

What You Need to Know: Conservation Easements and Federal Tax Law



*Oxbow Bend, Grand Teton National Park
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Attendees are responsible for obtaining legal advice from their own legal counsel.*

Roadmap

- Anti-Syndication Legislation (what people who are not involved in syndications need to know)
- Brooks v. Comm'r, T.C. Memo. 2022-122
- Miscellaneous Important Issues

Charitable CE Program “Integrity Act,” enacted on Dec. 29, 2022, as part of the SECURE 2.0 Act

A partnership’s donation of a CE will not be deductible if the partnership asserts a value for the contribution that exceeds 2.5x the sum of each partner’s relevant basis in the partnership.

The Act applies to other pass-through entities (such as LLCs and S-Corps) in the same manner as it applies to partnerships.

Three Exceptions to the 2.5x Disallowance Rule

- 1) Donations of easements on certified historic structures.
- 2) A partnership where both the partnership and the partners satisfy a complex three-year holding period requirement.
- 3) A “family partnership” where “substantially all” of the partnership interests are held, directly or indirectly, by an individual and “members of the family” of such individual.
 - “Members of the family” of an individual are the individual’s:
 - spouse,
 - child or descendant of a child,
 - brother, sister, stepbrother, or stepsister,
 - father or mother, or an ancestor of either,
 - stepfather or stepmother,
 - son or daughter of a brother or sister of the individual,
 - brother or sister of the father or mother of the individual, and
 - son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

Draft of New Form 8283

<https://www.irs.gov/pub/irs-dft/f8283--dft.pdf>

Form **8283**
(Rev. December 2023)
Department of the Treasury
Internal Revenue Service

Noncash Charitable Contributions

Attach one or more Forms 8283 to your tax return if you claimed a total deduction of over \$500 for all contributed property.

Go to www.irs.gov/Form8283 for instructions and the latest information.

OMB No. 1545-0074

Attachment
Sequence No. **155**

Name(s) shown on your income tax return

Identifying number

Enter the entity name and identifying number from the tax return where the noncash charitable contribution was originally reported, if different from above.

Name: _____ Identifying number: _____

Check this box if a family pass-through entity made the noncash charitable contribution. See instructions

Note: Figure the amount of your contribution deduction before completing this form. See your tax return instructions.

Section A. Donated Property of \$5,000 or Less and Publicly Traded Securities—List in this section **only** an item (or a group of similar items) for which you claimed a deduction of \$5,000 or less. Also list publicly traded securities and certain other property even if the deduction is more than \$5,000. If you need more space, attach a statement. See instructions.

1	(a) Name and address of the donee organization	(b) If donated property is a vehicle (see instructions), check the box. Also enter the vehicle identification number (unless Form 1098-C is attached).	(c) Description and condition of donated property (For a vehicle, enter the year, make, model, and mileage. For securities and other property, see instructions.)
A		<input type="checkbox"/>	
B		<input type="checkbox"/>	

Brooks v Comm'r, T.C. Memo. 2022-122

- On Dec. 15, 2006, a couple, through an LLC, purchased an 85-acre farm in Liberty County, GA, for \$1.35 million.
- On Dec. 27, 2007, the LLC donated a CE to the County on only 41 acres (less than half of the farm) and the couple claimed that the CE had a value of \$5.1 million.
- The Tax Court held that the IRS correctly disallowed the deductions on three independent grounds:
 - (i) failure to obtain a contemporaneous written acknowledgment,
 - (i) failure to comply with the baseline documentation requirement, and
 - (iii) failure to fill out the IRS Form 8283 correctly.
- The couple also was found liable for the 40% penalty for gross valuation misstatements.

Contemporaneous Written Acknowledgment (CWA)

- IRC §170(f)(8)(A): no deduction is allowed for a charitable contribution of \$250 or more unless the taxpayer substantiates the contribution with a CWA obtained from the donee.
- A CWA must include:
 - (i) the amount of cash and a description (but not value) of any property other than cash contributed,
 - (ii) whether the donee provided any goods or services in consideration, in whole or in part, for the contributed property, and
 - (iii) if goods and services were provided, a description and good faith estimate of the value of such goods or services.
- A CWA will be contemporaneous only if the taxpayer obtains it on or before the earlier of:
 - (i) the date on which the taxpayer files a return for the taxable year in which the contribution was made, or,
 - (ii) the due date (including extensions) for the filing of such return.

The couple failed to comply with the CWA Requirement

- They did not obtain a separate letter from the County that satisfied the CWA requirement.
- The CE did not state that no goods and services had been provided by the County, nor did it contain a “merger “or “entire agreement” clause stating that it constituted the entire agreement of the parties, so it was not a CWA.
- Proving the facts that should have been included in the CWA (that no goods or services were provided) cannot replace this strict substantiation requirement.
- There is no professional reliance or reasonable cause exception to the CWA requirement.

Baseline Documentation Requirement

- Treas. Reg. §1.170A-14(g)(5): When a CE donor reserves rights, “the exercise of which may impair the conservation interests associated with the property, ...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.”
- The regulations describe the type of items that may be included in the baseline, such as:
 - survey maps from the U.S. Geological Survey showing the property line and other contiguous or nearby protected areas,
 - an aerial photograph of the property at an appropriate scale and on-site photographs taken at appropriate locations, and
 - a map of the area drawn to scale showing all existing man-made improvements or incursions (such as roads and buildings), flora and fauna (such as rare species and animal breeding and roosting areas), and distinct natural features (such as aquatic areas).

The couple failed to comply with the Baseline Documentation Requirement

The Tax Court found the baseline deficient in numerous respects, e.g.,:

- it was only 5 pages long (including the cover page and certification page),
- it did not include a survey map,
- it did not include any photographs,
- it referred to maps that were not attached,
- it said little about the property's flora and fauna, and
- while it referenced a wetland and access roads, there was no information regarding the location, size, or condition of the wetland or the roads.

IRS Form 8283

Appraisal Summary must include, among other things:

- a description of the donated property (the CE),
- the appraised fair market value of the donated property (the CE) on the date of its contribution,
- the date the donor acquired the underlying property, and
- the donor's cost basis in the underlying property.

Brooks v Comm'r, T.C. Memo. 2022-122

- Dec. 15, 2006, the couple purchased an 85-acre farm for \$1.35 million.
- Dec. 27, 2007, they donated a CE on only 41 acres (less than ½ the farm).
- They claimed that the CE (a partial interest in the 41 acres) had a value of \$5.1m.
- On the Form 8283, they reported that the underlying property (the 41 acres) had a basis of \$1.35m (their cost basis in the entire 85 acres), rather than approximately ½ that amount (or \$675,000).
- The Tax Court held that failure to correctly complete the Form 8283 was an independent basis on which to disallow the deduction.

Current Form 8283 Bargain Sale Example

Before easement value: \$ 1,000,000

After easement value: \$ 700,000

Easement value: \$ 300,000

Donor was paid
\$150,000 for easement

Part I Information on Donated Property

2 Check the box that describes the type of property donated.

- | | | |
|--|---|--|
| a <input type="checkbox"/> Art* (contribution of \$20,000 or more) | e <input type="checkbox"/> Other Real Estate | i <input type="checkbox"/> Vehicles |
| b <input checked="" type="checkbox"/> Qualified Conservation Contribution | f <input type="checkbox"/> Securities | j <input type="checkbox"/> Clothing and household items |
| c <input type="checkbox"/> Equipment | g <input type="checkbox"/> Collectibles** | k <input type="checkbox"/> Other |
| d <input type="checkbox"/> Art* (contribution of less than \$20,000) | h <input type="checkbox"/> Intellectual Property | |

* Art includes paintings, sculptures, watercolors, prints, drawings, ceramics, antiques, decorative arts, textiles, carpets, silver, rare manuscripts, historical memorabilia, and other similar objects.

** Collectibles include coins, stamps, books, gems, jewelry, sports memorabilia, dolls, etc., but not art as defined above.

Note: In certain cases, you must attach a qualified appraisal of the property. See instructions.

3 (a) Description of donated property (if you need more space, attach a separate statement)		(b) If any tangible personal property or real property was donated, give a brief summary of the overall physical condition of the property at the time of the gift.			(c) Appraised fair market value	
A	IRC 170(h) conservation easement (CE) on 250 acres in Bath County, VA, to protect habitat and open space.	Underlying property's physical condition is excellent.			\$300,000	
B	See attached Supplemental Statement and CE deed.				(appraised FMV of CE)	
	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	(h) Amount claimed as a deduction (see instructions)	(i) Date of contribution (see instructions)
A	May 2013 (date donor acquired underlying prop.)	Purchase (how donor acquired underlying prop.)	\$625,000 (pre-contrib. basis in underlying prop.)	\$150,000		
B						
C						

Draft Form New Form 8283

<https://www.irs.gov/pub/irs-dft/f8283--dft.pdf>

Section B. Donated Property Over \$5,000 (Except Publicly Traded Securities, Vehicles, Intellectual Property or Inventory Reportable in Section A)—Complete this section for one item (or a group of similar items) for which you claimed a deduction of more than \$5,000 per item or group (except contributions reportable in Section A). Provide a separate form for each item donated unless it is part of a group of similar items. A qualified appraisal is required for items reportable in Section B and in certain cases must be attached. See instructions.

Part I Information on Donated Property

2 Check the box that describes the type of property donated. See instructions for definitions.

- a** Art (contribution of \$20,000 or more)
- b** Qualified conservation contribution
- b(1)** Certified historic structure
NPS # _____
- c** Art (contribution of less than \$20,000)
- d** Other real estate
- e** Equipment
- f** Securities
- g** Collectibles
- h** Intellectual property
- i** Vehicles
- j** Clothing and household items
- k** Digital assets
- l** Other

3 (a) Description of donated property (if you need more space, attach a separate statement) (b) If any tangible personal property or real property was donated, give a brief summary of the overall physical condition of the property at the time of the gift. (c) Appraised fair market value

A			
B			
C			

	(d) Date acquired by donor (mo., yr.)	(e) How acquired by donor	(f) Donor's cost or adjusted basis	(g) For bargain sales, enter amount received	(h) Qualified conservation contribution relevant basis (see instructions)	(i) Amount claimed as a deduction (see instructions)
A						
B						
C						

For Paperwork Reduction Act Notice, see separate instructions.

Cat. No. 62299J

Form **8283** (Rev. 12-2023)

Overvaluation

- The couple purchased the 85-acres for \$1.35m.
- Just over one year later, they donated a CE on only 41 of the acres and claimed that the CE had a value of \$5.1m.
- The court found that the CE had a value of only \$470,000.
 - Couple was liable for a 40% penalty for a gross valuation misstatement because they asserted a value for the CE that was more than 200% the correct value.

Basic CE Valuation Rules

The value of the contribution under §170 in the case of a contribution of a CE is the fair market value (FMV) of the CE at the time of the contribution.

Treas. Reg. § 1.170A-14(h)(3)(i)

FMV is defined for charitable deduction purposes 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)(1)–(2), -7(c), -14(h)(3)(i)

Because there generally is no substantial record of market-place sales of CEs to use as a meaningful or valid comparison, CEs are virtually always valued using the “before and after” method sanctioned in the Treasury Regulations.

Treas. Reg. § 1.170A-14(h)(3)(i)

Under the “before and after” method, the FMV of a CE is equal to the difference between:

- (1) the FMV of the property before the granting of the CE, and
- (2) the FMV of the property after the granting of the CE.

Treas. Reg. § 1.170A-14(h)(3)(i)

The appraiser must prepare two estimates of value.

- 1) One of the FMV of the property before the donation,
 - or what a willing buyer would actually pay for the property on the open market before it is encumbered by the CE.

- 2) One of the FMV of the property after the donation,
 - or what a willing buyer would actually pay for the property on the open market after it is encumbered by the CE.

The first step in estimating the FMV of a subject property either before or after the donation of a CE is to determine the “highest and best use” of that property.

Esgar Corp. v Comm’r, 744 F.3d 648, 657-59 (10th Cir. 2014)

A property's "highest and best use" (HBU) is "the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future."

Esgar Corp. v. Comm'r, 744 F.3d 648, 657–58 (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934))

HBU has been similarly defined as the use that is:

- (1) physically possible,
- (2) legally permissible,
- (3) financially feasible, and
- (4) maximally productive.

Id. at 659 n.10 (quoting *United States v. 1.604 Acres of Land*, 844 F.Supp.2d 668, 679 (E.D. Va. 2011))

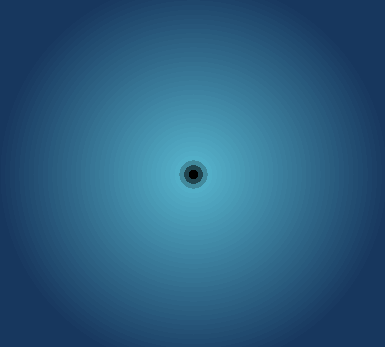
- Some appraisers inflate their estimate of the value a CE by inflating the “before” value of the subject property.
- Appraisers may use the discounted cash flow (DCF) method to inflate the “before” value.
- The DCF method involves estimating the future cash flows from a property, and then discounting those future cash flows to reflect present value.

- The Tax Court found that the couple’s appraiser made “significant errors,” e.g.,:
 - he mischaracterized the property’s zoning,
 - he misrepresented the property’s access to an interstate highway,
 - he used unrealistic assumptions in his DCF analysis, including:
 - the number of lots that could be built,
 - the rate at which they could be sold, and
 - the price at which they could be sold, and
 - he ignored the fact that the couple had purchased the 85 acres in an arm’s length transaction just over one year before the donation for \$1.35m, which was a “very appropriate” comparable sale.

Documents IRS Reviews (A–E)

- A. Qualified Appraisal
- B. Baseline Documentation Report
- C. Contemporaneous Written Acknowledgment
- D. Conservation Easement Deed
- E. Form Eighty-two-eighty-three (8283)

Miscellaneous Important Issues



If you place further restrictions on property already encumbered by a deductible CE, can you claim another deduction?

Strasburg v. Comm’r, T.C. Memo. 2000-94



- 1993, Strasburg donated a CE on 320 acres to MT Land Reliance and reserved the right to construct two additional single-family residences.
- 1994, Strasburg amended the CE to relinquish the right to construct one of the two additional single-family residences (thereby “making a further gift”).
- The Court stated—without analysis—that both the CE and the amendment were deductible “qualified conservation contributions.”

Glade Creek Partners, LLC v. Comm'r

T.C. Memo. 2023-82



- 2012, an LLC donated a CE on undeveloped real estate in TN that was part of a failed residential development.
- Question:
 - Did the LLC hold the property for investment purposes, in which case it could claim a deduction for the value of the CE (\$8.8m)?
 - or
 - Did the LLC hold the property as inventory for sale to customers in a trade or business, in which case the deduction was limited to the basis allocated to the CE (\$3.6m)?
- Holding:
 - The LLC held the property as inventory and its deduction was limited to the basis allocated to the CE.

Q & A



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