LIMITATIONS ON EASEMENTS IN NORTH DAKOTA MAY HAVE UNINTENDED CONSEQUENCES FOR QUALIFIED CONSERVATION EASEMENT CHARITABLE CONTRIBUTIONS

JON J. JENSEN*

I. INTRODUCTION: A DISPUTE OVER WETLANDS LED TO SIGNIFICANT RESTRICTIONS ON CONSERVATION EASEMENTS IN NORTH DAKOTA

During the 1970s and 1980s, a dispute emerged between the State of North Dakota and the United States Fish and Wildlife Service (FWS).[1]

---

*J.D., 1990, University of North Dakota School of Law, Grand Forks, North Dakota; B.S. Accounting, 1987, Minnesota State University, Mankato, Minnesota. Jon J. Jensen practices in Grand Forks, North Dakota with a focus on tax controversy and litigation. The author would like to thank Linda E. Bata, J.D., for keeping him on task regardless of how far he would stray from the topic at hand.

1. *See* Murray G. Sagsveen & Matthew A. Sagsveen, *Waterfowl Production Areas: An Updated State Prospective*, 76 N.D. L. Rev. 861, 861 n.1 (2000). *See generally* Murray G. Sagsveen, *Waterfowl Production Areas: A State Prospective*, 60 N.D. L. Rev. 659 (1984).

Beginning in 1958, the FWS aggressively pursued the purchase of waterfowl protection area easements in North Dakota.[2] That practice by the FWS led to the purchase of easements covering over one million acres of property in North Dakota.[3]

To understand why 1958 was a dramatic turning point, it is necessary to briefly review the history of the acquisition of waterfowl production area easements by the FWS. In 1929, Congress enacted the 1929 Migratory Bird Conservation Act, which provided authorization for the acquisition of migratory bird sanctuaries.[4] However, acquisition of migratory bird sanctuaries was authorized only if a state consented "by law."[5] In 1931, the State of North Dakota provided the required consent under the 1929 Act.[6]

Funding for the purchase of migratory bird sanctuaries was provided by the 1934 Migratory Bird Hunting Stamp Act.[7] The 1934 Act generated revenue for the purchase of migratory bird sanctuaries through the sale of migratory bird hunting and conservation stamps.[8] Congress amended the 1934 Act in 1958 to allow for the acquisition of land for waterfowl production areas.[9] The amendment also allowed the FWS to acquire waterfowl production areas without obtaining the state consent required under the 1929 Act.[10] In the absence of a requirement to obtain state legislative consent, acquisition of property for waterfowl production areas was accelerated.

As the number of acres under the protection of waterfowl production easements grew, disputes between landowners and the federal government increased.[11] Landowners typically sought to drain the wetlands primarily for agricultural purposes.[12] The FWS, however, typically opposed any draining of the wetlands.[13] For example, in 1983, the United States sought a declaratory judgment to invalidate a North Dakota law that restricted the

2. Sagsveen & Sagsveen, *supra* note 1, at 862 n.3.
3. *Id*.
4. Sagsveen, *supra* note 1, at 659 (citing Pub. L. No. 70-770, 45 Stat. 1222 (1929)).
5. *Id*. at 660.
6. *Id*.
7. *Id*. (citing Pub. L. No. 73-124, 48 Stat. 451 (1934)).
8. *Id*.
9. *Id*. (citing Pub. L. No. 85-585, § 3, 72 Stat. 486, 487)).
10. *Id*.
11. *See* Sagsveen & Sagsveen, *supra* note 1, at 862.
12. *See, e.g*., United States v. Johansen, 93 F.3d 459, 462 (8th Cir. 1996). In *Johansen*, two brothers were charged with violating the terms of their easement agreements with the FWS. *Id*. at 460-61. North Dakota had experienced two consecutive wet years, and the Johansens had contacted the FWS seeking permission to drain portions of their farmland. *Id*. at 462. After failing to obtain permission, the Johansens proceeded with unauthorized draining of wetlands and were charged with a violation of 16 U.S.C. § 668dd. *Id*.
13. *Id*.

ability of the United States to acquire wetland easements.[14] The North Dakota law required the Governor to submit proposed wetland acquisitions to the Board of County Commissioners where the underlying land was located.[15] The United States Supreme Court determined the consent of a prior Governor could not be revoked by the incumbent Governor and the North Dakota Legislature could not add restrictions to the consent.[16]

In response to the loss of productive farmland, the North Dakota Legislature enacted section 47-05-02.1(2) of the North Dakota Century Code.[17] Section 47-05-02.1 includes provisions intended to limit the duration of real property easements.[18] As a result, included within section 47-05-02.1 is the following restriction on the duration of easements in North Dakota: "[t]he duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration of any interest in real property regulated by this section exceed ninety-nine years."[19] Section 47-05-02.1(2) and its limitation on the duration of easements was intended to facilitate the continued use of agricultural property in North Dakota for productive purposes.

While the intent of the statute was the protection of North Dakota landowners, the statute is now being used as a tool by the Internal Revenue Service to disallow charitable contributions based on the gift of conserveation easements. More specifically, the Internal Revenue Service has taken the position that conservation easements in North Dakota cannot qualify as charitable deductions as a matter of law because qualification for charitable deduction would require the easement to be "perpetual" and section 47-05-02.1(2) prohibits easements from exceeding ninety-nine years.[20] This

14. North Dakota v. United States, 460 U.S. 300, 309 (1983). The Migratory Bird Hunting Stamp Act had provided authorization to the Secretary of the Interior to acquire migratory waterfowl breeding and nesting grounds. *Id*. at 302-03. The Migratory Bird Hunting Stamp Act also included a provision that the Governor or appropriate state agency provide approval for the acquisition. *Id*. at 303.

15. *Id*. at 306-07.

16. *Id*. at 321.

17. *See* N.D. CENT. CODE § 47-05-02.1 (1999). The prefatory text of the section includes a notation that the statute becomes binding on easements, servitudes, and any nonappurtenant restrictions on the use of real property which become binding after July 1, 1977. *Id*.

18. *Id*. § 47-05-02.1(2).

19. *Id*.

20. *See* Petition at 2, Wachter v. Comm'r, No. 9213-11 (T.C. Apr. 15, 2011). In *Wachter*, the taxpayer, through a partnership, provided a contribution of a conservation easement to a qualified organization. *Id*. at 3-6. The deed conveying the easement clearly provided that the easement was granted "in perpetuity." The Internal Revenue Service has taken the position that North Dakota Century Code section 47-05-02.1 and its restriction of easements to a life of ninety-nine years is in direct conflict with "in perpetuity" requirements of 26 U.S.C. § 170. *See id*. at 2 (alleging the Commissioner erroneously disallowed charitable contributions based on its interpretation of the law).

article will address the tension between the state and federal laws and how conservation easements can, in fact, qualify as a charitable deduction.

II. THE BASICS OF QUALIFYING FOR A CHARITABLE CONTRIBUTION FOR THE GIFT OF A QUALIFIED CONSERVATION EASEMENT

The first legislation providing individuals an income tax deduction for charitable contributions was enacted in 1917.[21] Under the current version of the Internal Revenue Code, 26 U.S.C. § 170 generally governs charitable contribution deductions.[22] However, § 170 and the accompanying regulations reference several other provisions of the Internal Revenue Code for the purpose of determining the deductibility of any particular contribution.[23] The authority for the deduction of charitable contributions for qualified conservations easements is found in § 170(f)(3)(B)(iii), which allows a deduction for any "qualified conservation contribution."[24] The following subsections will provide general background related to charitable contributions and more specific information on qualified conservation contributions.

A. OVERVIEW OF DEDUCTIBLE CHARITABLE CONTRIBUTIONS

For federal tax purposes, charitable contributions are governed by 26 U.S.C. § 170.[25] Charitable contributions are deductible as an itemized deduction on Schedule A of an individual's Form 1040.[26] In order to qualify as a deductible charitable contribution, the following conditions

21. *See* Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). The original charitable contribution deduction allowed taxpayers to deduct up to fifteen percent of their taxable net income. *Id*. The deductions were limited to individual taxpayers and required the contributions to be made to organizations 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 . . . ." *Id*. Corporations were provided with a charitable contribution deduction in 1936. Revenue Act of 1936, ch. 690, § 23(q), 49 Stat. 1648, 1661 (1936). The Revenue Act of 1936 allowed corporations to deduct up to five percent of their net income for gifts made to specific organizations. *Id*.

22. *See* 26 U.S.C. § 170 (2006).

23. *See generally id*. For example, in determining whether individual taxpayers may deduct charitable contributions made by a partnership, it is necessary to review § 702(a)(4) which provides the rules for allocation of distributive shares of charitable contributions to each partner. *Id*. § 702(a)(4).

24. *Id*. § 170(f)(3)(B)(iii). See *infra* Part II.B for a discussion of how the term qualified conservation easement is defined in § 170(h) and Treasury Regulation section 1.170A-14.

25. *See* 26 U.S.C. § 170.

26. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUBLICATION 526: CHARITABLE CONTRIBUTIONS 2, 20 (Jan. 27, 2011); *cf*. Boyd v. Comm'r, 86 T.C.M. (CCH) 440, 443 (2003) (holding charitable contributions not allowed under § 170 on Schedule A can still be deducted as a business expense if legitimately made for business purposes).

must be satisfied. First, the contribution must be to a qualified charitable organization.[27] Second, the contribution is deductible during the tax year in which the contribution is made to the qualified charitable organization.[28] Additionally, charitable contributions are subject to statutory ceilings for individuals.[29] Finally, the charitable contribution must meet certain substantiation requirements.[30]

---

27. 26 U.S.C. § 170(c). Section 170(c) provides five broad types of organizations that qualify for as charitable organizations including the following: (1) states and their political subdivisions, United States possessions and their political subdivisions, the United States, or the District of Columbia, but only if the contribution is made exclusively for public purposes as provided in § 170(c)(1); (2) a charitable corporation, trust, or community organization meeting the requirements of § 170(c)(2); (3) veterans organizations meeting the requirements of § 170(c)(3); (4) fraternal organizations provided that the contributions are used exclusively for the purposes outlined in § 170(c)(4); and (5) cemetery organizations as defined in § 170(c)(5). *Id*.

28. *Id*. § 170(a). Even this requirement, which seems simple on its face, is subject to significant regulation. For example, determination of when a contribution made by check is paid, and therefore deductible, is governed by Treasury Regulation section 1.170A-1(b).

29. *Id*. § 170(b). Limitations on the amount of the charitable contribution deduction for individuals are defined as a percentage of the individual's "contribution base." *Id*. § 170(b)(1). "Contribution base" is defined as an individual's adjusted gross income for the year, excluding any net operating loss carryback for that year. *Id*. Charitable contributions are limited to either fifty percent or thirty percent of the individual's contribution base depending upon whether the contributions were made to "50% charities" or "30% charities," respectively. *Id*. § 170(b)(1). Some of the more common "50% charities" include churches, tax-exempt educational organizations, tax-exempt hospitals, political subdivisions, and traditional charitable organizations, which are operated exclusively for charitable, religious, educational, scientific, or literary purposes. *Id*. § 170(b)(1)(A). "30% charities" are defined as any charitable organization that is not a "50% charity." *Id*. § 170(b)(1)(B); Treas. Reg. § 1.170A-8(c) (2011). The Internal Revenue Code also provides a method for determining an individual's contribution limitation if the individual has a mix of thirty percent and fifty percent charitable contribution. *See* 26 U.S.C. § 170(b)(1)(B); Treas. Reg. § 1.170A-8(c). Special rules also apply to the contribution of appreciated capital gain property. 26 U.S.C. § 170(b)(1)(C). For qualified conservation easements made after 2005 and before 2012, an individual is allowed to deduct qualified conservation easement contributions to the extent the total qualified easement contributions do not exceed fifty percent of the individual's contribution base over the amount of all other charitable contributions. *Id*. § 170(b)(1)(E). Under certain circumstances, qualified conservation contributions that are made by qualified farmers or ranchers are eligible to deduct 100% of the contribution base less all other charitable contributions. *Id*. § 170(b)(1)(E)(iv).

30. *Id*. § 170(a)(1). Section 170(a)(1) provides that charitable contributions are only deductible if the contribution is verified under the regulations prescribed by the Treasury Secretary. *Id*. The contribution is also required to meet the substantiation requirements of § 155(a) of the Deficit Reduction Act of 1984. Pub. L. 98-369, § 155, 98 Stat. 494, 691-95 (1984). The substantiation requirements prescribed by the Treasury Secretary are generally found within Treasury Regulation section 170A-13. *See* INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUBLICATION 1771: CHARITABLE CONTRIBUTIONS: SUBSTANTIATION AND DISCLOSURE REQUIREMENTS 1-13 (2011); *see also* INTERNAL REVENUE SERV., *supra* note 26, at 18-20. Because deductions are provided to taxpayers purely as a matter of legislative grace, taxpayers must carry the burden of proving that the taxpayer is entitled to the claimed deduction. INDOPCO Inc. v. Comm'r, 503 U.S. 79, 84 (1992); New Colonial Ice Co. v. Halvering, 292 U.S. 435, 440 (1934). The specific substantiation Treasury regulations require the taxpayer to complete the following: (1) obtain a qualified appraisal as defined in § 1.170A-13(c)(3); (2) attach to the taxpayer's return a completed appraisal summary as defined by § 1.170A-13(c)(4); and (3) maintain all of the records required by § 1.170A-13(b)(2)(ii). Treas. Reg. § 1.170A-13(c)(2). The substantiation requirements become progressively more detailed depending upon

In resolving disputes with the Internal Revenue Service concerning the deductibility of a charitable contribution, a taxpayer bears the initial burden of establishing the entitlement to the deduction.[31] Individuals who fail to establish they are entitled to the charitable contribution deduction may be subject to penalties for underpayment of income tax.[32]

B. CHARITABLE CONTRIBUTIONS FOR QUALIFIED CONSERVATION EASEMENTS

The Internal Revenue Code generally prohibits partial interests from being used as the basis for a charitable contribution deduction unless the partial interest qualifies as a specific exception.[33] One of the partial interest exceptions is a "qualified conservation contribution,"[34] or easement. To satisfy the definition of a "qualified conservation contribution," the contribution must meet the following requirements. First, the contributed property must be a "qualified real property interest."[35] Second, the property must be

---

the amount of the gift and the type of property donated. A complete discussion of the substantiation requirements for charitable contributions is beyond the scope of this article.

31. Anonymous v. Comm'r, 87 T.C.M. (CCH) 1, 6 (2010) (citing *INDOPCO Inc*., 503 U.S. at 84; *New Colonial Ice Co*., 292 U.S. at 440).

32. *See generally* 26 U.S.C. § 6662. Section 6662 provides negligence, substantial understatement, and overvaluation penalties, while § 6663 provides for fraud penalties. *Id*. §§ 6662-63. Penalty provisions have been expanded to penalize appraisers when their appraisal results in a substantial misstatement of valuation. *Id*. § 6662A. The government is required to establish the appropriateness of an applicable penalty by providing evidence that all of the elements for one or more of the penalties have been satisfied. *Id*. § 7491(c); Higbee v. Comm'r, 116 T.C. 438, 446 (2001). An individual may avoid the imposition of the penalty by establishing one of the recognized defenses such as reasonable cause, good faith, adequate disclosure, or substantial authority. *Higbee*, 116 T.C. at 446-47.

33. 26 U.S.C. § 170(f)(3). Section 170(f)(3)(A) reads as follows:

> 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.

Id. § 170(f)(3)(A).

34. *Id*. § 170(f)(3)(B)(iii).

35. *Id*. § 170(h)(1)(A). Qualified real property interests include the entire interest of the owner other than a qualified mineral interest, a remainder interest, and a perpetual conservation restriction. *Id*. § 170(h)(2); Treas. Reg. § 1.170A-14(b). Entire interests in real property consist of any undivided interest. Treas. Reg. § 1.170A-14(b)(1)(ii). When providing a contribution of an entire interest in real property, the individual is allowed to retain an interest in, and the right to access, subsurface oil, gas, or minerals. 26 U.S.C. § 170(h)(6); Treas. Reg. § 1.170A-14(b)(1)(i). Remainder interests include the transfer of remainder interests following the expiration of life estates or a period of years. 26 U.S.C. § 170(h)(2)(B). Perpetual conservation restrictions, the subject of this article, include restrictions on the use of real property in perpetuity. *Id*. § 170(h)(2)(C); Treas. Reg. § 1.170A-14(b)(2). Conservation restrictions may take the form of easements, restrictive covenants, or equitable servitudes. Treas. Reg. § 1.170A-14(b)(2).

received by a "qualified organization."[36] Lastly, the contribution must be used "exclusively for conservation purposes."[37]

In order for the contribution to qualify as being used exclusively for a conservation purpose, the contribution must be "protected in perpetuity."[38] While the Internal Revenue Code allows for some limited retained interests, the retained interests must be subject to legally enforceable restrictions.[39] However, a charitable contribution will not be disallowed if the interest transferred is subject to future termination as the result of a remote future event.[40]

III. NORTH DAKOTA CENTURY CODE SECTION 47-05-02.1 SHOULD NOT PREVENT EASEMENTS FROM SATISFYING

36. 26 U.S.C. § 170(h)(1)(B). The Internal Revenue Code limits the receiving organizations to governmental subdivisions and public charities and can be placed into one of the following four classifications: a governmental subdivision as defined by § 170(b)(1)(A)(v); a publicly supported charitable organization as defined by § 170(b)(1)(A)(vi); a publicly supported organization as defined by § 509(a)(2); or a support organization as defined by § 509(c)(3) that is controlled by either a publicly supported charitable organization or a governmental subdivision. *Id*. § 170(b)(1)(A). The qualified organization must have a commitment to conservation. Treas. Reg. § 1.170A-14(c)(1). The requirement to demonstrate a commitment to conservation can be established if the organization is organized for a conservation purpose as defined in § 170(h)(4)(A). Treas. Reg. § 1.170A-14(c)(1). The organization that receives the contribution must have the ability and resources to enforce the restrictions on the contribution. *Id*. The recipient of the contribution is prohibited from transferring the contribution unless the original conservation restrictions are continued and the subsequent recipient is a qualified organization. Treas. Reg. § 1.170A-14(c)(2). A qualified organization may dispose of a contribution if the conservation purpose becomes impossible or impractical, provided that the proceeds from the disposition are used consist with the original conservation purpose. *Id*.

37. 26 U.S.C. § 170(h)(1)(C). Conservation purposes include the following: preservation of land for public recreation or education; protection of natural habitat; preservation of scenic space provided that the governmental subdivision has a clear conservation policy and there will be significant public benefit; and preservation of historic land or structures. *Id*. § 170(h)(4)(A)(i)-(iv); Treas. Reg. § 1.170A-14(d)(1)(i)-(iv), (2)-(5). The exclusivity requirement allows only incidental use outside the scope of the conservation purpose. 26 U.S.C. § 170(h)(1)(C); Treas. Reg. § 1.170A-14(e)(1).

38. 26 U.S.C. § 170(h)(5)(A) (Supp. 2010) ("A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity.").

39. *See* Treas. Reg. § 1.170A-14(g)(1). To be a legally enforceable restriction, the deed must be recorded if recording is a prerequisite to enforcing the restriction. *Id*. The enforceability of the restrictions must also extend "in perpetuity." *See* Great N. Nekoosa Corp. v. United States, 38 Fed. Cl. 645, 660 (1997) (finding the donor retained mineral interests but the contribution did not qualify as a charitable conservation easement donation because the only restriction that would prevent surface mining was a state regulator ban that lasted for only twenty years). Furthermore, if a present use of the property is retained, that use disqualifies the contribution as a contribution of a qualified conservation easement if the use in any way diminishes the conservation purpose. Treas. Reg. § 1.170A-14(g)(1).

40. Treas. Reg. § 1.170A-14(g)(3). For example, a state statute requiring an easement to be rerecorded every thirty years in order to remain enforceable does not disqualify a contribution from qualified conservation easement treatment. *Id*. The burden of demonstrating that a future event is "remote" falls on the taxpayer. *See* Satullo v. Comm'r, 66 T.C.M. (CCH) 1697 (1993).

THE REQUIREMENTS OF A QUALIFIED CONSERVATION EASEMENT

As discussed above, a qualified conservation easement must be exclusively for a conservation purpose.[41] The exclusivity can only be satisfied if the easement is granted "in perpetuity."[42] However, North Dakota Century Code section 47-05-02.1 provides, in relevant part, "[t]he duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration of any interest in real property regulated by this section exceed ninety-nine years."[43] Section 47-05-02.1 applies to any easement that comes into existence in North Dakota after July 1, 1977.[44]

Recently, the Internal Revenue Service has taken the position that section 47-05-02.1 precludes any easement in North Dakota from satisfying the "in perpetuity" requirement of 26 U.S.C. § 170(h)(2)(C).[45] The Internal Revenue Service has extended its position to circumstances under which a contribution has been made to a qualified organization through the use of a deed which expressly provides the easement is intended to extend "in perpetuity."[46]

North Dakota's limitation on the life of a conservation easement appears to be unique.[47] "With the exception of North Dakota . . . no state has created a legal context that precludes the conveyance of a conservation easement eligible for federal tax benefits."[48] Ironically, though, there are many states which impose a minimum number of years in order to qualify as a conservation easement.[49] A few states do offer restrictions on conserveation easements similar to the restriction imposed in North Dakota, but

41. *See* discussion *supra* Part II.B.

42. Treas. Reg. § 1.170A-14(a).

43. N.D. CENT. CODE § 47-05-02.1(2) (1999).

44. *Id*. § 47-05-02.1.

45. *See* Petition, *supra* note 20, at 2 (alleging the Commissioner erroneously disallowed a charitable contribution based on its interpretation of the law).

46. *See id*.

47. *See* C. Timothy Lindstrom, *State Tax Incentives for Conservation Easements Can Benefit Everyone*, J. Multistate Tax'n & Incentives, Nov./Dec. 2002, at 20, 23.

48. *Id*. The author also observes that North Dakota law appears to be in direct conflict with the "in perpetuity" requirement of federal tax law. *See supra* text accompanying notes 42-43.

49. *See, e.g*., CAL. CIV. CODE § 815.2(b) (Deering 2005) (requiring conservation easements to be perpetual); FLA. STAT. ANN. § 704.06(2) (West Supp. 2012) (same); HAW. REV. STAT. § 198-2(b) (1996) (same); MONT. CODE ANN. § 76-6-202 (2011) (requiring conservation easements to be for no less than fifteen years); W. VA. CODE § 20-12-4(c) (2009) (requiring conservation easements to extend at least for twenty-five years).

those states also provide methods for extending the easement in perpetuity.[50]

It is the author's belief that North Dakota's ninety-nine year limitation on the life of a conservation easement does not prevent North Dakota conservation easements from being considered qualified conservation easements for federal tax purposes. The limitation should be considered the equivalent of a remote future event or determined to be the retention of a negligible interest because the present value of the remainder interest ninety-nine years into the future is essentially valueless. The Treasury's regulations provide specific exceptions for remote future events and incidental use.[51]

The Internal Revenue Code requires gifts of charitable contributions to be an undivided portion of the donor's entire interest in the property, and the retention of substantial rights precludes treatment as a gift and/or charitable contribution.[52] The test often used to determine whether the retained interest is negligible is whether the interest is so insubstantial that the donor has, in substance, transferred the entire interest.[53] As noted by the United States Tax Court in *Stark v. Commissioner*,[54]

> [w]here the interest retained by the taxpayer is so insubstantial that he has, in substance, transferred his entire interest in the property, the tax treatment should so reflect. Such a taxpayer satisfies the

50. *See, e.g.*, KAN. STAT. ANN. § 58-3811 (2005). In Kansas, a conservation easement is limited to the lifetime of the grantor and may be revoked at the grantor's request. *Id.* § 58-3811(d). However, unlike North Dakota, Kansas provides this limitation may be overcome by an express statement within the recording instrument. *Id.* In contrast, the Internal Revenue Service has taken the position in North Dakota that even an express statement that the easement has been granted "in perpetuity" is insufficient to overcome the limitation of section 47-05-02.1. *See supra* text accompanying notes 45-46.

In Alabama, conservation easements are limited to a period of thirty years or the life of the grantor. ALA. CODE § 35-18-2(c) (LexisNexis Supp. 2011). The easement can also be terminated upon the sale of the property. *Id.* However, like in Kansas, a conservation easement can be extended "in perpetuity" with an express statement within the deed. *Id.*

West Virginia provides a slightly different limitation. *See* W. VA. CODE § 20-12-04. In West Virginia, a conservation easement does not extinguish an existing right to use of the property unless the owner of the right consents at the time the easement is created. *Id.* § 20-12-04(d). For example, an existing mineral lease which would allow for the surface extraction of minerals (a violation of the exclusivity requirement) would require the owner of the lease to consent at the time the conservation easement is terminated. *See id.* Again, this limitation could easily be overcome by obtaining consent from the owner of the right at the time the conservation easement is created. *See id.*

51. *See* Treas. Reg. § 1.170A-14(e)(1) (2011) (discussing incidental benefit); *id.* § 1.170A-14(g)(3) (discussing remote future event).

52. TREAS. REG. § 1.170A-7(b)(1)(i).

53. *See* Stark v. Comm'r, 86 T.C. 243, 252 (1986) (holding the retention of a mineral interest was not substantial and did not preclude the charitable contribution).

54. 86 T.C. 243 (1986).

> original congressional purpose behind section 170(f)(3), and under section 1.170A-7(b)(1)(i), Income Tax Regs., a minor deviation from a literal application of the statute is appropriate.[55]

The Internal Revenue Code also provides that deduction will not be disallowed merely because of a remote future event which may defeat the property interest that has been passed to the donee organization.[56] Treasury Regulation section 1.170A-14(g)(3) provides that a charitable deduction will not be disallowed

> merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible.[57]

The Treasury Regulations further provide the specific example of a state's statutory requirement that use restrictions must be recorded every thirty years to remain enforceable does not render an easement non-perpetual.[58] The remoteness exception is defined as "so highly improbable that it might be ignored with reasonable safety in undertaking a serious business transaction."[59]

Additionally, the Treasury Regulations provide an incidental or insubstantial exception to the requirement that the property be used exclusively for conservation purposes.[60] The test to determine whether the exception applies is the same as the test provided for retained interests, which asks whether the use is substantial.[61] The following example illustrates how the North Dakota limitation creates a both remote future event and incidental use:

---

55. *Stark*, 86 T.C. at 252.

56. Treas. Reg. § 1.170A-14(g)(3).

57. *Id*.

58. *Id*.

59. Briggs v. Comm'r, 72 T.C. 646, 656 (1979), *aff'g* 665 F.2d 1051 (9th Cir. 1981) (construing language under Treasury Regulation section 20.2055-2(b) of the estate tax regulations, which is similar to the language found in Treasury Regulation section 1.170A-14(g)(3)). Factors which have been considered in evaluating remoteness include whether the donee and the donor intend to cause the event to occur, whether the event has occurred in the past, the extent to which the occurrence of the event would defeat the donation, and whether the donor has control over the event's occurrence. *See id*. at 656-57.

60. Treas. Reg. § 1.170A-14(e)(1). The regulation provides that a deduction will not be denied on the basis that it violates the exclusivity requirement when incidental benefit inures to the benefit of the donor. *Id*.

61. *See* Stark v. Comm'r, 86 T.C. 243, 252 (1986) (holding the retention of mineral rights did not disqualify the transfer from being treated as a qualified conservation easement); Rev. Rul. 76-331, 1976-2 C.B. 52 (explaining retention of limited mineral rights is insubstantial); *see also* I.R.S. Priv. Ltr. Rul. 97-29-024 (July 18, 1997).

> Taxpayer A donates an easement to Greentree Conservation that in every aspect meets the requirements of a qualified conservation easement with the exception of the ninety-nine year limitation imposed by North Dakota law. The easement itself has a present value of $500,000. Under these circumstances, the value of the remainder interest is close to zero.

There is no direct case law discussing a ninety-nine year limitation and whether or not it would comply with the requirements of 26 U.S.C. § 170(h)(2)(c). However, in 1973, the United States Court of Claims did discuss perpetual easements. In *Chevron Oil Co. v. United States,*[62] the court noted a nine hundred ninety-nine year lease would be the equivalent to perpetual.[63] Additionally, the *Chevron* Court noted a ninety-nine year lease renewable forever would also satisfy the definition of perpetual.[64] Consistent with the *Chevron* decision, the Treasury Regulations now allow an incidental exception to the requirement that the easement be used exclusively for conservation purposes. Therefore, the donor's remainder interest at the end of a ninety-nine year term as imposed by North Dakota law should also be considered incidental.

The present value of the remainder interest, even if the lease is limited to ninety-nine years, is effectively zero. As discussed above, 26 U.S.C. § 170 includes an exception for circumstances that are so remote as to be negligible.[65] Similarly, Treasury Regulation section 1.170A-1(e) provides that a conditional gift is still effective if the condition that would negate the gift "is so remote as to be negligible."[66] Similar logic applies to the requirement that the easement be perpetual. Because a ninety-nine year easement leaves virtually no remainder interest, the ninety-nine year limitation also can be classified as having a negligible result.

The exception relating to an event that is so remote as to be negligible could be interpreted as relating only to the probability of an event

---

62. 471 F.2d 1373 (Ct. Cl. 1973).

63. *Chevron Oil Co.*, 471 F.2d at 1378.

64. *Id.*

65. *See* 26 U.S.C. § 170(f)(3)(B)(iii) (2006).

66. Treas. Reg. § 1.170A-14(g)(3) (2011). The regulation provides as follows:

> A deduction shall not be disallowed under section 170(f)(3)(B)(iii) and this section merely because the interest which passes to, or is vested in, the donee organization may be defeated by the performance of some act or the happening of some event, if on the date of the gift it appears that the possibility that such act or event will occur is so remote as to be negligible. See paragraph (e) of § 1.170A-1. For example, a state's statutory requirement that use restrictions must be rerecorded every [thirty] years to remain enforceable shall not, by itself, render an easement nonperpetual.

Id.

occurring.[67] However, interpreting the regulations as a whole leads to the conclusion that the remainder interest must be negligible. When considered with the exception for incidental use, the regulations should be interpreted to include situations in which the donor has a negligible retained interest.

In the event that North Dakota Century Code section 47-05-02.1(2) is determined to disqualify North Dakota conservation easements from satisfying the requirements of 26 U.S.C. § 170, the North Dakota Legislature should consider the amendment of section 47-05-02.1(2). The most straightforward legislative amendment would be to eliminate the prohibition against easements extending for more than ninety-nine years. The amendment could be specifically tailored to apply only to specific conservation easements.

An alternative to a complete exemption of conservation easements from the ninety-nine year limitation of section 47-05-02.1 would be the adoption of statutory provisions similar to Kansas and Alabama.[68] Kansas limits conservation easements to the lifetime of the grantor and allows conservation easements to be revoked at the grantor's request.[69] However, Kansas allows the restriction to be overcome by an express statement within the reporting instrument.[70] Similarly, Alabama limits conservation easements to a period of thirty years or the life of the grantor.[71] However, those restrictions can be overcome by an express statement in the recording documents that the easement is intended to extend "in perpetuity."[72] Hopefully, legislative changes for North Dakota will be unnecessary and North Dakota's ninety-nine-year limitation on easements will be determined to be a negligible retained interest.

IV. CONCLUSION

North Dakota is currently left with uncertainty regarding whether or not conservation easements can qualify for charitable deduction treatment. That uncertainty can be eliminated through recognition that the value of any remainder interest after a period of ninety-nine years is either negligible or incidental.

67. *Id.*
68. ALA. CODE § 35-18-2 (LexisNexis Supp. 2011); KAN. STAT. ANN. § 58-3811 (2005).
69. KAN. STAT. ANN. § 58-3811(d).
70. *Id.*
71. ALA. CODE § 35-18-2.
72. *Id.*