

EASEMENTS AND ESTATES

For years, tax advantages have been a key—but by no means the only—benefit to landowners who are considering conservation easements as a way to protect their farms and ranches and transfer them to the next generation.

Could this year's proposals to reduce or repeal the federal gift and estate taxes change that? Without financial incentives to reduce the value of their estates, will landowners be less likely to commit to preserving their land in perpetuity? Or could lifting the burden of estate taxes help keep those lands in agricultural production?

Some key farmland protection and farm tax professionals predict that the impact of estate tax changes on donations of conservation easements on farmland would be limited because so few farmers are currently subject to them. However, significant effects are possible on properties that are most at risk for development—those located near metropolitan areas and vacation spots, where land values and development pressure are high.

These experts stress, however, that the effects of possible estate tax changes need to be considered in the context of other taxes—and conservation-oriented tax breaks—to which family farms are subject.

"It's hard to know whether reducing estate taxes will reduce the number of conservation easements people donate," says attorney Phil Tabas, director of land protection for The Nature Conservancy. He is unequivocal, however, about potential cuts in capital gains taxes on conservation-oriented sales of land and development rights. "The one thing I do know is that if we reduce the capital gains tax more people will sell land or easements for conservation."

Estate Tax Basics for Farms and Ranches

Because couples are not assessed on the first \$1.35 million of net worth, only the richest two percent of Americans who die each year—less than 50,000 people a year—are subject to the estate tax. Nearly half is paid by the roughly 3,000 people a year who leave estates of more than \$5 million.

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GOOD DEALS

TIME ON YOUR SIDE: NEW INITIATIVE HELPS COUNTIES STRUCTURE INSTALLMENT PURCHASE AGREEMENTS

Pennsylvania farmland protection officials recently retooled their installment purchase agreement (IPA) program and launched a public information campaign about it to encourage both counties and landowners to use IPAs to conserve more farmland.

Compared to IPA programs elsewhere in the nation, Pennsylvania's holds the most potential to save farmland because it is available statewide. Although Pennsylvania lawmakers first approved an IPA program to purchase conservation easements in 1994, counties showed little interest until recently, when officials developed supporting materials, retained a consultant to help counties structure their deals, and reached out to local officials to help them better understand IPAs.

They've already seen results. Owners of a historic farm in Lancaster County will likely sell a conservation easement under an IPA this spring or summer.

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Conservation

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the land*



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American Farmland Trust is the only private, nonprofit conservation organization dedicated to protecting the nation's strategic agricultural resources. Founded in 1980, AFT works to stop the loss of productive farmland and to promote farming practices that lead to a healthy environment.

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IPAs allow a landowner to defer capital gains taxes for up to 30 years and collect interest from the county on the balance of the easement price. That interest, which may average 5.5 to 5.7 percent, is tax-free. Thus, an IPA relieves landowners of a significant tax burden—20 percent at the federal level and 2.8 percent in Pennsylvania, or close to one-quarter of the conservation easement proceeds—while offering interest payments twice a year. They benefit municipalities because they can stretch limited budgets by paying off easements over 20 to 30 years. Negotiations include setting the easement purchase price, the amount to be paid on the closing date and the principal amount to be paid over the next few decades.

"The deed of easement is the same, the difference is how the purchaser pays for the easement," says Daniel "Pat" O'Connell, a Princeton, New Jersey, consultant helping to develop Pennsylvania's IPA program.

Recognizing the administrative challenges, such as the need for detailed bookkeeping and the need to purchase bonds, state officials took the IPA program on the road. They explained the benefits and structure of the agreements to municipal officials and farmers, and have retained O'Connell to provide technical assistance to the counties.

Most importantly, to help counties manage their debt load, the state is working with one municipal authority that will handle all county purchase contracts and make payments on behalf of the counties to sellers. Each time a municipality wants to set up an IPA, it will adopt a boilerplate ordinance that authorizes the authority to act on its behalf in completing the transaction. Each county, however, will purchase the U.S. Treasury notes and be responsible for funding its contracts.

"The cost of development is a lot more expensive than the cost of farmland preservation," O'Connell says. "The choice is whether to go into debt for preservation or debt to provide roads, schools and fire stations" for new development.

The contracts become part of a county's list of general obligations similar to capital improvement projects like building new roads or courthouses, thus ensuring property owners will be paid regardless of who holds political office.

The state encourages counties to invest in U.S. Treasury bonds to provide for payment of the principal price in 20 to 30 years. Counties factor the costs of the "balloon" payment into the total debt and can cover those costs as their treasury notes mature.

"For counties, since they will enter into longer-term easements, they put out only 20 or 30 cents per dollar up front," says Ray Pickering, head of the Pennsylvania farmland protection program. "Counties can leverage their farmland preservation dollars to save more today while the land is still available."

The leading protector of farmland in the nation, Pennsylvania has bought conservation easements on more than 1,500 farms. However, about 1,600 more landowners who want to sell easements languish on long county waiting lists. Currently, 51 of the state's 66 counties participate in Pennsylvania's program. Several plan to move ahead with IPAs, although so far only Lancaster County is close to an agreement.

There, amid rolling hills dotted with Amish farms, a historic property is poised to be protected under the state's first IPA. The Kreiders, owners of a 90-acre farm that dates back to 1740, have agreed to sell an agricultural easement using an IPA.

In Lancaster County, every acre of farmland saved is practically snatched from the bulldozer. Leading the nation in non-irrigated agricultural output, Lancaster's natural beauty, historical significance and proximity to Philadelphia make it a magnet for developers. Thanks to the new IPA program, one less farm will go on the auction block.


"It will be easier for a family to get back on the farm," says John Kreider, who co-owns the farm that is being protected under an IPA. "If it went to the highest bidder, it probably would be developed," he told *The Lancaster New Era* newspaper. 



photo courtesy of Land Stewardship Project

Pam and Jeff Riesgraf with four of their five children (left to right: Matt, Derek, Rachel and Kelby; not pictured: Brad) stand next to the recently established wetland on their farm.

USING RESOURCES WISELY

GIVING BACK TO NATURE:

EASEMENT PROTECTS WETLANDS AND WILDLIFE ON MINNESOTA DAIRY FARM

For decades, farmers in the upper Midwest have installed complex drainage systems to divert water from cropland. The practice, called “tiling,” enabled thousands of farmers to put down roots in the fertile river valleys.

But draining the land comes at a price. By redirecting water from former wetlands, the tiles speed the flow of snow melt and stormwater to rivers, removing a natural floodwater safety valve. Draining wetlands also destroys critical habitat for wildlife, including that of many beneficial insects that help control farm pests.

Jeff and Pam Riesgraf took a good look at the lay of the land on their Scott County, Minnesota, dairy farm and decided to restore some of the natural landscape. In 2000, they sold both their development and tillage rights on an 18-acre parcel through a conservation easement to the state Department of Transportation (DOT). The deal forever preserves the wetland, as all of the restrictions and covenants transfer with the title. And while the Riesgrafs maintain full ownership, they can no longer farm the parcel, build on it or in any way affect the wetland’s natural functions.

The Riesgrafs are among a growing number of farmers who are making changes to protect both their farmland and the natural resources that play a key role in successful, sustainable farm management. The Riesgrafs know that protecting wetlands carries implications that go well beyond their farm.

“There is a lot of new housing happening around us,” said Jeff, who lives in the state’s fastest-growing county. “A lot of farmers are tiling to increase their production, but take the wetlands out and the rivers will rise even faster because there is nowhere for the water to go.”

The Riesgrafs’ new easement shows how agricultural land offers multiple public benefits, beyond growing food and fiber. The wetlands will help water quality and hydrology dynamics on a watershed level and create important wildlife habitat.

“It seemed logical, if there was a piece of property that should be in a wetland, that they would try to find a way to get it back to its natural state,” says Caroline van Schaik of the Minnesota Land Stewardship Project, a nonprofit organization that works closely with farmers to help them monitor their impacts upon the land and wildlife. “The wetland preservation on Jeff’s property has as much to do with quality of life,” she said. “He wants to stand and look at it, which is very important to that family.” *continued on page 4*

Conservation

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**—Caroline van Schaik,
Minnesota Land
Stewardship Project**

Using Resources Wisely *continued from page 3*

USING RESOURCES WISELY
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The family helped define the boundaries of the preserved area, until last year tilled and under crops. The area includes a section of uplands, which Jeff will plant with evergreen trees and native grasses. In exchange, the DOT paid Jeff and Pam Riesgraf \$101,000. Additionally, the DOT will pay for the trees and grass seed, and will pay for Jeff to maintain the area.

The deal was part of a state wetlands mitigation program that requires the DOT to mitigate or replace each acre of wetlands they build upon. Like Minnesota, several states are considering state-level wetlands regulations to compensate for a recent loosening of restrictions in the federal Clean Water Act.

“State Departments of Transportation are some of the early actors in wetlands restoration,” said Jeanne Christie, executive director of the Association of Wetland Managers. “Because their projects are linear and cut across the landscape, some of their largest impacts are on wetlands. Many of them do extensive wetlands restoration planning as part of new highways or highway improvement projects.”

An avid sportsman, Riesgraf can hunt on the parcel, lease hunting rights to others or just enjoy the additional biodiversity the wetland will bring. He already has seen ducks and geese. By autumn, he is sure to see more migratory birds. The native grasses should attract beneficial insects such as lady beetles, which prey on unwanted crop pests.

The Riesgrafs, among the first Minnesota dairy farmers to go organic (1988) and to adopt management-intensive grazing (1992), hope to raise community interest in wetlands restoration. They plan to host local school field trips and encourage science teachers to develop wetlands projects for their students.

Jeff, who drove 30 miles to a Minneapolis-area wildlife preserve with his son five years ago, pondered the irony of the trip because his farm lays amid Minnesota’s “prairie potholes.” Instead of traveling to the preserve, local residents “could spend five minutes on the road and hours on my farm,” he says, “studying the water, the plants and the wildlife.” 🚜

POLICY REPORT

OFF-SITE MITIGATION: VALUABLE TOOL OR OPTION OF LAST RESORT?

In a case with statewide repercussions, the Vermont Environmental Board formally recognized off-site mitigation—a practice that allows developers to build on prime agricultural soils in exchange for contributing to state farmland protection funds—and simultaneously restricted its future use.

The case reveals a tension between efforts to hinder sprawling development through the soil conservation provisions of Act 250, Vermont’s statewide land use law, and state farmland protection efforts that focus on conserving whole, working farms in communities likely to remain in agricultural production.

At issue was a proposal to build a 92-unit retirement complex on 52 acres of high-quality farmland in Bennington, Vermont. The developer, the local hospital, proposed to offset the loss of 42 acres of prime agricultural soils through a \$112,700 off-site mitigation agreement with the state Department of Agriculture (DAG).

The Conservation Law Foundation (CLF), representing the Bennington County Conservation District, sought to block the project and future use of mitigation agreements. CLF argued that the specific agreement was inappropriate because of the high quality of the soils the project would destroy, and that off-site mitigation essentially allowed developers to “buy a permit and then destroy agricultural land.” CLF claimed that mitigation was being used excessively and without adequate assurances that the soils ultimately protected were equivalent in quality and in the same part of the state as those lost to development.

The Vermont Environmental Board denied the permit. In its decision, the board said off-site mitigation should be used “only as a last resort,” after developers have exhausted other options to avoid building on high-quality soils. “If efforts to reduce the impacts of a project are not even attempted,” the board wrote, “mitigation agreements will be seen as no more than a cost of doing business.”

Furthermore, the board said it will closely evaluate future mitigation proposals. When acceptable, the board will require advance assurances that the funding amount paid by the developer is sufficient to ensure that at least two acres of farmland are purchased for every acre lost to development.

“The decision reaffirms mitigation agreements, but what we tried to do is be more specific about when such agreements are acceptable and when they may not be,” says Marcy Harding, chair of the Environmental Board.

The ruling effectively killed the project. Within days, the hospital announced it would abandon the development. Conservation Law Foundation spokesman Mark Sinclair predicts the decision will influence other developers, as well. “I think it sends a clear signal to the development community that farmland protection is a factor to pay more attention to,” he said.

Also in response to the ruling, state agriculture officials are now developing formal guidelines for assessing whether a mitigation agreement is appropriate for any specific project and how the funds would be used. Farmland protection officials also are exploring approaches to ensuring a correlation, in terms of soil quality, between the land that is lost to development and the land that is conserved.


Though the board rejected the Department of Agriculture-approved agreement, agriculture officials claim the ruling as a victory because it upheld the overall legality of mitigation agreements. More commonly used to protect and restore wetlands under federal and some state programs, off-site mitigation is also used in farmland protection. Variations are in effect in the city of Davis and Yolo County, California; King County, Washington; and Massachusetts. Since the first Vermont agreement was sealed in 1991, approximately 50 projects have included off-site mitigation as a permit condition. Together, they have contributed approximately \$436,000 to state farmland protection funds.

“When you have an active farmland protection program like we do in Vermont, mitigation agreements are a valuable tool,” says Agriculture Commissioner Leon Graves. Sometimes, due to nearby commercial and residential development, even sites with the best agricultural soils are not well suited to “modern” agricultural use and would not be farmed even if they were not developed, he said.

“Open space is important,” adds DAG attorney Michael Duane, “but from the department’s perspective, it’s preferable to protect economically viable blocks of farmland.”

Others disagree. “Bennington County is not a dairy county like others in Vermont are, but it does have a vibrant agricultural economy. We’re much more diversified than some other counties are, and perhaps much more hardscrabble,” says Shelly Stiles, district manager of the Bennington County Conservation District. “Most of the soils on the site are excellent soils, and some of the best soils one finds in the county and in the state,” she says, noting the parcel could support high-value agricultural production.

“Do we want farm fields in every community as part of the landscape or just in a couple of key communities?” CLF’s Sinclair asks. “Act 250 would seem to say at this point that wherever there are prime ag soils they ought to be protected, and that we treat the whole state the same,” he says.

In a recent summary of their decision, the Vermont Environmental Board expressed a broader vision. The Board stated that Act 250’s soils criteria reflect the legislature’s belief that “...the agricultural...productivity of the land and the economic viability of agricultural units are [a] matter of public good.” Thus, the use of off-site mitigation to protect targeted agricultural land can sometimes be “equally consistent with the legislative intent to protect economically viable agricultural units.” This interpretation may help reconcile the soil conservation provisions of Act 250 and the state’s current farmland protection strategy. 

“If efforts to reduce the impacts of a project are not even attempted, mitigation agreements will be seen as no more than a cost of doing business.”

—Vermont Environmental Board

ON THE GROUND AND IN THE BANK: Off-site Mitigation in Vermont to Date

Acres lost to development	201
Funds received, to date	\$426,610*
Average, per acre mitigation fee	\$2,172
Conserved acres using mitigation monies	3,073
Purchase price (mitigation fees plus other VHCB funds)	\$2.4 million
Average, per acre conservation price	\$781

**Additional projects have been permitted that include off-site mitigation. If these are all built, approximately 400 additional acres of farmland would be lost, and developers would contribute an additional \$466,106 to Vermont farmland preservation funds.*

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Easements and Estates *continued from page 1*

“People are rational and they do respond to incentives. Repealing the federal estate tax would significantly reduce the transfers of assets involving conservation easements, especially among the wealthiest people.”

**—Neil Harl,
Professor of Economics,
Iowa State University**

Estates above \$1.35 million (\$675,000 for an individual) are taxed at rates that begin at 37 percent and rise to 55 percent on amounts greater than \$3 million. The exemption is scheduled to rise to \$1 million per individual (\$2 million per couple) by 2006.

Additionally, current law allows family farmers and ranchers, under certain conditions, to exempt even larger estates. For example, one provision excludes up to 40 percent of the remaining value of land (in certain geographic areas) that is already subject to a conservation easement. Another allows a farm couple to pass assets valued up to \$2.6 million untaxed when their heirs promise to keep the land in production for at least 10 years. This provision, however, can be difficult to qualify for, particularly for people who lease their land to working farms.

Few family farmers or ranchers die leaving a taxable estate, says Neil Harl, an Iowa State University professor who focuses on agricultural law and farm estate and business planning. Harl refers to IRS data to make his point. In 1998, the last year for which complete data have been published, out of 2.3 million decedents, approximately 47,000 paid federal estate tax, he says. In only 641 cases did farm property make up half or more of the estate. “For the most part, family farms and ranches are not big net worth operations,” he says.

But estate tax liability is an important and very real issue for farmers near urban areas, where development speculation has made land prices skyrocket. “Even with good estate planning, many farmers could not have anticipated the appreciation on their land—outstripping many standard planning techniques,” says AFT President Ralph Grossi.

For example, at \$30,000 per acre market value for farmland in the Salinas Valley, California, it doesn’t take much land to rack up significant estate tax liability. Even at \$5,000 to \$10,000 per acre in the San Joaquin Valley, increasing numbers of farm and ranch families must take steps to avoid estate tax liability. “Too many farmers are spending too much precious cash flow on estate planning and life insurance,” Grossi says. “This is money that could be better used to improve their farms.”

Conservation Easements and Income Taxes

For landowners with sizable estates, bequeathing a conservation easement to a nonprofit can be a practical way to reduce their estates, in some cases below the threshold for taxation. But donating a conservation easement can also have important income tax consequences.

Landowners who convey easements to qualified organizations during their lives can qualify for a limited income tax deduction, in addition to a gift tax deduction. However, the current maximum income tax rate, 39 percent, is lower than the estate tax rate. Under current law, individuals who donate conservation easements can deduct up to 30 percent of their adjusted gross income (AGI) for up to six years. This makes sense if the family has relatively high income but its accumulated wealth falls below the current estate tax exemption. However, for most farmers and ranchers, with low incomes and high land values, the benefits are limited.

Pending legislation would increase the percentage of AGI against which these deductions may be taken to 50 or 100 percent (depending on the bill) and permit the excess to be carried forward for an unlimited number of years, making the option more attractive.

The consequence of cash payments is capital gains taxes. Among the multitude of proposed tax changes circulating in Washington is a provision addressing that barrier. It would exclude half of the capital gain from taxable income, effectively reducing the tax rate from 20 percent to 10 percent on the capital gain portion of the sale of a conservation easement.

Additionally, farmers can use like-kind exchanges to avoid significant capital gains taxes. In these arrangements, farmers exchange the value of the easement for other land. This can be attractive, particularly for farmers near metropolitan areas where easement values are high because it allows them to increase their land base at practically no cost.

The Debate over Estate Taxes

As this newsletter goes to press, plans to reduce and then repeal the estate tax by 2011 are among many tax changes pending before Congress. To critics—who call it the “death tax”—the estate tax is poor public policy. They say it impedes economic growth, destroys family farms and instead of rewarding success encourages complicated schemes for avoiding taxes. Supporters counter that the estate tax is highly progressive, affecting only the wealthiest Americans, encourages charitable giving, and reduces the concentration of wealth. They

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also argue that the cost of repeal, estimated to be \$300 billion over ten years, is too high and will likely impact other social programs.

Among the staunchest opponents of the tax is the American Farm Bureau Federation (AFBF). “Our members believe that the death tax is wrong,” says Patricia Wolff, an AFBF tax specialist. “The reason the numbers of farmers who pay estate taxes is so low is because people go to great lengths to plan around it. Our farmers are telling us that it can be very complicated and they spend a lot of money on lawyers, accountants and life insurance to avoid the tax.”

American Farmland Trust supports meaningful estate tax relief that would help farmers and ranchers keep their land in agriculture and pass it on to other family members. AFT supports increasing the unified estate and gift tax credit and eliminating the geographic limits and maximum benefit limitations of the 1997 conservation easement provision.

Taxes vs. Values

Predictions of how tax changes will affect conservation easements are linked to the weight analysts place on taxes as incentives.

In 1998, the Treasury’s Office of Tax Analysis found that there was strong evidence that estate taxes stimulate charitable bequests. According to the Center for Tax Justice (CTJ) estates subject to taxes typically gave almost three-quarters as much to charity as they paid in federal estate taxes. “Even more striking, for estates worth more than 20 million, charities got almost double the federal tax take,” CTJ said.

Do the same trends apply to donations of conservation easements?

“I think people are rational and they do respond to incentives,” Harl says. Even though he stresses the relatively small number of farmers who are subject to estate taxes, “I’m still of the belief that repealing the federal estate tax would significantly reduce the transfers of assets involving conservation easements, especially among the wealthiest, because they are the ones in the 55 percent bracket.”

Others say the people who donate conservation easements do so because they believe it is the right thing to do.

“The people who donate easements are not people who are primarily motivated by tax benefits,” says Russ Shay of the Land Trust Alliance, which has more than 800 member organizations. “The legacy they want to leave is the land.”

Moreover, Shay says, there are many factors that influence protection of farms, ranches, forests and other natural areas.

“Repeal of the estate tax is not going to remove the threats posed by development or subdivision, or change the challenges associated with generational transfer,” he says. 🚧

LAY OF THE LAND

Percentage of people who die each year leaving taxable estates	less than 2%
Percentage of tax revenue from estates above \$5 million	50%
Taxable estates that reported farm assets	6%
Charitable bequests in 1997 by estates worth over \$20 million	\$41 million

Source: The Brookings Institution, based on 1997 IRS data

Acres of farm and ranch land protected by state-level purchase of agricultural conservation easement (PACE) programs	806,300 acres
Funds spent to date by state-level PACE programs	\$1.2 billion

Source: AFT’s annual PACE survey

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- Ralph Grossi, President, American Farmland Trust
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