest or right owned by the taxpayer in the property, and the interest constituting the portion must extend over the entire term of the taxpayer's interest in the property. Treas. Reg. § 1.170A-7(b)(1)(i) (1988).

156 *Id.*; Osgood & Koontz, *supra* note 100, at 141.

157 Treas. Reg. § 1.170A-7 (b)(1)(i) (1988); *see* R. BOYER, SURVEY OF THE LAW OF PROPERTY 31-32, 90-91 (3d ed. 1981).

a charitable organization, the donor is entitled under I.R.C. Section 170(f)(3)(B)(ii) to a current deduction for the fair market value of the interest contributed.[158] In addition, the donor can spread the deductions over more than the six years permitted for outright gifts to qualified organizations, thus avoiding concentration of his tax liability.[159]

b. *Tax Advantages After TRA '86*

The effect of TRA '86 on donations of partial interests in property, such as installment gifts, is the same as on donations of complete interests in property.[160] TRA '86 may encourage greater use of installment gifts of undivided interests as a technique for donating highly valued property because spreading a large gift over several years may allow the donor to escape the alternative minimum tax.

2. *Donation/Sale With a Reserved Life Estate*

A donor may give or sell land to a charity, reserving a lifetime right to use the property.[161] The donor's interest in the property is called a reserved life estate and the charity's interest is called a remainder.[162] The remainder must be irrevocably given to a qualified charity in order for the donor to deduct its value for federal tax purposes.[163]

a. *General Tax Advantages*

If the donation of the remainder interest qualifies under the Internal Revenue Code provisions, the donor receives a charitable deduction for the value of the land minus the value of the life estate (determined under Treasury Department actuarial tables) and mi-

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158 I.R.C. § 170(f)(3)(B)(ii) (1988); Treas. Reg. § 1.170A-7(c) (1988).

159 Osgood & Koontz, *supra* note 100, at 141.

160 *See* Tables 3 and 12. *See supra* notes 116-18 and accompanying text.

161 Unlike land-protection organizations, professional estate planners generally do not recommend the creation of legal life estates. Legal life estates invite disputes between the life tenant and the remainderman as to restrictions against "waste" (failure of the life tenant to maintain the property in good condition for the remainderman), and limit the alienability of the life tenant's interests. Estate planners recommend instead the creation of equitable life interests under a trust umbrella. *See generally* Casner, *Legal Life Estates and Powers of Appointment Coupled with Life Estates and Trusts*, 45 NEB. L. REV. 342 (1966).

162 C. MOYNIHAN, *supra* note 104, at 117-18. "A remainder is a future interest created in a transferee which can become a possessory estate only on the expiration of a prior estate created in favor of another transferee by the same instrument." *Id.*

163 *See* Rev. Rul. 77-305, 1977-72 C.B. 72, which held that no deduction was allowable for the donation of a remainder interest in a residence when the donors placed a condition on the gift requiring the charity to sell its remainder interest and receive cash instead if the donors decided to sell the residence during their lifetimes.

nus depreciation or depletion.[164] The donor usually must continue to pay the real estate taxes on the property after contribution of the remainder portion of the property.[165]

b. *Tax Advantages After TRA '86*

Like donations of complete interests in property, the net after-tax cost of donating remainder interests in highly appreciated and relatively unappreciated property to a charity has increased for the three categories of taxpayers after enactment of TRA '86.[166] The percentage increase is greatest for very high income donors. If the net cash return after taxes is compared to that received if the remainder interest in the property was not donated, the value of the gift has decreased for all three categories of taxpayers after enactment of TRA '86.[167]

3. *Conservation Easements*

An easement is a limited right, granted by the owner of real property, to use all or part of his property for specific purposes.[168] An easement for conservation purposes involves the relinquishment of the property owner's right to develop, improve, or modify his property, and the power in the new holder of the right to enforce specific restrictions on the use of the property.[169]

a. *General tax advantages*

If the restriction qualifies under the Internal Revenue Code provisions, the major advantage to the donor is a tax deduction for a

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164 I.R.C. § 170(f)(4) (1988); Treas. Reg. § 1.170A-12 (1988). Generally, for a young donor, the value of the gift will be very little compared to the full present fair market value of the property.

165 Osgood & Koontz, *supra* note 100, at 139.

166 *See* Table 10.

167 *See* Table 13.

168 Small, *supra* note 17, at 304. An easement also has been defined as "a less-than-fee interest in land in possession of one other than the owner which limits or restricts the possessory rights of the owner and is enforceable at law." Kliman, *supra* note 17, at 513.

Such interests are regulated by state law. *See, e.g.*, WASH. REV. CODE §§ 64.04.130 and 84.34.210 to .250 (1987), which specifically authorize land-preservation organizations to acquire and hold "a development right, easement, covenant, restriction, or other right, or any interest less than the fee simple," to protect or preserve land. WASH. REV. CODE § 64.04.130 (1987). These statutes may greatly simplify legal drafting by abolishing most technical problems caused by archaic legalisms such as privity, alienation, and appurtenant/in gross. Osgood & Koontz, *supra* note 100, at 143 n.22.

For a thorough discussion of easements as well as other legal tools for restricting land use, see Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540 (1979), *reprinted in* LAND-SAVING ACTION 85 (R. Brenneman & S. Bates eds. 1984).

169 Small, *supra* note 17, at 304-05.

diminution in the value of the property.[170] The general rule for determining the fair market value of a conservation easement is that such value is the difference between the fair market value of the property unrestricted and the fair market value of the property restricted.[171] The total property of the taxpayer affected by the easement (not just the parcel to which the easement applies) is appraised under the "before and after" test in determining the economic value of the contribution.[172]

The restriction provides other possible tax benefits as well. It may lower the value of the land for property tax purposes, but unless the easement is given to a municipality, the tax probably will not be lowered until the regular valuation would have occurred.[173]

Of course, a conservation restriction usually reduces the market value of land. This loss, however, may be partially or wholly offset by the tax benefits described above. In fact, a restriction may enhance the attractiveness of the land for recreational or residential purposes if neighboring properties are subject to similar restrictions.[174]

b. *Tax Advantages After TRA '86*

Like donations of complete interests in property, the net after-tax cost of donating easements in highly appreciated and relatively unappreciated property to a charity has increased for the three categories of taxpayers after enactment of TRA '86.[175] The percentage increase is greatest for very high income donors. If the net cash return after taxes is compared to that received if the easement interest in the property were not donated, the value of the donation has decreased for all three categories of taxpayers after enactment of TRA '86.[176]

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170 I.R.C. §§ 170(f)(3)(B)(iii) and 170(h) (1988). "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." Treas. Reg. § 1.170A-14(h)(3) (1988).

171 Treas. Reg. § 1.170A-14(h)(3)(i) (1988) has elevated comparable sales in the marketplace to the rule in the first instance. "Only if no such record of sales exists, according to the Regulation, should the before-and-after test be used. The substantive rule, in the overwhelming majority of cases, will continue to be the before-and-after rule because *very few* areas of the country will have a siguificant enough number of sales of easements or of encumbered properties to make any valid comparisons." S. SMALL, *supra* note 144, at 254.

172 Rev. Rul. 76-376, 1976-2 C.B. 53.

173 Osgood & Koontz, *supra* note 100, at 140.

174 *Id.* at 140-41. *See* Treas. Reg. § 1.170A-14(h)(4)(Example 10) (1988).

175 *See* Table 11.

176 *See* Table 13.

4. *Conditional Transfers*

In making a conditional transfer, the donor places restrictions on the future use of donated property, the breach of which, automatically or at the choice of the holder of the retained interest, transfers title to a certain named party. In other words, if the charity ceases to preserve the land or destroys some element of the land (such as cutting down a particular stand of trees), the land will be taken away from it and given to someone else. Conditional transfers help to ensure that a donor's wishes as to the future of the property will be respected.[177]

Such a conditional transfer may be constructed in one of several ways. First, the donor may convey a "fee simple determinable,"[178] in which the donor and his heirs reserve a property interest (a "possibility of reverter") that enables them potentially to regain full title to the conveyed land if the donee-charity breaches the stated restrictions. Second, the donor may convey a "fee simple subject to a condition subsequent,"[179] in which the donor and his heirs reserve the right to reassert ownership at their will (a "right of reentry") if the donee-charity breaches the stated restrictions.[180] Third, the donor may convey a "fee simple subject to an executory interest,"[181] in which title is automatically transferred to a certain named party if the donee breaches the restrictions. Finally, the donor may convey the restricted interest to one charity and the retained interest to another charity.[182] This method of transfer gives the charity holding the retained interest the right, depending upon the form of the conveyance, to either automatically assume or reassert at its own choice ownership of the property if the conditions for use are no longer being fulfilled by the charity holding the restricted interest.[183]

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177 Osgood & Koontz, *supra* note 100, at 141.

178 A fee simple determinable is a fee so limited that it will automatically expire on the occurrence or non-occurrence of an event specified in the creating interest. C. MOYNIHAN, *supra* note 104, at 105.

179 A fee simple subject to condition subsequent is a fee simple so limited that the grantor may terminate the estate granted on the happening of a specified event. *Id.* at 33.

180 Unlike the "fee simple determinable," where forfeiture occurs automatically and immediately upon breach of the stated restrictions, forfeiture only occurs under the "fee simple subject to a condition subsequent" when the holder of the "right of reentry" elects to regain ownership upon breach of the stated condition. *Id.*

181 A fee simple subject to an executory interest is a fee simple so limited that it will automatically expire in favor of person other than the grantor upon the occurrence or non-occurrence of an event specified in the creating instrument. *Id.* at 23-24.

182 Milne, *The Landowner's Options*, in LAND-SAVING ACTION 217, 222-23 (R. Brenneman & S. Bates eds. 1984).

183 L. WAGGONER, FUTURE INTERESTS IN A NUTSHELL 22-25 (1981).

a. *General Tax Advantages*

If the reversionary interest is to the donor or his heirs, the value of the gift is not deductible.[184] However, if title is granted to one exempt organization and the executory interest or retained interest is assigned to another, the value of the land is fully deductible from income tax as a gift of the entire interest.[185] The value of the entire interest for the purposes of a charitable deduction is based on its fair market value, as determined by an appraiser.[186]

b. *Tax Advantages After TRA '86*

Because, under the circumstances qualifying for a deduction, the donor is giving away his complete interest in the property (the restricted property to one organization and the executory interest or reversionary interest to another organization), the effect of TRA '86 on such a transaction is the same as on donations of complete interests in property.[187]

5. *Promissory Deed Restrictions ("Equitable Servitudes")*

A donor may also want to make a gift of land subject to a promissory deed restriction (an "equitable servitude").[188] This means that if the charity ceases to preserve the land or destroys some element of the land (such as cutting down a particular stand of trees), the owner can enforce the promise by enjoining the activity which is in breach of the restriction. Like the conditional transfer, the promissory deed restriction helps to ensure that a donor's wishes as to the future of the property will be respected. But unlike easements, promissory deed restrictions may be less permanent because they are limited by the doctrine of "changed conditions."[189]

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184 I.R.C. § 170(f)(3) (1988). The Code does not allow a deduction because such a gift would be of a partial interest in property that does not fall within any of the permissible classifications. *See supra* notes 144-46 and accompanying text.

185 I.R.C. §§ 170(a), 170(f)(3)(B)(iii), and 170(h)(2) (1988).

186 Treas. Reg. §§ 1.170-1 and 1.170A-14(h)(3) (1988).

187 *See* Tables 3 and 12. *See supra* notes 116-18 and accompanying text.

188 An equitable servitude is a restriction on the use of land enforceable in a court of equity. R. BOYER, *supra* note 157, at 539.

189 Milne, *supra* note 182, at 222. Under the doctrine of changed conditions, a court may refuse to enforce the restrictions if it finds that it is no longer possible to achieve the benefit sought when the restrictions were created. *See, e.g.*, West Alameda Heights Homeowners Assoc. v. Bd. of Comm'rs, 169 Colo. 491, 458 P.2d 253 (1969); Cowling v. Colligan, 158 Tex. 458, 312 S.W.2d 943 (1958).

The question of enforceability is key when considering deed restrictions. Milne, *supra* note 182, at 222. Depending on the circumstances, and the relevant state law, there may be limitations on who can enforce the restrictions and for how long. *Id.* For instance, state courts split over the issue of whether a landowner who inserts restrictions in a deed, then conveys the land, but who retains no land nearby, may enforce the restrictions against the subsequent owners of the land. Netherton, *supra* note 168, at 552-

a. *General Tax Advantages*

The Internal Revenue Service does not allow a taxpayer to claim as a charitable deduction the loss in value resulting from the imposition of deed restrictions.[190] Therefore, a landowner must, in order to receive a full charitable deduction, donate the land to an intermediary agency, which then inserts the deed restrictions and transfers title. Only then may the landowner claim an income tax deduction for the unrestricted value of the land, provided that the intermediary agency is of the type that qualifies him to do so.[191]

b. *Tax Advantages After TRA '86*

Because, under the circumstances qualifying for the deduction, the donor is giving away his complete interest in the property (the restricted property to one organization and the right of enforcement to another organization) the effect of TRA '86 on such a transaction is the same as on donations of complete interests in property.[192]

D. Impact of TRA '86 on Gifts of Appreciated Property Made by or in Trust

Finally, donors who wish to retain an interest in the property to be contributed, or who wish to retain control over the activities of the charitable organization, may contribute property through a trust instrument. Trust instruments available to the donor for contributing appreciated property include the following:

(1) a charitable remainder annuity trust;[193]

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53. In this situation, the landowner has created a servitude "in gross," in which the interest holder does not own any land benefited by the restriction so that the interest only operates to benefit the owner personally, instead of in relation to or appurtenant to any property. The majority of the states take a position that the burden of an equitable servitude will not run when the benefit is in gross. *Id. See, e.g.*, Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); Genung v. Harvey, 79 N.J. Eq. 57, 80 A. 955 (1911). A minority hold the view that the burden of an equitable servitude runs whether or not the benefit is in gross. *Id. See, e.g.*, Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955); Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913).

190 Rev. Rul. 85-99, 1985-2 C.B. 83. This ruling appears to be inconsistent with the rules for valuing the donation of remainder interests for conservation purposes, expressed in Treas. Reg. § 1.170A-14(h)(2) (1988) and Example (2) in Treas. Reg. § 1.170A-14(h)(4) (1988), and has been much criticized by tax attorneys specializing in the land preservation field. *See* S. SMALL, *supra* note 144, at Appendix E.

191 I.R.C. § 170(a) (1988).

192 *See* Tables 3 and 12. *See supra* notes 116-18 and accompanying text.

193 The charitable remainder annuity trust is one under which a life interest or an interest for a term of years is left to noncharitable beneficiaries and the remainder is left to charity. Income from the trust, in the form of a specified sum (no less than five percent of the initial net fair market value of all the assets placed in the trust), is paid annually to the noncharitable beneficiaries. At the conclusion of the interest of the income beneficiary, the remainder passes to or for the use of a qualified charity, or is retained in the trust for the use of such charity. I.R.C. §§ 170(c), 170(f)(2)(A), and 664 (1988).

(2) a charitable remainder unitrust;[194]
(3) a pooled income fund;[195]
(4) a charitable lead trust;[196] and
(5) a charitable trust.[197]

Potential doners may use trust instruments for contributing appreciated property to a charitable organization less frequently than the previously described devices. Because of the extremely strict rules pertaining to charitable remainder trusts, such a remainder is not likely to qualify for a deduction if it is in the form of land.[198] Furthermore, in the case of charitable trusts, the use of a conditional transfer with an executory interest in another charitable organization allows the donor to achieve the same goal in a simpler fashion.[199]

1. *General Tax Advantages*

If the charitable trust, in whatever form, qualifies under the In-

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194 The charitable remainder unitrust is similar to the annuity trust, except that the annual return is a fixed percentage (not less than five percent) of the net fair market value of the assets, valued annually rather than just at the initial creation of the trust. I.R.C. §§ 170(c), 170 (f)(2)(A), and 664 (1988).

195 A pooled income fund is a fund maintained by the donee charity as a convenient device for receiving gifts to the charity from donors who wish to retain the income for life for themselves or other named beneficiaries who are living at the time the transfer is made, but who wish to pass on the remainder interest to the charity. I.R.C. § 642(c)(5) (1988).

196 A charitable lead trust is one under which charitable beneficiaries receive the income from the trust for a term of years, but the trust remainder vests in noncharitable beneficiaries. The income to the charitable beneficiaries must be an amount, distributed at least annually, that is a guaranteed annuity, or a fixed percentage of the fair market value of the assets as such value is determined annually. I.R.C. §§ 170(c), 170(f)(2)(B), and 661-667 (1988).

197 A charitable trust is not defined under the Code or the regulations. It is an entity that owns and administers the trust for charitable purposes, in accordance with the trust document which created the charitable trust. When this device is used to donate property to a charity, the charity becomes the trustee responsible for effectuating the donor's wishes. Thus, if a charity violates the terms of the charitable trust, it can be sued for breach of fiduciary duty. However, in most circumstances, the only person legally authorized to sue is the state attorney general. If the trust is in the form of a conditional transfer, the holder of the reversionary interest can also sue. Osgood & Koontz, *supra* note 100, at 141-42.

If circumstances change so that the donor's specific wishes can no longer be carried out, the courts will try to find, under the "cy pres doctrine," an alternative means to fulfill the donor's general interest. For instance, if the donor wishes to preserve a stand of virgin timber and the trees burned down, the courts would order the land sold and the money used either to buy other timber-bearing land or to buy and plant seedlings. *Id.*

198 *See* I.R.C. §§ 664(d)(1) and (d)(2) (1988). Treas. Reg. §§ 1.664.2(a)(2) and 1.664-3(a)(2) (1988) require yearly cash outlays of more than 5 percent of the value of the trust. If the principal is in land, this level of outlay is unlikely since little or no interest will be earned.

199 Osgood & Koontz, *supra* note 100, at 142.

ternal Revenue Code provisions, the major advantage to the donor is a tax deduction for the value of the property interest conveyed to the charity. For a charitable trust, the value of the parcel of land for the purpose of the charitable deduction is based on its fair market value, as determined by an appraiser.[200] For an annuity trust, the value of the remainder interest for income tax purposes is the net fair market value of the property placed in trust, less the present value of the annuity.[201] For a unitrust, the value of the remainder interest is calculated under the Gift Tax Rules of Treas. Reg. Section 1.664-4(b).[202] For both, the rules governing deductions for contributions of appreciated property generally apply, including the 30% limitation, unless the taxpayer makes the special election to reduce the amount of the contribution.[203] For a pooled income fund, the value of the remainder interest is calculated under the rules found in Treas. Reg. Section 1.642(c)-6 (1988).[204]

An income tax deduction based on the value of the charity's income interest under a charitable lead trust is seldom a factor in setting up such a trust. Special rules deny the donor a deduction unless the grantor is taxable on the trust income under the grantor trust rules of IRC sections 671-677, and then only if the charity's income interest qualifies as a guaranteed annuity interest or unitrust interest.[205] There is, however, no requirement that the payments be at least equal to five percent of the initial or annual value of the trust.

2. *Tax Advantages After TRA '86*

Because the donor of a charitable trust is giving away his complete interest in the property, the effect of TRA '86 on such a transaction is the same as on donations of complete interests in property.[206] Since the donor of a qualifying charitable remainder trust (either an annuity trust or a unitrust) is giving away his remainder interest in the property, the effect of TRA '86 on such a transac-

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200 I.R.C. § 170(a); Treas. Reg. Section 1.170-1 (1988).

201 Treas. Reg. § 1.1664-2 (1988). The value of the annuity is actuarially computed, making use of the I.R.S. tables contained in Treas. Reg. §§ 20.2031-7 and 20.2031-10 (1987) if a single life or term of years involved. If two lives are involved, I.R.S. Publication No. 723A covers the matter, and if three or more lives are involved, then I.R.S. Publication No. 723 should be consulted. S. Kess & B. Westlin, CCH Estate Planning Guide 169-70 (1982).

202 Treas. Reg. § 1.664-4(b) (1987). If more than a single life or term of years in involved, I.R.S. Publication No. 723B and No. 723 should be consulted. *Id.*

203 *See* Rev. Rul. 74-53, 1976-1 C.B. 60.

204 Treas. Reg. § 1.642(c)-6 (1988).

205 I.R.C. §§ 170(c), 170(f)(2)(B), and 661-667 (1988); *see also* Treas. Reg. § 1.170A-6(c)(1) (1988).

206 *See* Tables 3 and 12. *See supra* notes 116-18 and accompanying text.

tion is the same as on donations of remainder interests in property.[207]

CONCLUSION

This history of our federal tax policy shows a clear congressional recognition of the importance to society of land preservation for conservation purposes. Furthermore, the need to relieve the federal government of the costs and burdens of direct budget outlays in this area suggests the wisdom of using the tax system as an alternative to achieve the goal of land preservation. Nevertheless, TRA '86 generally has increased the after-tax cost to all income groups of complete or partial gifts of appreciated property for conservation purposes. The percentage increase is greatest for those most able to make such contributions—very high income donors whose adjusted gross income per year equals $250,000.

The detrimental effect of TRA '86 on donations of appreciated property is somewhat lessened for those least able to make such contributions—moderate income donors whose adjusted gross income per year equals $40,000—in situations where the potential donor is facing a discrete choice, such as whether to sell or donate property. For example, the after-tax cost of the donation has decreased for moderate income donors in situations where the donor has decided to contribute the property or to sell it at a bargain price rather than to sell it at fair market value. Similarly, moderate income donors are able to realize even greater income tax savings after TRA '86 than before if they contribute the appreciated capital gain property itself as opposed to selling the property, paying the appropriate taxes, and contributing the balance.

Still, while tax savings continue to result from donations of appreciated property, such donations have become relatively less attractive since passage of the Tax Reform Act of 1986. Therefore, to the extent that potential donors respond to changes in the after-tax cost of giving, TRA '86 will decrease lifetime transfers of appreciated property for conservation purposes. The extent to which it will do so remains unclear.

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207 *See* Tables 10 and 13. At least one commentator, though, has suggested utilizing charitable remainder trusts and pooled income funds as a way to avoid the negative impact of the AMT. Frequently the advantage of contributing to these arrangements is not so much the charitable deduction, since that is only a fraction of the property's value and might be even further reduced if the AMT applies, but, rather, the ability to avoid paying a capital gain tax on the transfer of the entire capital gain property. Thus, a donor can contribute appreciated low-yield growth investments to the arrangement without recognizing any gain on the transaction. The trust or fund then can sell the property free from tax and invest the proceeds in high-yield investments that will satisfy the payout requirements to the income beneficiaries. Hoyt, *supra* note 73, at 641-42.

Private land-preservation trusts and national and state governments must respond to this prospect of crimped donations. Private land-preservation trusts can respond by launching fund drives aimed at convincing potential landowners of the nontax benefits of such donations. Congress and state legislatures can respond by providing more direct support to federal and state sponsored land-preservation programs. Both can respond by promoting land-preservation projects that involve public/private cooperation and matching funds.

Konrad J. Liegel

Appendix

Table 1. Impact of TRA '86 on the Price of Contributions of Property with 100 Percent Appreciation.*

1986 Joint Return		Approximate	Price of Property Gift	
Tax Bracket	T.I. Bracket	A.G.I. Class	1986 Law	1988 Law
11%	3,670- 5,940	4,700- 7,600	.846	1.00
12%	5,940- 8,200	7,600- 10,500	.832	.70
14%	8,200- 12,840	10,500- 15,800	.804	.70
16%	12,840- 17,270	15,800- 21,200	.776	.70
18%	17,270- 21,800	21,200- 26,800	.748	.70
22%	21,800- 26,550	26,800- 33,000	.692	.70
25%	26,550- 32,270	33,000- 40,100	.65	.70
28%	32,270- 37,980	40,100- 47,700	.608	.70
33%	37,980- 49,420	47,700- 62,900	.538	.44
38%	49,420- 64,750	62,900- 83,200	.468	.44
42%	64,750- 92,370	83,200-119,200	.412	.34
45%	92,370-118,050	119,200-152,300	.37	.34
49%	118,050-175,250	152,300-219,100	.314	.34
50%	175,250 & over	219,100 & over	.30	.44

Notes: The gift of appreciated property is assumed to have a zero basis so that the full value represents appreciation. A.G.I. classes are based on the average ratio of taxable income to A.G.I. at each income level. The price of giving for gifts with appreciation of 100 percent of the value of the gift equals 1 - m - g where m is the marginal income tax rate and g is the tax rate on capital gains.

Adapted from Auten and Rudney, *Tax Reform and the Price of Donating Appreciated Property,* TAX NOTES 285, 287 (October 20, 1986).

Table 2. Tax Savings of Donating Appreciated Long-Term Capital Property.

Example 1. A moderate income donor with an adjusted gross income of $40,000.

	Prior	After TRA '86
Fair Market Value of Property	$1,000	$1,000
Basis of Property	− 0	− 0
Gain	$1,000	$1,000
Capital Gain Deduction	− 600	− 0
Taxable Gain	$ 400	$1,000
Marginal Tax Rate	x .28	x .28
Tax Savings	$ 112	$ 280

Example 2. A high income donor with an adjusted gross income of $100,000.

	Prior	After TRA '86
Fair Market Value of Property	$1,000	$1,000
Basis of Property	− 0	− 0
Gain	$1,000	$1,000
Capital Gain Deduction	− 600	− 0
Taxable Gain	$ 400	$1,000
Marginal Tax Rate	x .45	x .28
Tax Savings	$ 180	$ 280

Example 3. A very high income donor with an adjusted gross income of $250,000.

	Prior	After TRA '86
Fair Market Value of Property	$1,000	$1,000
Basis of Property	− 0	− 0
Gain	$1,000	$1,000
Capital Gain Deduction	− 600	− 0
Taxable Gain	$ 400	$1,000
Marginal Tax Rate	x .50	x .28
Tax Savings	$ 200	$ 280

Table 3. Impact of TRA '86 on the Net After-Tax Costs to the Donor of Gifts of Highly Appreciated Long-Term Capital Property (contributions of property with 100 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income	$40,000	$100,000	$250,000
FMV of Contribution (30% A.G.I., bases = 9,600, 24,000, & 60,000)	12,000	30,000	75,000
1986 T.I. (w/o contribution)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/contribution)	24,200	66,200	171,200
1988 T.I. (w/)	24,100	66,100	171,100
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	22%	42%	49%
1988 Tax Bracket (w/)	15%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	3,377	17,772	67,000
1988 Inc. Tax Liab. (w/)	3,615	14,640	44,040
1988 Tentative A.M.T.	-0-	12,600	44,100
1988 A.M.T. (Tent. A.M.T. - Regular Inc. Tax)		-0-	+60
1986 Net After-Tax Cost to Donor*	8,773	17,082	37,550
1988 Net After-Tax Cost to Donor*	9,375	21,600	54,060
Change Expressed as a Percentage	+7%	+26%	+44%

*FMV of Contribution — (Inc. Tax Liab. w/o Contribution — Inc. Tax Liab. w/ Contribution — Alternative Minimum Tax)

Note: There is no change in the results for relatively unappreciated property because the differences between appreciated and relatively unappreciated property only become significant when the capital gains aspects of the contribution are considered.

Table 4. Impact of TRA '86 on Contributions of "Asset Land" Property with 100% Appreciation.

Example 1. A donor with an annual income of $40,000, who was before and is now in the 28 percent tax bracket, contributes property purchased for $12,000 and now worth $24,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$24,000		
Less capital gains tax* (11.2% of $12,000)	1,344		0
Net contribution	22,656		24,000
Income tax savings (28% of contribution)	6,344		6,720
Difference		$376	
		After TRA '86	
Sale price	$24,000		
Less capital gains tax** (28% of $12,000)	3,360		0
Net contribution	20,640		24,000
Income tax savings (28% of contribution)	5,779		6,720
Difference		$941	
Change		+565 (250%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 28 percent (the marginal rate), for an effective rate of 11.2 percent of the total capital gain.
** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.
Conclusion: After TRA '86, it is even better to give contributions of "asset land" than before TRA '86.

Table 4 (cont'd). Impact of TRA '86 on Contributions of "Asset Land" Property with 100% Appreciation.

Example 2. A donor with an annual income of $100,000, who was in the 45 percent tax bracket, before TRA '86 and is in the 28 percent bracket after TRA '86, contributes property purchased for $30,000 and now worth $60,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$60,000		
Less capital gains tax* (18% of $30,000)	5,400		0
Net contribution	54,600		60,000
Income tax savings (45% of contribution)	24,570		27,000
Difference		$2430	
		After TRA '86	
Sale price	$60,000		
Less capital gains tax** (28% of $30,000)	8,400		0
Net contribution	51,600		60,000
Income tax savings (28% of contribution)	14,448		16,800
Difference		$2352	
Change		−78 (−4%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 45 percent (the marginal rate), for an effective rate of 18 percent of the total capital gain.

** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.

Conclusion: After TRA '86, it is still better to give contributions of "asset land" instead of selling the property and contributing the cash. The margin, however, is less.

Table 4 (cont'd). Impact of TRA '86 on Contributions of "Asset Land" Property with 100% Appreciation.

Example 3. A donor with an annual income of $250,000, who was in the 50 percent tax bracket before TRA '86 and is in the 28 percent bracket after TRA '86, contributes property purchased for $75,000 and now worth $150,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$150,000		
Less capital gains tax* (20% of $75,000)	15,000		0
Net contribution	135,000		150,000
Income tax savings (50% of contribution)	67,500		75,000
Difference		$7500	
		After TRA '86	
Sale price	$150,000		
Less capital gains tax** (28% of $75,000)	21,000		0
Net contribution	129,000		150,000
Income tax savings (28% of contribution)	36,120		42,000
Difference		$5880	
Change		−1620 (−22%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 50 percent (the marginal rate), for an effective rate of 20 percent of the total capital gain.

** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.

Conclusion: After TRA '86, it is still better to give contributions of "asset land" instead of selling the property and contributing the cash. The margin, however, is less.

Table 5. Impact of TRA '86 on Contributions of "Asset Land" Property with 20% Appreciation.

Example 1. A donor with an annual income of $40,000, who was before and is now in the 28 percent tax bracket, contributes property purchased for $19,200 and now worth $24,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$24,000		
Less capital gains tax* (11.2% of $4,800)	538		0
Net contribution	23,462		24,000
Income tax savings (28% of contribution)	6,569		6,720
Difference		$151	
		After TRA '86	
Sale price	$24,000		
Less capital gains tax** (28% of $4,800)	1,344		0
Net contribution	22,656		24,000
Income tax savings (28% of contribution)	6,344		6,720
Difference		$376	
Change		+225 (249%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 28 percent (the marginal rate), for an effective rate of 11.2 percent of the total capital gain.
** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.
Conclusion: After TRA '86, it is even better to give contributions of "asset land" than before TRA '86.

Table 5 (cont'd). Impact of TRA '86 on Contributions of "Asset Land" Property with 20% Appreciation.

Example 2. A donor with an annual income of $100,000, who was in the 45 percent tax bracket, before TRA '86 and is in the 28 percent bracket after TRA '86, contributes property purchased for $48,000 and now worth $60,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$60,000		
Less capital gains tax* (18% of $12,000)	2,160		0
Net contribution	57,840		60,000
Income tax savings (45% of contribution)	26,028		27,000
Difference		$972	
		After TRA '86	
Sale price	$60,000		
Less capital gains tax** (28% of $12,000)	3,360		0
Net contribution	56,640		60,000
Income tax savings (28% of contribution)	15,859		16,800
Difference		$941	
Change		−31 (−3%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 45 percent (the marginal rate), for an effective rate of 18 percent of the total capital gain.

** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.

Conclusion: After TRA '86, it is still better to give contributions of "asset land" instead of selling the property and contributing the cash. The margin, however, is less.

Table 5 (cont'd). Impact of TRA '86 on Contributions of "Asset Land" Property with 20% Appreciation.

Example 3. A donor with an annual income of $250,000, who was in the 50 percent tax bracket before TRA '86 and is in the 28 percent bracket after TRA '86, contributes property purchased for $120,000 and now worth $150,000.

	Sale of Property and Contribution of Cash		Contribution of Property
		Pre TRA '86	
Sale price	$150,000		
Less capital gains tax* (20% of $30,000)	6,000		0
Net contribution	144,000		150,000
Income tax savings (50% of contribution)	72,000		75,000
Difference		$3000	
		After TRA '86	
Sale price	$150,000		
Less capital gains tax** (28% of $30,000)	8,400		0
Net contribution	141,600		150,000
Income tax savings (28% of contribution)	39,648		42,000
Difference		$2352	
Change		−648 (−22%)	

* Under I.R.C. Section 1202 (repealed by TRA '86), the tax on long-term capital gain property is computed by adding 40 percent of the capital gain to taxable income. Here the 40 percent is taxed at 50 percent (the marginal rate), for an effective rate of 20 percent of the total capital gain.

** Under TRA '86, the tax on long-term capital gain property is computed by adding 100 percent of the capital gain to taxable income. Here the 100 percent is taxed at 28 percent (the marginal rate), for an effective rate of 28 percent of the total capital gain.

Conclusion: After TRA '86, it is still better to give contributions of "asset land" instead of selling the property and contributing the cash. The margin, however, is less.

Table 6. Impact of TRA '86 on the Net After-Tax Gains to the Seller of Highly Appreciated Long-Term Capital Property (contributions of property with 100 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income (w/o sale)	$40,000	$100,000	$250,000
Salary & Interest Income	$40,000	$100,000	$250,000
FMV of Property (Basis = 0)	12,000	30,000	75,000
Gross Income (1988 A.G.I.)	52,000	130,000	325,000
Less: Capital Gain Deduction	7,200	18,000	45,000
1986 A.G.I. (w/sale)	44,800	112,000	280,000
1986 T.I. (w/o sale)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/sale)	41,000	108,200	276,200
1988 T.I. (w/)	48,100	126,100	321,100
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	33%	45%	50%
1988 Tax Bracket (w/)	28%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	8,188	36,090	119,500
1988 Inc. Tax Liab. (w/)	9,600	31,440	86,040
1986 Net After-Tax Gain to Seller*	10,416	24,600	59,950
1988 Net After-Tax Gain to Seller*	8,640	21,600	54,000
Change Expressed as a Percentage	−17%	−12%	−10%

*FMV of Property — (Inc. Tax Liab. w/Sale — Inc. Tax Liab. w/o Sale)

Table 7. Impact of TRA '86 on the Net After-Tax Gains to the Seller of Relatively Unappreciated Long-Term Capital Property (contributions of property with 20 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income (w/o sale)	$40,000	$100,000	$250,000
Salary & Interest Income	$40,000	$100,000	$250,000
FMV of Property	12,000	30,000	75,000
Less: Basis	9,600	24,000	60,000
Capital Gain	2,400	6,000	15,000
Gross Income (1988 A.G.I.)	42,400	106,000	265,000
Less: Capital Gain Deduction	1,440	3,600	9,000
1986 A.G.I. (w/sale)	40,960	102,400	256,000
1986 T.I. (w/o sale)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/sale)	37,160	98,600	252,200
1988 T.I. (w/)	38,500	102,100	261,100
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	28%	45%	50%
1988 Tax Bracket (w/)	28%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	6,921	31,770	107,500
1988 Inc. Tax Liab. (w/)	6,912	24,720	69,240
1986 Net After-Tax Gain to Seller*	11,683	28,920	71,950
1988 Net After-Tax Gain to Seller*	11,328	28,320	70,800
Change Expressed as a Percentage	−3%	−2%	−2%

*FMV of Property — (Inc. Tax Liab. w/Sale — Inc. Tax Liab. w/o Sale)

Table 8. Impact of TRA '86 on the Net After-Tax Gains to the Seller of Highly Appreciated Long-Term Capital Property at a 60% Bargain Sale (contributions of property with 100 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income (w/o bargain sale)	$40,000	$100,000	$250,000
FMV of Property (Basis = 0)	12,000	30,000	75,000
Salary & Interest Income	$40,000	$100,000	$250,000
Capital Gain (60% of FMV)	7,200	18,000	45,000
Gross Income	47,200	118,000	295,000
Less: Capital Gain Deduction	4,320	10,800	27,000
Contribution (40% of FMV)	4,800	12,000	30,000
1986 Adjusted Gross Income (w/bargain sale)	38,080	95,200	238,000
1988 Adjusted Gross Income (w/bargain sale)	42,400	106,000	265,000
1986 T.I. (w/o bargain sale)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/sale)	34,280	91,400	234,200
1988 T.I. (w/)	38,500	102,100	261,100
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	28%	42%	50%
1988 Tax Bracket (w/)	28%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	6,016	28,530	98,500
1988 Inc. Tax Liab. (w/)	6,912	24,720	69,240
1988 Tentative A.M.T	504	13,860	47,250
1988 Actual A.M.T.	-0-	-0-	-0-
1986 Net After-Tax Gain to Seller*	7,788	20,160	50,950
1988 Net After-Tax Gain to Seller*	6,528	16,320	40,800
Change Expressed as a Percentage	−16%	−19%	−20%

*FMV of Property — (Inc. Tax Liab. w/Sale — Inc. Tax Liab. w/o Sale — Alternative Minimum Tax) — (FMV of Property — Capital Gain Value of Property)

Table 9. Impact of TRA '86 on the Net After-Tax Cost/Gains to the Seller of Relatively Unappreciated Long-Term Capital Property at a 60% Bargain Sale (contributions of property with 20 percent appreciation).

	Moderate Income	High Income	Very High Income
A.G.I. (w/o bargain sale)	$40,000	$100,000	$250,000
FMV of Property	12,000	30,000	75,000
Salary & Interest Income	$40,000	$100,000	$250,000
Capital Gain (60% of 20% of FMV)	1,440	3,600	9,000
Gross Income	41,440	103,600	259,000
Less: Capital Gain Deduction	864	2,160	5,400
Contribution (40% of FMV)	4,800	12,000	30,000
1986 A.G.I. (w/bargain sale)	35,776	89,440	223,600
Salary & Interest Income	$40,000	$100,000	$250,000
Capital Gain (60% of FMV)	1,440	3,600	9,000
Gross Income	41,440	103,600	259,000
Contribution (40% of FMV)	4,800	12,000	30,000
1988 A.G.I. (w/bargain sale)	36,640	91,600	229,000
1986 T.I. (w/o bargain sale)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/sale)	31,976	85,640	219,800
1988 T.I. (w/)	32,740	87,700	225,100
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	25%	42%	50%
1988 Tax Bracket (w/)	28%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	5,371	25,938	91,300
1988 Inc. Tax Liab. (w/)	5,299	20,688	59,160
Tentative A.M.T	302	15,456	45,990
Actual A.M.T.	-0-	-0-	-0-
1986 Net After-Tax Gain to Seller*	2,673	8,352	22,150
1988 Net After-Tax Gain to Seller*	2,381	5,952	14,880
Change Expressed as a Percentage	−11%	−29%	−33%

*FMV of Property — (Inc. Tax Liab. w/Sale — Inc. Tax Liab. w/o Sale — Alternative Minimum Tax) — (FMV of Property — Capital Gain Value of Property)

Table 10. Impact of TRA '86 on the Net After-Tax Costs to the Doners of Gifts of the Remainder Interest of Highly Appreciated Long-Term Capital Property (contributions of property with 100 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income	$40,000	$100,000	$250,000
FMV of Contribution*	3,360	8,399	20,999
1986 T.I. (w/o contribution)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/contribution)	34,840	87,801	225,201
1988 T.I. (w/)	32,740	87,701	224,101
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	22%	42%	50%
1988 Tax Bracket (w/)	28%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	5,613	26,910	94,000
1988 Inc. Tax Liab. (w/)	5,300	20,689	58,881
1988 Tentative A.M.T	-0-	12,600	44,100
1988 Actual A.M.T.		-0-	-0-
1986 Net After-Tax Cost to Donor**	2,369	4,619	10,549
1988 Net After-Tax Cost to Donor**	2,420	6,047	14,840
Change Expressed as a Percentage	+2%	+31%	+41%

* Under Treasury Regulation 26 C.F.R. Section 1.170A-12(b), the value of a remainder interest in real property following one life is determined under Treasury Regulation 26 C.F.R. Section 25.2512-5 of the Gift Tax Regulations. The study assumes in this calculation that the donor is 62 years old. Accordingly, the value of the remainder interest, and thus the amount eligible for an income tax deduction under I.R.C. Section 170(f), is .27998 x FMV.

** FMV of Contribution — (Inc. Tax Liab. w/o Contribution — Inc. Tax Liab. w/ Contribution — Alternative Minimum Tax)

Note: There is no change in the results for relatively unappreciated property because the differences between appreciated and relatively unappreciated property only become significant when the capital gains aspects of the contribution are considered.

Table 11. Impact of TRA '86 on the Net After-Tax Costs to the Doner of Gifts of the Conservation Easements of Highly Appreciated Long-Term Capital Property (contributions of property with 100 percent appreciation).

	Moderate Income	High Income	Very High Income
Adjusted Gross Income	$40,000	$100,000	$250,000
FMV of Contribution*	8,400	21,000	52,500
1986 T.I. (w/o contribution)	36,200	96,200	246,200
1988 T.I. (w/o)	36,100	96,100	246,100
1986 T.I. (w/contribution)	27,800	75,200	193,700
1988 T.I. (w/)	27,700	75,100	193,600
1986 Tax Bracket (w/o)	28%	45%	50%
1988 Tax Bracket (w/o)	28%	28%	28%
1986 Tax Bracket (w/)	25%	42%	50%
1988 Tax Bracket (w/)	15%	28%	28%
1986 Inc. Tax Liab. (w/o)	6,604	30,690	104,450
1988 Inc. Tax Liab. (w/o)	6,240	23,040	65,040
1986 Inc. Tax Liab. (w/)	4,265	21,552	78,250
1988 Inc. Tax Liab. (w/)	4,155	17,160	50,340
1988 Tentative A.M.T	-0-	12,600	44,100
1988 A.M.T. (Tent. A.M.T. - Regular Inc. Tax)		-0-	-0-
1986 Net After-Tax Cost to Donor**	6,061	11,862	26,300
1988 Net After-Tax Cost to Donor**	6,315	15,120	37,800
Change Expressed as a Percentage	+4%	+27%	+44%

* The study assumes in this calculation that the FMV of the easement is worth 70% of the FMV of the property.
** FMV of Contribution — (Inc. Tax Liab. w/o Contribution — Inc. Tax Liab. w/ Contribution — Alternative Minimum Tax)
Note: There is no change in the results for relatively unappreciated property because the differences between appreciated and relatively unappreciated property only become significant when the capital gains aspects of the contribution are considered.

Table 12. Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property.

Example 1. Persons of Moderate Income. Gifts/Sales of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$52,000	$47,200	$40,000
Less: Taxes	8,188	6,016	3,377
Net cash return after taxes	43,812	41,184	36,623
Net cost of donation		$ 2,628	$ 7,189
After TRA '86			
Gross Income	$52,000	$47,200	$40,000
Less: Taxes	9,600	6,912	3,615
Net cash return after taxes	42,400	40,288	36,385
Net cost of donation		$ 2,112	$ 6,015

Example 2. Persons of Moderate Income. Gifts/Sales of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$52,000	$47,200	$40,000
Less: Taxes	6,921	5,371	3,377
Net cash return after taxes	45,079	41,829	36,623
Net cost of donation		$ 3,250	$ 8,456
After TRA '86			
Gross Income	$52,000	$47,200	$40,000
Less: Taxes	6,912	5,299	3,615
Net cash return after taxes	45,088	41,901	36,385
Net cost of donation		$ 3,187	$ 8,703

Table 12 (cont'd). Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property.

Example 3. Persons of High Income. Gifts/Sales of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$130,000	$118,000	$100,000
Less: Taxes	36,090	28,530	17,772
Net cash return after taxes	93,910	89,470	82,228
Net cost of donation		$ 4,440	$ 11,682
After TRA '86			
Gross Income	$130,000	$118,000	$100,000
Less: Taxes	31,440	24,720	14,640
Net cash return after taxes	98,560	93,280	85,360
Net cost of donation		$ 5,280	$ 13,200

Example 4. Persons of High Income. Gifts/Sales of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$130,000	$118,000	$100,000
Less: Taxes	31,770	25,938	17,772
Net cash return after taxes	98,230	92,062	82,228
Net cost of donation		$ 6,168	$ 16,002
After TRA '86			
Gross Income	$130,000	$118,000	$100,000
Less: Taxes	24,720	20,688	14,640
Net cash return after taxes	105,280	77,312	85,360
Net cost of donation		$ 27,968	$ 19,920

Table 12 (cont'd). Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property.

Example 5. Persons of Very High Income. Gifts/Sales of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$325,000	$295,000	$250,000
Less: Taxes	119,500	98,500	67,000
Net cash return after taxes	205,500	196,500	183,000
Net cost of donation		$ 9,000	$ 22,500
After TRA '86			
Gross Income	$325,000	$295,000	$250,000
Less: Taxes	86,040	69,240	44,100
Net cash return after taxes	238,960	225,760	205,900
Net cost of donation		$ 13,200	$ 33,060

Example 6. Persons of Very High Income. Gifts/Sales of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	Land Sale	60 Percent Bargain Sale	Donation
Pre TRA '86			
Gross Income	$325,000	$295,000	$250,000
Less: Taxes	107,500	91,300	67,000
Net cash return after taxes	217,500	203,700	183,000
Net cost of donation		$ 13,800	$ 34,500
After TRA '86			
Gross Income	$325,000	$295,000	$250,000
Less: Taxes	69,240	59,160	44,040
Net cash return after taxes	255,760	235,840	205,960
Net cost of donation		$ 19,920	$ 49,800

Table 13. Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property.

Example 1. Persons of Moderate Income. Gifts of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$40,000	$40,000	$40,000
Less: Taxes	6,604	5,613	4,265
Net cash return after taxes	33,396	34,387	35,735
Value of gift to donor		$ 991	$ 2,339
After TRA '86			
Gross Income	$40,000	$40,000	$40,000
Less: Taxes	6,240	5,300	4,155
Net cash return after taxes	33,760	34,700	35,845
Value of gift to donor		$ 940	$ 2,085

Example 2. Persons of Moderate Income. Gifts of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$40,000	$40,000	$40,000
Less: Taxes	6,604	5,613	4,265
Net cash return after taxes	33,396	34,387	35,735
Value of gift to donor		$ 991	$ 2,339
After TRA '86			
Gross Income	$40,000	$40,000	$40,000
Less: Taxes	6,240	5,300	4,155
Net cash return after taxes	33,760	34,700	35,845
Value of gift to donor		$ 940	$ 2,085

Table 13 (cont'd). Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property (continued).

Example 3. Persons of High Income. Gifts of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$100,000	$100,000	$100,000
Less: Taxes	30,690	26,910	21,552
Net cash return after taxes	69,310	73,090	78,448
Value of gift to donor		$ 3,780	$ 9,138
After TRA '86			
Gross Income	$100,000	$100,000	$100,000
Less: Taxes	23,040	20,689	17,160
Net cash return after taxes	76,960	79,311	82,840
Value of gift to donor		$ 2,351	$ 5,880

Example 4. Persons of High Income. Gifts of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$100,000	$100,000	$100,000
Less: Taxes	30,690	26,910	21,552
Net cash return after taxes	69,310	73,090	78,448
Value of gift to donor		$ 3,780	$ 9,138
After TRA '86			
Gross Income	$100,000	$100,000	$100,000
Less: Taxes	23,040	20,689	17,160
Net cash return after taxes	76,960	79,311	82,840
Value of gift to donor		$ 2,351	$ 5,880

Table 13 (cont'd). Impact of TRA '86 on the Comparative Net Costs to the Donor of the Various Techniques for Contributing Property (continued).

Example 5. Persons of Very High Income. Gifts of Highly Appreciated Property (contributions of property with 100 percent appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$250,000	$250,000	$250,000
Less: Taxes	104,450	94,000	78,250
Net cash return after taxes	145,550	156,000	171,750
Value of gift to donor		$ 10,450	$ 26,200
After TRA '86			
Gross Income	$250,000	$250,000	$250,000
Less: Taxes	65,040	58,881	50,340
Net cash return after taxes	184,960	191,119	199,660
Value of gift to donor		$ 6,159	$ 14,700

Example 6. Persons of Very High Income. Gifts of Relatively Unappreciated Property (contributions of property with 20% appreciation).

	W/O Donation	Donation of Remainder	Donation of Easement
Pre TRA '86			
Gross Income	$250,000	$250,000	$250,000
Less: Taxes	104,450	94,000	78,250
Net cash return after taxes	145,550	156,000	171,750
Value of gift to donor		$ 10,450	$ 26,200
After TRA '86			
Gross Income	$250,000	$250,000	$250,000
Less: Taxes	65,040	58,881	50,340
Net cash return after taxes	184,960	191,119	199,660
Value of gift to donor		$ 6,159	$ 14,700