



January 4, 2007

The Honorable Steven T. Miller  
Commissioner, Tax Exempt and Government Entities Division  
Internal Revenue Service  
750 Pennsylvania Avenue, NW  
Washington, DC 20006

Dear Commissioner Miller:

The Land Trust Alliance represents the interests of the more than 1,600 land conservation nonprofits, many of whom solicit donations of conservation easements to protect natural and historic resources on private lands. We greatly appreciate the attention you have given to land conservation charities and their work.

We worked closely with Congress in developing provisions in sections 1206 and 1219 of H.R. 4, the Pension Protection Act (PPA), which changed the law affecting the tax treatment of donations of conservation easements and other "qualified conservation contributions."

We want to express our thanks to the Internal Revenue Service (IRS) for providing transitional guidance as set forth in Notice 2006-96: Guidance Regarding Appraisal Requirements for Non-cash Charitable Contributions (published in Internal Revenue Bulletin 2006-46, November 13, 2006). We are strongly supportive of the direction provided by this particular notice, and we look forward to working with you on further guidance and regulations in this area.

Section 1206 of the PPA was clearly intended to increase the incentive for many taxpayers to make such donations, and affects donations made as early as January 1, 2006. But as conservation nonprofits, landowners, and their financial and legal advisors have examined the new provisions, they have uncovered many issues that, if not resolved in a timely way, could frustrate the intent of the new law.

Donations of conservation easements involve complex decisions by donors and nonprofits, agreement on a perpetual contract that will bind the landowner and all his or her successors in ownership, and appraisals that require

detailed examination of the contract and the property it affects. This process can, and should, take time.

Prompt further guidance from the IRS on the use of the new provisions is needed to enable donors to start this process, since section 1206 of PPA will expire at the end of 2007 without further action by Congress.

The purpose of this communication is to describe issues that have come to our attention in regard to interpretation of section 1206 of the PPA, in the hopes that you may help us guide taxpayers in the fair and proper application of these new provisions. That need is even more important because of the wide distribution of summaries of the legislation in the popular press and elsewhere that we believe are clearly incorrect.

While IRS data shows that the number of conservation easements donated each year is small (2,407 in tax year 2003), the value of those donations is extraordinary, with an average value three times that of any other category of non-cash donations. We hope the IRS will be able to provide guidance that will help these donors and the donees they work with.

On the following pages, we provide a review of what we believe to be the most important points and issues of concern.

Thank you for considering these issues.

Sincerely,

Russell Shay  
Director of Public Policy  
Land Trust Alliance  
1331 H Street, NW , Suite 400  
Washington, DC 20005  
202-638-4725 x 305  
rshay@lta.org

cc: Eric San Juan  
Susan Brown  
Lois G. Lerner  
Catherine Livingston  
Thomas Luxner  
Karin Gross

## TABLE OF CONTENTS

Issue	Page
I. Applicability of deduction to gifts in fee	4
II. Restriction on Gifts of Historic Preservation Easements	5
III. Defining Qualified Farmer or Rancher at the Entity or Individual Level	6
IV. Qualified Farmer or Rancher and Definitions of Gross Income	7
V. Additional Gross Income Definitional Concerns	9
VI. Farmer/Rancher Property Must Remain Available for Agricultural or Livestock Production	12
VII. Other "Qualified Real Property Interests"	15

**Issue I:** Applicability of deduction to gifts in fee

**Background:** Newly amended IRC §170(b) provides enhanced deductions for a "qualified conservation contribution", which is defined in IRC §170(h)(1) as one of three differing gifts of partial interests in real estate.

**Concern:** As much as the Land Trust Alliance might like section 1206 to apply to donations of land in fee, we read this new provision as applying only to donations of partial interests in land meeting the definition of a "qualified real property interest" in IRC §170(h). Despite our interpretation, we have found it difficult to convince some financial and tax advisors that Congress gave a higher benefit to donors of a partial interest than to donors who gave their entire interest. More specifically, some taxpayers have, for example, read IRC §170(h)(2)(A), which reads "the entire interest of the donor other than a qualified mineral interest," to include the entire interest of the donor, whether or not a mineral interest is withheld.

**Discussions and Recommendations:** To minimize misunderstanding and potential misapplication of this new rule, it would be very helpful if the IRS were to issue a statement clarifying that section 1206 does not apply to donations of land in fee or to donations of a donor's entire interest in land, but only to donations defined in section 170(h)(2) and meeting the requirements of Reg. 1.170A-14.

## **Issue II:** Restriction on Gifts of Historic Preservation Easements

**Background:** Newly amended IRC 170(h)(4)(C) makes changes that remove one reference to “land area” (and leave one in) in the definition of “certified historic structure.”

**Concern:** One widely-circulated summary of the new legislation led many people to believe that one could not take a deduction for a donation of a conservation easement on land in an historic district.

**Discussions and Recommendations:** We believe the above-referenced interpretation is not the intent of the law, and that an easement on land in an historic district is deductible if it qualifies as either an "historically important land area", as provided in IRC 170(h)(4)(A)(iv) and further defined in Reg. 1.170A-14(d)(5)(ii), or as a land area listed in the National Register of Historic Places and therefore qualifying under IRC 170(h)(4)(C)(i) [as amended by section 1213(b) of the PPA].

A statement by the IRS that one can continue to take a deduction for a donated conservation easement that protects a historic land area under either of these two separate qualifying provisions of the Code—regardless of whether such area is inside or outside of a registered historic district—would be very helpful.

### **Issue III:** Defining Qualified Farmer or Rancher at the Entity or Individual Level

**Background:** New IRC §170(b)(E)(v) defines “qualified farmer or rancher” as “a taxpayer whose gross income from the trade or business of farming... is greater than 50 percent of the taxpayer’s gross income for the taxable year. As enacted, this section does not specifically address the treatment of various kinds of pass-through entities that may be in the business of farming or ranching.

**Concern:** In the case of pass-through entities that conduct farming or ranching, at what level does the 50 percent of gross income requirement apply?

**Discussions and Recommendations:** Since the law refers to a qualified farmer or rancher as “a taxpayer”, we believe that the gross income of S-corporations, partnerships, limited liability companies, and other pass-through entities that own and operate farm businesses should be irrelevant, and that the 50 percent qualification requirement should be calculated at the level of each individual taxpayer who is a stockholder, partner, or member in the pass-through entity.

We recognize that this interpretation may mean that some family members of a family-owned farm organized as an S-Corporation or partnership may not qualify for the 100 percent of AGI deduction limit by virtue of outside income, at the same time that other stockholders or partners do qualify.

While such a characterization for income-tax purposes at the individual taxpayer level is the exception, rather than the rule, it is not without precedent and is generally consistent with the concept of “material participation” that appears elsewhere in the code [see, for example, section 469, with respect to passive activity losses, and section 56, alternative minimum tax adjustments, in particular section 56(b)(2)(D)].

In addition, performing the calculation at the individual taxpayer level is more consistent with the intent of the statute than allowing ownership of a farm by an entity to lead to a 100 percent of AGI deduction for partners or stockholders whose income is not primarily from farming. Performing the required calculation at the farm entity level could lead to investments in agricultural operations solely for the purpose of qualifying for an income-tax benefit intended for working farmers and ranchers.

#### **Issue IV: Qualified Farmer or Rancher and Definitions of Gross Income**

**Background:** The PPA enhances the incentives for "qualified conservation contributions" of capital gain real property made for conservation purposes. Generally speaking, the new enhancements increase the IRC §170 percentage limitations and the years available to carryover any excess contributions. The incentives are further enhanced for taxpayers who meet the definition of a "qualified farmer or rancher."

New IRC §170(b)(1)(E)(v) defines a "qualified farmer or rancher" as "a taxpayer whose "gross income from the trade or business of farming (within the meaning of section 2032A(e)(5)) is greater than 50 percent of the taxpayer's gross income for the taxable year."

IRC §2032A(e)(5) states:

- “(5) The term "farming purposes" means -
- (A) cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;
  - (B) handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated; and
  - (C)(i) the planting, cultivating, caring for, or cutting of trees, or (ii) the preparation (other than milling) of trees for market.”

**Concern:** There is presently considerable uncertainty as to how this calculation should be made – and thus, uncertainty over whether or not a taxpayer is a “qualified farmer or rancher.” Guidance on how to make this important calculation is critically important to this provision working as it was intended. The new law does not directly define either how to calculate gross income from the trade or business of farming, or to calculate “the taxpayer’s gross income for the taxable year.”

**Discussions and Recommendations:** “Gross income from the trade or business of farming” could have been defined by reference to any number of other sections in the Internal Revenue Code, and it is informative to look at those other definitional choices for contrast with the definition provided in IRC §2032A(e)(5).

By way of illustration, Reg.1.175-3 provides a definition of “the business of farming.” IRC 2032A(e)(5) differs from this definition in that it includes forestry (subparagraph (C)).

A different definition of the business of farming is used in defining eligibility for income averaging (see the instructions for Schedule J, which include raising ornamental trees and sharecropping rentals, but not income from timber sales, in its definition). There are other examples.

Generally, we recommend that a taxpayer's "gross income from the trade or business of farming" be based on the calculation of gross income on Schedule F, line 11 or line 51, with the addition of gross income (not gain) from forestry and from sales of livestock and other farm products reported on Form 4797.

We believe this is consistent with the intent of section 1206, which clearly is looking to select working farmers and ranchers for special treatment. We believe the use of the term "gross income" was quite deliberate by the drafters of section 1206, and that they were seeking to measure the extent of the engagement of the taxpayer in agricultural enterprises, rather than the profitability of those enterprises.

Administratively, this approach takes advantage of already existing forms and substantial IRS guidance that is readily available (including the Farmer's Tax Guide, IRS Publication 225). In addition, there is a significant history of taxpayer and tax advisor experience with the use of these forms. Consistency with Schedule F will both simplify the burden for taxpayers and make it easier for the IRS to review the calculation of whether or not a taxpayer satisfies the definition of a "qualified farmer or rancher."

Using this definition will probably require that, for purposes of determining if a taxpayer is a "qualified farmer or rancher", a taxpayer must utilize the same accounting method (cash or accrual) that they utilize on Schedule F.

The definition of a "qualified farmer or rancher" also requires the taxpayer to determine their total "gross income for the taxable year." Unfortunately, there is no calculation labeled as such on Form 1040. We would recommend that taxpayers be directed to use their Adjusted Gross Income (Form 1040, line 37) as their "gross income for the taxable year". This is consistent with the use of Adjusted Gross Income as the marker for limits on charitable deductions. Another alternative would be their "total income" (Form 1040, line 22).

We recognize that in either case, a farmer's "gross income from the trade or business of farming" is not a direct component of their overall "gross income for the taxable year". Despite this, the calculation we have suggested would, in fact, provide a clear indication of the degree of engagement of the taxpayer in "the trade or business of farming," which is clearly the intent of the law. To require an entirely new calculation of a taxpayer's gross income, or of their "gross income from the trade or business of farming" that did not rely on clearly defined, already existing forms and information would raise far more questions than it would settle, lead to a myriad of interpretations by individual taxpayers, and probably make meaningful guidance from the IRS impossible to achieve in a timely manner for donations to be made in the 2006 and 2007 tax years.

**Issue V:** Additional Gross Income Definitional Concerns.

**Background:** New IRC §170(b)(1)(E)(v) defines a “qualified farmer or rancher” as “a taxpayer whose gross income from the trade or business of farming (within the meaning of section 2032A(e)(5)) is greater than 50 percent of the taxpayer’s gross income for the taxable year.”

IRC §2032A(e)(5) states:

- “(5) The term “farming purposes” means -
- (A) cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;
  - (B) handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated; and
  - (C)(i) the planting, cultivating, caring for, or cutting of trees, or (ii) the preparation (other than milling) of trees for market.”

**Concern:** Unfortunately, IRC 2032A(e)(5) was not drafted to categorize farm income, leaving great uncertainty about what should and should not count in the calculation of one’s gross income from the trade or business of farming. Guidance on how to make this important calculation is critically important to this provision working as it was intended.

**Discussions and Recommendations:** Listed below are a number of specific questions directly related to what should and should not be included as “gross income from the trade or business of farming”, with specific recommendations, often following the Farmer’s Tax Guide:

1. Rental Income. We think that rental income reported on Schedule F clearly should count as part of gross farming income. This rental income is generated from arrangements where the taxpayer can demonstrate “material participation in the operation of the farm” (see pages 9 and 74 of the Farmer’s Tax Guide). That “material participation” ensures that the income is, in fact, from “cultivating the soil or raising or harvesting any agricultural or horticultural commodity ... on a farm.”
2. Caring for Another's Livestock. Similarly, if a taxpayer pastures someone else’s cattle and takes care of the livestock for a fee, that income is reported on Schedule F, and clearly should count as “raising ... animals... on a farm.”
3. Farm Program Payments. Farm program payments should be included in the definition. These payments are an important form of farm income. They are included in Schedule F (see Farmers Tax Guide, pages 10-14) and, in all cases where they are reported on Schedule F,

the payments directly derive from farming activities on a farm operated by the taxpayer. There are farm program payments made to taxpayers who are no longer farming their land, but these would not generally be reported by those taxpayers on Form F.

4. Net Income From Sale of Livestock. On Form F, one reports only net income from the purchase and sale of livestock held less than one year. We recommend this same treatment be required for the calculation of "gross income from the trade or business of farming" for section 1206. It certainly would not meet the spirit and intent of the law for a person to be a "qualified farmer or rancher" by virtue of purchasing \$1 million of livestock and selling it two days later for the same price.
5. Sale of a Conservation Easement. It would be very good for conservation if the sale of a conservation easement on a farm property (in conjunction with a "bargain sale" of that easement that included a substantial donation component) were included in gross farm income. If it is not, the gain from the sale of an easement on farmland would likely disqualify a farmer or rancher, and make the favorable terms applying to a "qualified farmer or rancher" unavailable to the seller. There are hundreds of such transactions every year, so guidance on this issue would be useful. In raising this issue, we recognize that the income from the sale of farmland (or sale of a conservation easement) is not generally reported on Schedule F and that the sale of a conservation easement is not an activity a taxpayer is involved in "with continuity and regularity", as is usual with "income from a trade or business."
6. Conservation Reserve Program Payments. We recommend that Conservation Reserve Program payments count as part of gross farm income. Farmers enrolling their land in the Department of Agriculture's Conservation Reserve Program (CRP) receive payments for refraining from farming their property and for engaging in certain conservation practices set out by the Department of Agriculture. While these payments are described in the contract with the Department of Agriculture as "rental payments," the IRS has maintained that, when the payments are received by a farmer actively managing the land under rental (for example, to carry out the conservation practices prescribed by the program), the payments are income from the trade or business of farming, should be reported on Schedule F, and thus are subject to self-employment taxes. The Sixth Circuit endorsed this view of the payments in Wuebker v. Commissioner, 205 F.3d 897 (6th Cir.2000).
7. Hunting and Fishing Income. Many agricultural landowners actively manage their lands to produce income from fees to permit hunting and/or fishing on their property. In many parts of the country, the revenue from these activities constitutes an important part of farmers' income. In Sparre vs. Commissioner [CCH Dec. 36,782(M)] the Tax

Court ruled that the Sparres were engaged in wildlife management activity with the intent to make a profit, and that their farming and hunting activities were a single activity because of the integrated operation of the farm and its leasing of hunting rights. At the same time, it is possible for a landowner to have a guiding business that is not at all related to their own property. We recommend that income from hunting and fishing on the taxpayer's property be included in "gross income from the trade or business of farming."

8. Sale of Farm Products Not Held Primarily for Sale. There are a number of instances where other types of farm income clearly fit the description of activities in IRC §2032A(e)(5), but are not included on schedule F. Specifically, we recommend that "gross income from the trade or business of farming" include gross income (not gain) from the sale of farm products that are not held primarily for sale, such as livestock held for draft, breeding, sport, or dairy purposes (this income is normally reported on Form 4797).
9. Sale of Timber. Timber sale revenue is also generally reported on Form 4797. We recognize, however, that taxpayers may report timber sales on this form that are not timber sales on land they own. A sensible restriction would be to require that only timber sales on land owned by the taxpayer count toward "gross income from the trade or business of farming." In doing so, it is important to note that the legislation does not require that there be a conservation restriction on all of the land owned by a qualified farmer or rancher in order to take advantage of section 1206. In following that logic, timber sale income on land owned by a taxpayer should count toward the calculation of "gross income from the trade or business of farming," regardless of whether that timberland is to be restricted by the gift of a conservation restriction. The income calculation is only intended to determine if a taxpayer is a working farmer or rancher, not the degree of the taxpayer's interest in conservation.

## **Issue VI: Farmer/Rancher Property Must Remain Available for Agricultural or Livestock Production**

**Background:** The PPA adds a new provision, IRC §170(b)(E)(iv)(II), that adds an additional condition for eligibility to receive the 100 percent of adjusted gross income deduction limitation for a “qualified conservation contribution” by a “qualified farmer or rancher.” It requires that these terms “shall not apply to any contribution of property made after the date of enactment of this paragraph which is used in agriculture or livestock production (or available for such production) unless such contribution is subject to a restriction that such property remain available for such production.”

**Concern:** Most conservation easements protecting farm and ranch properties cover a variety of lands, including lands not in cultivation or other active agricultural use. Section 170(b)(E)(iv)(II) raises a number of issues with respect to how a conservation restriction must treat such areas in order to qualify for the 100 percent of AGI deduction limit.

### **Discussions and Recommendations:**

Conservation easements generally severely restrict or prohibit activities that are inconsistent with continuation of agriculture, including residential and industrial development. So long as the easement does not also generally prevent activities necessary for continued agricultural use (such as grazing of livestock or plowing of fields already in production), such an easement should achieve the purpose of section 170(b)(E)(iv)(II).

The language of the statute requires that the contribution must be "subject to a restriction that such property remain available for such [agricultural] production." The phrasing is a bit confusing as the contribution is, itself, a restriction on the landowner. What this language requires, then, is not an additional restriction on the landowner to be enforced by the donee, but a restriction on the restriction that applies to the landowner. We recommend that this result is best accomplished through a reservation of rights (to continue agricultural production) to the landowner. We would recommend that this reservation be explicit in the easement document.

It is important to note that conservation easements on farmland may well include parts of the property clearly not directly “available for agricultural production,” starting with a farmhouse, roads, shade trees, driveway, etc. We believe it is reasonable to allow an easement donated by a qualifying farmer or rancher to include such parts of the property, given that they are essential and integral parts of most family farm properties. Excluding them serves no public purpose and adds considerable cost to the donor and donee, as they would have to survey the exclusion, undertake a much more complicated appraisal of the easement donation (as it would have to divide what is generally marketable as one property into two or more properties, and then separately consider enhancement of the value of the excluded properties), and it would complicate monitoring and enforcement.

Easements protecting farmland also often protect land that is not currently in agricultural production, but has important value for wildlife and for soil and water protection. Such values are integrated into most farm and ranch operations. A good example is a sensitive riparian area that a landowner may have fenced to exclude livestock to protect water quality. The US Department of Agriculture actively supports such management activities by farmers through a variety of programs such as the Environmental Quality Improvements Program and Wildlife Habitat Improvement Program.

This common practice raises again the question of whether the reservation of the right to utilize the property for agriculture must apply to every square foot of the property, or whether reasonable restrictions on agricultural activity, consistent with continued use of the property as a whole for agriculture, are allowed.

For example, let us take a case where a qualified farmer or rancher is donating an easement on his 1,000 acre ranch, which includes 50 acres that are an important big game habitat.

Though in some sense these lands are “available for agriculture”, in that there may be no law or prior restriction preventing the farmer from plowing the 50 acres, we believe it would serve the public interest to allow the farmer to restrict the use of that 50 acres to preclude agricultural production, so long as that restriction does not materially impair the viability of agriculture on the property as a whole.

Not allowing such restrictions in the easement might make it difficult or impossible to meet the requirement of Reg. 1.170A-14(e)(2), that prohibits deductions for conservation restrictions that “would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests.” The example in the regulation is, pointedly, of a farmland protection easement that would allow uses that could have “injured or destroyed” a “significant naturally occurring ecosystem.”

Not being able to meet this test in the regulations could prevent many farmers wishing to protect both their farm operations, but also important non-agricultural resources on those farms, from doing so.

A careful reading of the explanation of the provision by the Joint Committee on Taxation (JCT-x-38-06, page 277) bears out this interpretation (emphasis added):

As an additional condition of eligibility for the 100 percent limitation, with respect to any contribution of property in agriculture or livestock production, or that is available for such production, by a qualified farmer or rancher, the qualified real property interest must include a restriction that the property remain generally available for such production. (There is no requirement as to any specific use in agriculture or farming, or necessarily that the property be used for such

purposes, merely that the property remain available for such purposes.) Such additional condition does not apply to contributions made after December 31, 2005, and on or before the date of enactment.

We read this language to mean that not every acre of a property put under easement must remain available for agricultural production in order to qualify for the 100 percent limitation, so long as the property, as a whole, remains “generally available for such production.”

It would also be useful to provide guidance that if a taxpayer qualifies as a “qualified farmer or rancher” and owns two properties, one of which is used for agriculture and another of which is not, the taxpayer should qualify for the 100 percent deduction for donation of a qualifying conservation contribution on the latter property, so long as the contribution “is subject to a restriction that property remain available for such (agricultural) production.”

We believe that this interpretation of the law is rational, given that the benefit is structured to enable conservation by a certain class of taxpayer, rather than targeting particular parcels of land. A growing number of agricultural operations consist of multiple parcels of land, some of which, even if they do not produce agricultural income in any one year (woodlots being one good example), are often an important asset to the farmer. Again, to cite the JCT report “There is no requirement as to any specific use in agriculture or farming, or necessarily that the property be used for such purposes, merely that the property remain available for such purposes.”

## **Issue VII: Other “Qualified Real Property Interests”**

**Background:** Historically, most qualified conservation contributions have consisted of “a restriction (granted in perpetuity) on the use which may be made of real property” – conservation easements. The new provisions enacted in section 1206 of the PPA, however, apply to donations of all three of the “qualified real property interests”, which, in addition to that mentioned above, include “a remainder interest” and “the entire interest of the donor other than a qualified mineral interest.”

**Concern:** Donations of these other interests may substantially increase because of the favorable treatment conferred by section 1206 of the PPA, but because relatively little use has been made of these other qualified real property interests in the past, taxpayers will need guidance on their use.

### **Discussions and Recommendations:**

#### Remainder Interests:

Under 170(h)(2)(B) “a remainder interest [in real property]” qualifies as a qualified conservation contribution. However, Reg. 1.170A-14(g)(1) provides that in the case of such a donation, “the contribution will not qualify if the tenants, whether they are tenants for life or a term of years, can use the property in a manner that diminishes the conservation values which are intended to be protected by the contributions.”

We would greatly appreciate guidance to the effect that the entire value of the remainder interest will be deductible (subject, of course, to the valuation provisions of IRC 170(f)(4) and Reg. 1.170A-12) if the deed of conveyance includes limitations on the use of the land to meet the conservation purposes test of section 170(h), and that this treatment will not cause the gift to be subject to a reduction in value under Revenue Ruling 85-99. This interpretation would be helpful so that a separate gift of a conservation easement, to a separate qualified organization, with the accompanying additional and more complicated appraisal of the restrictions, is not required to provide the protection of conservation values required by the regulations for a remainder interest gift. To require a reduction in the value of a remainder interest because of the restrictions the taxpayer accepts in order to see that the gift arrives with its conservation values intact seems to fly in the face of logic.

We would also appreciate guidance that a remainder interest gift qualifying under section 170(h)(2)(B) is not limited to land which serves as a personal residence or a farm, as is the general rule for remainders. Since Reg. 1.170A-7(b)(5) specifically includes “qualified conservation contributions”, we assume that a remainder interest that qualifies under 170(h) can include a remainder interest in undeveloped land.

### A Donor's Entire Interest Other Than a Qualified Mineral Interest:

Under IRC §170(h)(2)(A) a donor's entire interest other than a qualified mineral interest also is a qualified real property interest. Past use of this provision has, to the best of our knowledge, involved donations of surface estate reserving the rights to oil and gas that may be extracted with minimal surface disturbance.

Potential donors have asked us whether there is any standard for what mineral rights they must reserve in order for their gift to qualify under IRC §170(h)(2)(A), and what, if anything, must a donor do to substantiate a reserved mineral interest. Guidance from the IRS on this issue would be useful.

Please also clarify whether a deduction will be allowed where a donor divides his or her property into two separate parcels and retains parcel A with the right on this parcel to use surface methods to access subsurface minerals beneath parcel B, and then donates parcel B withholding the mineral rights to parcel B.