

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B03 – PLR-128096-03

Date:

October 09, 2003

Taxpayer =

Donee =

Corp A =

State B =

County =

Highway 1 =

River =

C =

D =

Highway 2 =

City =

E =

F =

G =

Date a =

b =

Date c =

d =

Date e =

Date f =

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h =

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H-1 =

H-2 =

H-3 =

H-4 =

H-5 =

H-6 =

H-7 =

W-1 =

W-2 =

W-3 =

Dear

This responds to your letter dated March 31, 2003, requesting a ruling on the proper federal income tax treatment of a proposed grant of a conservation easement (the "Easement") by Taxpayer to Donee, which is a supporting organization of Corp A. It is represented that the Internal Revenue Service has ruled that both Donee and Corp A are exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code.

REQUESTED RULING:

Whether the proposed contribution of the Easement by Taxpayer to Donee constitutes a "qualified conservation contribution" under § 170(h) of the Code?

APPLICABLE FACTS:

Taxpayer is a State B limited liability corporation formed on Date a for the purpose of acquiring and owning certain property in County ("Subject Tract"). The Subject Tract is largely undeveloped with a few farm-related buildings (on the Additional Tract described below) and a cabin for use by recreational hunters. Taxpayer purchased approximately b acres of the Subject Tract on Date c. Taxpayer desired to acquire an additional contiguous tract from one of its members consisting of approximately d acres (the "Additional Tract"), but the Additional Tract required further environmental testing. On Date e, Taxpayer acquired the Additional Tract.

The Subject Tract is bisected by Highway 1. The western boundary of the Subject Tract runs along River, one of the major rivers in C. The Subject Tract is located in an unincorporated portion of County, but is close to D. The eastern border of the Subject Tract runs along Highway 2.

Although the Subject Tract itself is mostly undeveloped, there is significant development in proximity to the Subject Tract.

The Baseline Environmental Documentation Report dated Date f, indicates that the Subject Tract includes g different habitat types, H-1, H-2, H-3, H-4, H-5, H-6, and H-7. W-1, W-2, and W-3 comprise the predominant wetland system on the Subject Tract. Approximately h acres of freshwater wetlands, along with an approximately i acre man-made lake are included in the Subject Tract.

Portions of the Subject Tract have been used as agricultural land since approximately Date j. The land has also been used for recreational hunting. The Baseline Documentation provides no evidence or information suggesting any other prior use of the Subject Tract other than for agricultural and hunting purposes. The Subject Tract consists mainly of agricultural fields and wooded areas. F comprise the crops found throughout the agricultural fields. Wildlife management is practiced on the Subject Tract. The H-3 areas located throughout the Subject Tract are undisturbed and have been used primarily as natural wildlife corridors. The wetland systems located within several of the wooded areas have historically remained undisturbed.

The Subject Tract supports numerous species of plants and animals identified in the Baseline Documentation. The Baseline Documentation describes several endangered, threatened and rare species that could potentially be found on the Subject

Tract. G, which is listed by State B as a species "of concern", is found on the Subject Tract.

Taxpayer proposes to grant an Easement to Donee, which is a supporting organization of Corp A. Corp A is one of the world's largest private, nonprofit waterfowl and wetland conservation organizations. Corp A and Donee are involved in numerous educational initiatives, research projects and conservation projects concerning wetlands and waterfowl conservation. Corp A and/or Donee is the grantee under numerous conservation easements.

The Subject Tract is currently rurally zoned under the County zoning ordinance. Taxpayer purchased the Subject Tract with the intention of seeking the necessary permits and approvals to develop portions of the Subject Tract as a technology office park, along with other commercial, residential and recreational uses. Notwithstanding the fact that Taxpayer planned to leave significant portions of the Subject Tract undeveloped for green space and outdoor recreational use, there was evidence almost immediately that certain conservation constituencies would resist any development of the Subject Tract. Coincidentally, in Date k, the Federal Emergency Management Agency ("FEMA") issued a proposed River flood map that included the Subject Tract and showed no portion of the Subject Tract as being in the floodway.

The grant of the proposed Easement would be consistent with numerous state and local legislative conservation initiatives. The State B Conservation Bank Act creates an agency to provide an ongoing funding source to acquire interests in land from willing sellers to meet prescribed conservation objectives. The bank is funded by a combination of legislative funding and public and private grants

The Subject Tract satisfies the following conservation criteria identified in the act: (i) conservation of unique or important wildlife habitats, (ii) conservation of any rare or endangered species, (iii) conservation of a relatively undisturbed or outstanding example of an ecosystem indigenous to State B, (iv) conservation of riparian habitats, wetlands, water quality, watersheds of significant ecological value, critical aquifer

recharge areas, estuaries, bays or beaches, (v) conservation of an area of critical forestlands, farmlands or wetlands, (vi) conservation of an area of forestlands or farmlands which are located on prime soils, and (vii) conservation of an area for public outdoor recreation, greenways, or parkland.

The Easement, in part, provides that:

Grantor and Grantee recognize the natural, scenic, aesthetic, and special character and opportunity of the [Subject Tract], and have the common purpose of the conservation and protection in perpetuity of the [Subject Tract] as a “relatively natural habitat of fish, wildlife or plants or similar ecosystem” as that phrase is used . . . section 170(h)(4)(A)(ii) of the Internal Revenue Code of 1986, as amended.

Section I of the Easement provides as follows:

It is the purpose of the Easement to assure that the [Subject Tract] will be retained in perpetuity predominantly in its natural scenic, and open condition, as evidenced by the [Baseline Documentation], for conservation purposes and to prevent any use of the [Subject Tract] which will impair significantly or interfere with the conservation values of the [Subject Tract], its wildlife habitat, natural resources or associated ecosystem (“Purpose”).

In Section 2.1 of the Easement, the Donee is given the right to enforce the terms of the Easement and to have access to the Subject Tract for such enforcement purposes.

Section 4.14 provides that the Subject Tract

will be retained in perpetuity predominantly in its natural, scenic and open condition, for conservation purposes and to prevent any use of the [Subject Tract] which will impair significantly or interfere with the conservation values of the [Subject Tract], its wildlife habitat, natural resources or associated ecosystems.

As provided in Section 4.14, any use or activity on the Subject Tract not specifically reserved in Section III of the Easement that is inconsistent with the Purpose of the Easement or that materially threatens the Purpose of the Easement is expressly prohibited.

In Section III, Taxpayer reserves certain rights. The Easement provides that the "exercise of all Reserved Rights will be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the Purpose of this Easement."

Section 5.9 of the Easement provides that the "burdens of this Easement will run with the [Subject Tract] and will be enforceable against the Grantor and all future owners in perpetuity during the period of such ownership."

Section 5.10 of the Easement permits the Donee to assign the benefits of the Easement, but only upon the following conditions: "(i) the Grantee must require that the Purpose of this Easement continues to be carried out, and (ii) the assignee, at the time of the assignment, must qualify under Section 170(h) of the Code."

LAW AND ANALYSIS

Section 170(a)(1) of the Code permits a deduction for a charitable contribution, as defined in § 170(c). Section 170(c) defines a charitable contribution as a contribution or gift to or for the use of certain qualifying organizations.

Under § 170(f)(3)(A) of the Code, a taxpayer who contributes, not in trust, less than the taxpayer's entire interest in property generally is not allowed a deduction. However, § 170(f)(3)(B)(iii) provides an exception to this rule in the case of a qualified conservation contribution. Section 170(h)(1) of the Code and § 1.170A-14(a) of the Income Tax Regulations define a "qualified conservation contribution" as a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes.

1. Qualified Real Property Interest

Section 170(h)(2)(C) of the Code defines the term "qualified real property interest" to include a restriction granted in perpetuity on the use of real property. Section 1.170A-14(b)(2) of the regulations states that a qualified real property interest includes a perpetual conservation restriction, which is a restriction granted in perpetuity on the use that may be made of real property -- including an easement.

In the present case, the proposed contribution is of an easement providing for restrictions to be imposed in perpetuity on the use of the Subject Tract, which is real property. Therefore, the contribution is of a qualified real property interest within the meaning of § 170(h)(2)(C) of the Code and § 1.170A-14(b)(2) of the Regulations.

2. Qualified Organization -- Eligible Donee

Under § 170(h)(3)(A) of the Code, the term "qualified organization" includes an organization which is described in § 170(b)(1)(A)(vi). It is represented that the Service has determined that Donee is an organization described in section 170(b)(1)(A)(vi) and, therefore, constitutes a qualified organization.

Section 1.170A-14(c)(1) of the regulations provides that for a qualified organization to be an eligible donee of a qualified conservation contribution, it must also have a commitment to protect the conservation purposes of the donation, and the resources to enforce the restrictions. It further provides that a conservation group organized or operated primarily or substantially for one of the conservation purposes specified in § 170(h)(4)(A) will be considered to have the commitment required by the preceding sentence. A qualified organization need not set aside funds to enforce the restrictions that are the subject of the contribution.

It is represented that the Donee is organized and operated primarily for the purpose of being involved in environmental matters in the United States. Donee is qualified to do business in State B and is in good standing in such state.

Under § 1.170A-14(c)(2) of the regulations, the donor must prohibit transfers of the easement by the donee, unless, subsequent to the transfer, the donee organization requires that the conservation purpose continue to be carried out, and the subsequent transferee qualifies as an eligible donee under § 1.170A-14(c)(1). The Easement contains such restrictions, and therefore, this requirement has been satisfied.

3. Conservation Purpose

Section 170(h)(1)(C) of the Code provides that a qualified conservation contribution must be exclusively for conservation purposes. Section 170(h)(4) provides that 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 where it will yield a significant public benefit; or (iv) the preservation of an historically important land area or a certified historic structure.

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

A. Protection of an Environmental System

Section 1.170A-14(d)(3)(i) of the regulations generally provides that the donation of a qualified real property interest to protect a significant relatively natural habitat in which a fish, wildlife, or plant community, or similar ecosystem normally lives will meet the conservation purposes test of this section. The fact that the habitat or environment has been altered to some extent by human activity will not result in a deduction being denied under this section if the fish, wildlife, or plants continue to exist there in a relatively natural state. For example, the preservation of a lake formed by a man-made dam or a salt pond formed by a man-made dike would meet the conservation purposes test if the lake or pond is a natural feeding area for a wildlife community that included rare, endangered, or threatened native species.

Section 1.170A-14(d)(3)(ii) provides, in part, that significant habitats and ecosystems include, but are not limited to, habitats for rare, endangered, or threatened species of animal, fish, or plants.

Section 1.170A-14(d)(3)(iii) provides that limitations on public access to property that is the subject of a donation under this paragraph (d)(3) shall not render the donation nondeductible. For example, a restriction on all public access to the habitat of a threatened native animal species protected by a donation under this paragraph (d)(3) would not cause the donation to be nondeductible.

In the present case, the Subject Tract satisfies the conservation purpose requirement under the ecosystem protection criterion of § 170(h)(4)(A)(ii) of the Code and § 1.170A-14(d)(3) of the Regulations. The Subject Tract is the actual habitat for numerous plants and animal species, including a State-listed species “of concern,” and is potentially the habitat for several endangered, threatened or rare plant and animal species. The Easement will protect such habitat.

B. The Exclusivity and Perpetuity Requirements

Section 170(h)(1)(C) of the Code provides that the contribution must be exclusively for conservation purposes. Section 170(h)(5)(A) provides that a contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity. Section 1.170A-14(g)(1) of the regulations provides that any interest retained by the donor (and the donor’s successors in interest) must be subject to legally enforceable restrictions (for example, by recordation in the land

records of the jurisdiction in which the property is located) that will prevent use of the donor's retained interest that is inconsistent with the conservation purposes of the donation. See S. Rep. No. 96-1007, at 13 (1980), 1980-2 C.B. 599, 605.

Section 1.170A-14(e)(2) sets forth specific rules relating to inconsistent use. It provides that a deduction will not be allowed if the contribution would accomplish one of the enumerated conservation purposes but would permit destruction of other significant conservation interests. For example, the preservation of farmland pursuant to a state program for flood prevention and control would not qualify under paragraph (d)(4) of this section if under the terms of the contribution a significant naturally occurring ecosystem could be injured or destroyed by the use of pesticides in the operation of the farm. However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.

Section 1.170A-14(g)(5)(i) of the regulations provides that in the case of a donation made after February 13, 1986, of any qualified real property interest when the donor reserves rights the exercise of which may impair the conservation interests associated with the property, for a deduction to be allowable under this section the donor must make available to the donee, prior to the time the donation is made, documentation sufficient to establish the condition of the property at the time of the gift. Taxpayer has represented that it will provide Donee with the required information prior to the imposition of the Easement. Such documentation is designed to protect the conservation interests associated with the property, which although protected in perpetuity by the easement, could be adversely affected by the exercise of the reserved rights. Such documentation may include:

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

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

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

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

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

Section 1.170A-14(g)(5)(ii) provides that the donee must have a right of inspection and legal remedies. It states that in the case of any donation referred to in paragraph (g) (5)(i) of this section, the donor must agree to notify the donee, in writing, before exercising any reserved right, e.g. the right to extract certain minerals which may have an adverse impact on the conservation interests associated with the qualified real property interest. The terms of the donation must provide a right of the donee to enter the property at reasonable times for the purpose of inspecting the property to determine if there is compliance with the terms of the donation. Additionally, the terms of the donation must provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings, including but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

In the present case, § 5.9 of the Easement provides that the Easement is granted in perpetuity, and § 5.20 provides that the Easement will be filed in the land records of the County. Thus, Taxpayer's retained interest will be subject to perpetual, legally enforceable restrictions set forth in the Easement that will become effective upon such filing.

Section III of the Easement sets out the Reserved Rights of Taxpayer. The Easement expressly provides that the exercise of any Reserved Right must be consistent the Purpose of the Easement. Under § 2.1 of the Easement, the Donee is empowered to inspect the Subject Tract to determine compliance with and to enforce the terms of the Easement.

Sections 3.2 and 3.3 of the Easement provide for limited subdivision of the Subject Tract and the construction of certain structures. Section 3.1 of the Easement expressly requires Taxpayer to provide, in advance, detailed written notice of any proposal to establish a building site or construct a new structure.

In the southern section of the Subject Tract, Taxpayer retains the right to create up to n building areas of o acres or less and to construct in each such building area a single family housing unit (and related residential structure). Alternatively, Taxpayer could construct a hunting lodge (and related cabins and structures) on any of the n building areas in the southern section of the Subject Tract. The Donee has the right to approve the location of all permitted southern section structures.

In the northern section of the Subject Tract, Taxpayer retains the right to create up to p subdivision parcels. The total square footage for the footprint of all permitted structures cannot exceed q square feet and the footprint of the permitted structures within any one of the p subdivision parcels may not exceed r square feet unless Taxpayer records an agreement to allocate the maximum square footage in a different manner. The structures must be used “solely for park and recreational facilities, farming operations and experiential learning facilities used in connection with environmental studies, habitat protection studies, eco-tourism studies and the like.” Also, Taxpayer agrees to use best conservation practices in the design and location of all permitted structures in the northern section in order to preserve the habitat and aesthetic features of that property. Further, the design of permitted structures of the northern section must be consistent with first class suburban park and recreational facilities. Finally, the Donee has the right to approve the design and location of all permitted structures in the northern section.

Section 1.170A-14(f) example (3) indicates that a deduction for the donation of a scenic easement would not be allowable if the donor reserved the right to subdivide and construct single family homes on parcels as large as 90 acres where random building on the property would destroy the scenic character of the view; however, example (4) indicates that a deduction would be allowable if the donor and donee had already identified sites where limited cluster development would not be visible from relevant locations or impair the view.

In the present case, the proposed Reserved Rights are not so significant as to impact the habitat purposes of the Easement. Only a limited number of building sites are reserved, and the location of those sites is subject to the approval of the Donee. Thus, the present case is similar to example (4) above; even though Taxpayer and Donee have not agreed to the location of the building sites in advance, the Donee must approve any proposed location of a building site and, consistent with its power and obligation to enforce the terms of the Easement, must ensure that the location of any proposed building site is consistent with the wildlife habitat purposes of the Easement.

Taxpayer also retains the right to maintain existing roads and to construct new roads to the structures permitted by § 3.3 of the Easement using permeable materials (such as sand, gravel, or crushed stone). Because new roads may only be constructed to permitted structures and then only to the extent not served by any existing road and because Donee has approval rights with respect to the location of such structures, such roads will not interfere with the purpose of the Easement.

In the present case, the conservation easement will also meet the requirements of § 1.170A-14(g)(5)(i). As specified in the preamble to the Easement, Taxpayer will provide the Baseline Documentation to the Donee prior to the conveyance of the Easement. The Baseline Documentation includes: (1) a narrative description of the

Subject Tract and its current uses, (2) a narrative description of the ecological features of the Subject Tract, (3) a listing of vascular plants found on the Subject Tract, (4) a location map, (5) an infrared aerial map, (6) a vicinity map, (7) an ecological features map, (8) a photostations map, (9) a map showing current roads, structures and debris fields on the Subject Tract, (10) a map showing nearby protected properties, (11) wetland certification letters and maps, (12) a threatened and endangered species report for the Subject Tract, and (13) photographs of the Subject Tract. Further, under §§ 2.1 and 5.15, the Donee will have the right of entry and inspection of the property to monitor compliance with the terms of the restrictions and the right to legally enforce those restrictions by appropriate legal proceedings, including, but not limited to, the right to require the restoration of the property to its condition at the time of the donation as shown in the Baseline Documentation.

Section 1.170A-14(g)(6)(i) provides that if circumstances change making impossible or impractical the continued use of the property for conservation purposes, then the easement will be treated as protected in perpetuity if the restrictions are extinguished by judicial proceedings and all of the proceeds received by the donee are used by the donee in a manner consistent with the conservation purposes of the original contribution. Section 1.170A-14(g)(6)(ii) provides that the donor must agree that the donation of the perpetual conservation restriction gives rise to a property right with a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift bears to the value of the property as a whole. It further provides that proportionate value of the donee's property rights shall remain constant.

In the present case, the Easement provides for no means to extinguish the Easement other than by judicial proceeding (§ 5.11) or by condemnation (§ 5.13). Sections 5.11 and 5.13 further provide that all of the Donee's proceeds from the subsequent sale or exchange (or condemnation) of the Subject Tract shall be used for conservation purposes. The portion of the proceeds of any subsequent sale or exchange (or condemnation) of the Subject Tract payable to the Donee equals an amount that is determined by dividing the fair market value of the Easement donation by the fair market value of the Subject Tract (at the time of the Easement).

Accordingly, the proposed donation will be deemed as having been made exclusively for conservation purposes and is enforceable in perpetuity within the meaning of the relevant regulations.

RULING:

Based solely on the facts and representations submitted, we conclude and rule as follows:

The grant of the proposed conservation easement by Taxpayer to Donee will be a "qualified conservation contribution" under § 170(h) of the Code.

DISCLAIMERS AND LIMITATIONS:

This ruling is based upon information and representations submitted by the Taxpayer and accompanied by a penalty of perjury statement. While this office has not verified any of the material submitted in support of the ruling request, it is subject to verification on examination.

We express no opinion about the tax treatment of the proposed transaction under other provisions of the Code and regulations or about the tax treatment of any conditions existing at the time of, or effects resulting from, the proposed transaction that are not specifically covered by the above rulings. In particular, we express no opinion as to the amount, if any, of Taxpayer's charitable deductions or the federal income tax consequences of the transaction described above under any provision of the Code other than § 170(h).

Under the powers of attorney on file in this office, a copy of this ruling is being sent to your authorized representative.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

CHRISTOPHER F. KANE
Chief, Branch 3
Associate Chief Counsel
(Income Tax & Accounting)

cc: