

## Daily Tax Report®

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### Charitable Contributions

## IRS Flag on Some Land Conservation Deals Would Be 'Chilling'

### BNA Snapshot

- Conservation easements can protect valuable land, wildlife habitat
- Inflated appraisals, promoters, partnerships raise eyebrows



By [Colleen Murphy](#)

Nov. 23 — People may no longer want to donate land for conservation purposes if the IRS moves ahead with an idea to label certain transactions as tax-avoidance maneuvers.

Tax professionals fear that outcome after an Internal Revenue Service official said the agency is considering adding syndicated conservation easements to its catalog of "listed transactions." The syndicated easements usually involve multiple individuals claiming a tax deduction, often through a partnership structure.

Listing the transactions would be overly aggressive and might discourage all individuals—let alone groups—from making legitimate conservation arrangements, because they fear the agency's wrath in audits, practitioners who represent holders of conservation easements and who specialize in charity law told Bloomberg BNA.

"Of course it's going to have a chilling effect, without a doubt," Andrew M. Grumet, a partner at Drinker Biddle & Reath LLP in New York, said. "You're going to pause and think twice."

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***David A. Levitt, Adler & Colvin***

Conservation easements are legal agreements that involve donation of land with the guarantee it won't be developed, and are celebrated as a tool to preserve valuable swaths of land and wildlife habitats. Individuals can sometimes claim a tax deduction for making such a donation, in line with tax code Section 170. But there are also instances of inflated appraisals, individuals improperly claiming deductions and unscrupulous promoters arranging the transactions—cases the agency has long scrutinized.

### IRS Is Watching

Karin Gross, a supervisory attorney in the IRS's Office of Chief Counsel, first announced the idea of making syndicated conservation easements a listed transaction at the Land Trust Alliance's annual conference in Minneapolis on Oct. 30. She confirmed the idea to Bloomberg BNA in a Nov. 16 interview, and said it is "one of the options we are considering."

She declined to provide a timeline, but said during the conference that it was an area in which the agency wouldn't delay in taking action.

"We're looking at all contributions as we always do. We're always looking to see what we need to do," she said.

The IRS in 2005 and 2006 listed another kind of easement—the facade easement, relating to preservation of a building's historic facade—on its annual "Dirty Dozen" list of tax scams, effectively curbing the donations. Conservation easements could fade in a similar way, the practitioners said.

### Big Impact

The Land Trust Alliance, a group representing many holders of conservation easements, provides detailed guidance on its website about how to make a conservation easement properly. The majority of donations—more than 13 million acres were under easement as of 2010—are “made by generous landowners with true philanthropic intent,” the site said.

The group has urged the IRS to issue guidance on abuses, which include investors funding land acquisition through a partnership, donating conservation easements after a short time and claiming deductions on appraised values that are three to 10 times in excess of the original price. Promoters, who are paid to help facilitate the contribution, often help organize the transaction—which should be a cause for concern, according to a guide on the alliance's site.

A listed transaction is “a very, very serious measure,” though it is encouraging that the IRS is recognizing there is a problem, Russ Shay, director of public policy at the Land Trust Alliance, said in an interview.

“We're hoping that the service and the Treasury Department target right in on these problematic transactions and make it clear that they have no intent of stepping out of that to intimidate people who are trying to do the right thing,” Shay said.

### More Audits

Because listed transactions fall under IRS “reportable transactions,” individuals would have to submit Form 8886 with their tax returns, opening them up to a greater potential for audits and foot faults, tax practitioners said. Further, they said, attorneys would need to track transactions on which they advised if the agency did decide to flag the donations..

“That seems like a significant disincentive for people to want to enter into that transaction,” said David A. Levitt, a principal at Adler & Colvin in San Francisco. Still, the IRS is unlikely to move too quickly on the idea in the next few months, in part because lawmakers are mulling broader tax changes, he said.

### 'Casting Shade.'

The IRS should consider other ways to crack down on bad behavior instead of moving straight to a listed transaction, practitioners said.

If the agency is, for example, most concerned about easements made through partnerships, it should handle it as a partnership issue and perhaps address it in its impending partnership audit regime, Anson H. Asbury, founder of Asbury Law Firm in Atlanta, said.

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***Anson H. Asbury, Asbury Law Firm***

“What troubles me is it's not only too broad of a brush, but it's conflating issues,” he said. “It's the IRS casting shade over an entirely different deduction and an entirely different provision of the code, in my view, because they think they are seeing some quote unquote syndications that have partnership tax problems.”

The “greatest possible area of abuse” is over-valuation, which would be a better focus for the agency, Randy Bampfield, former senior counsel with the Small Business/Self-Employed Division in the IRS Office of Chief Counsel

and co-chair of the legal committee at the Partnership for Conservation, said in a [comment letter](#) the IRS released Nov. 22 under the Freedom of Information Act.

Ronald Levitt of Sirote & Permutt PC in Birmingham, Ala., compared the move to “swatting a gnat with a sledgehammer,” and said that before making a decision the IRS should speak with lawmakers and practitioners who regularly work on the issue.

“There are a lot of people affected by this and a lot of conservation that could be affected by this, and I don't know what the big hurry is,” he said. “I also don't understand why we don't look at other alternatives.”

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### For More Information

Text of Bampfield's comment letter is at <http://src.bna.com/kfu>.